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How Transnationally Effective are the UK Migration Policies in Relation to Missing Migrants? A Transnational Law Perspective

Luke N. Eda

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ABSTRACT

All over the world, several thousands of migrants go missing when they attempt to flee from war, violence, persecution, repressive regimes, systematic human rights violations, etc. Thousands die each year in deadly shipwrecks in a desperate attempt to enter Europe and the United Kingdom. In these instances of deaths and loss, international human rights law imposes duties on states to account for people missing in transnational migration and to respect the rights of members of their families. Despite such provisions, states sometimes deny that they have obligations to deal with cases of migrants reported missing in transnational migration until migrants reach their territories. Such conflicting claims raise serious questions about migration policies and governance and how the subject of missing migrants should be dealt with at the international level. The newly adopted UN Global Compact for Safe, Orderly and Regular Migration (Objective 8(a-f)) answers a part of the question by recognising that migration generally, and missing migrants specifically, is a transnational social problem which requires greater cooperation amongst states as well as policies with transnational effects. The United Kingdom was one of the earliest countries to endorse the new migration compact, hinting that it respects the sovereign rights of states to determine and implement their own migration policies and protect national interest. The Article asks if, from a transnational law perspective, the UK migration policy in relation to missing migrants is transnationally effective such as to facilitate enforcement of the new Global Compact and other related international instruments nationally. Existing evidence in the literature shows limited knowledge about the transnational effects of UK policies in relation to missing migrants. Therefore, the Article highlights the imperatives of strengthening, in order to avoid a future policy vacuum, the transnational effectiveness of UK policies in

addressing the increasing cases of people who go missing while attempting to reach international destinations.

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I. Introduction

The phenomenon of missing migrants[1] poses exceptional challenges for states, affected families, and the international community as a whole for many reasons. The first challenge is migration's transnational scale—involving a large number of irregular migrants from origin countries crossing the high sea and state borders in a desperate attempt to enter transit and destination countries.[2] Second is the immense cost[3] and other practical challenges involved in search, investigation, identification,[4] and repatriation of dead migrants to their families. And third is the apparent transnational ineffectiveness of national migration policies in response to the problem. Migrants mostly go missing at sea and EU external borders when they attempt to escape from war and generalised violence, repressive regimes,

1. *See* Her Majesty Queen Noor, ICMP Commissioner, Speech at the Hague Conference: Missing Persons: An Agenda for the Future (Oct. 29, 2013) ("When we speak of a missing person, we mean someone being missed by others. It is those that remain who experience the anguish of uncertainty . . . [and who] turn to state authorities for answers . . . .").

2. *See* Gabriella Citroni, *The First Attempts in Mexico and Central America to Address the Phenomenon of Missing and Disappeared Migrants*, 99 Int'l Rev. Red Cross 735, 737 (2017).

3. On challenges with high cost of repatriation of migrant remains, see Ruairi Connolly, Richard Prendiville, Denis Cusack & Gerard Flaherty, *Repatriation of Human Remains Following Deaths in International Travellers*, 24 J. Travel Med. 1, 4 (2017). On the cost of rescue of migrants at sea, see David Miller, *Our Responsibilities to Refugees*, in Studying Migration Policies at the Interface Between Empirical Research and Normative Analysis 37, 46 (Matthias Hoesch & Lena Laube eds., 2018).

4. *See generally* Lara Olivieria, Debora Mazzarelli, Barbara Bertoglio, Danilo De Angelis, Carlo Previderè, Pierangela Grignani, Annalisa Cappella, Silvano Presciuttini, Caterina Bertuglia, Paola Di Simone, Nicolò Polizzi, Agata Iadicicco, Vittorio Piscitelli & Cristina Cattaneo, *Challenges in the Identification of Dead Migrants in the Mediterranean: The Case Study of the Lampedusa Shipwreck of October 3rd 2013*, 285 Forensic Sci. Int'l 121 (2018).

systematic human rights abuses, etc.[5] The UNCHR estimates that worldwide, by the end of 2018, more than 70.8 million people around the world were forced to flee their homes as a result of persecution, violence, conflicts, or human rights abuses, out of which 25.9 million were refugees.[6] Most of the migrants are fleeing armed conflict[7] in the Middle East, mainly the Syrian civil war,[8] and also armed conflicts in different parts of Africa,[9] mainly those sparked by the Arab spring uprisings[10] and regime crisis in the Horn of Africa and Libya.[11] Generally, over the last three decades, international migration has increased at an unprecedented level; far more than E.G. Ravenstein, widely believed to be principal pioneer of migration studies, could have imagined in 1885.[12] In 2010, it was estimated that around 214 million people (representing 3.1 percent of the total global population)[13] resided outside their home countries,[14] an increase of 35 million from

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5.   *See* HUMAN RIGHTS WATCH, THE MEDITERRANEAN MIGRATION CRISIS: WHY PEOPLE FLEE, WHAT THE EU SHOULD DO 2–3 (2015).

6.   UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2018 2 (2019).

7.   *See generally* Vanessa Holzer, *The 1951 Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence* (U.N. High Commissioner for Refugees, Geneva, Switzerland, Legal & Prot. Pol'y Rsch Series, 2012).

8.   *See* George J. Somi, *Syria Under Pinheiro: Reformulating Syrian Domestic Law for Decentralized Reconstruction*, 43 BROOK. J. INT'L L. 717, 717 (2018) (stating that between 2011 and 2018, the Syrian conflict produced roughly 5.4 million refugees).

9.   *See* Helen Obregón Gieseken, *The Protection of Migrants Under International Humanitarian Law*, 99 INT'L REV. RED CROSS 121, 122 (2017); Marion Panizzon & Micheline van Riemsdijk, *Introduction to Special Issue: Migration Governance in an Era of Large Movements: A Multi-level Approach*, 45 J. ETHNIC & MIGRATION STUD. 1225, 1225 (2019).

10.   For detailed analysis of the impact of the Arab Spring uprising on migration to Europe, see MARTINA TAZZIOLI, SPACES OF GOVERNMENTALITY: AUTONOMOUS MIGRATION AND THE ARAB UPRISINGS 1–33 (2014).

11.   *See* PUBLICATIONS OFFICE OF THE EUROPEAN UNION, THE EU AND THE MIGRATION CRISIS (2017), https://op.europa.eu/en/publication-detail/-/publication/e9465e4f-b2e4-11e7-837e-01aa75ed71a1 [https://perma.cc/EKE8-SYUM]; CHRISTINE AGHAZARM, PATRICE QUESADA & SARAH TISHLER, MIGRANTS CAUGHT IN CRISIS: THE IOM EXPERIENCE IN LIBYA 5 (Olga Sheean ed., 2012), https://publications.iom.int/system/files/pdf/migrationcaughtincrisis_forweb.pdf [https://perma.cc/WCX9-8QDM] (archived Jan. 21, 2021).

12.   *See generally* E. G. Ravenstein, *The Laws of Migration*, 48 J. STAT. SOC'Y LONDON 167 (1885) (pt. I); E. G. Ravenstein, *The Laws of Migration*, 52 J. STAT. SOC'Y LONDON 241 (1889) (pt. II).

13.   *See* U.N. Dep't of Econ. & Soc. Affairs, International Migration Rep. 2009: A Global Assessment, U.N. Doc. ST/ESA/SER.A/316, at 1 (2011).

14.   *See* PIA OBEROI, JUANA SOTOMAYOR, PAOLA PACE, BARBARA RIJKS, JACQUELINE WEEKERS & YEHENEW TESGAYE WALILEGNE, INTERNATIONAL ORGANIZATION FOR MIGRATION [IOM], INTERNATIONAL MIGRATION, HEALTH AND HUMAN RIGHTS 11 (2013), https://publications.iom.int/system/files/pdf/iom_unhchr_en_web.pdf [https://perma.cc/L6C2-P3L8]; *cf.* Off. of the U.N. High Comm'r for Human Rts. [OHCHR], *Migration, Human Rights and Governance*, at 17 (2015), https://www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2009.pdf [https://perma.cc/6K7K-6PG7].

2000 and 58 million since 1990.[15] In 2017, the number reached 258 million, up from 248 million in 2015 and 191 million in 2005.[16] With the number hitting 272 million in 2020,[17] it is now estimated that if migration continues at the same rate as it has been in the last 20 years, the number could be as high as 405 million by 2050.[18] Thus, migrant and refugee flows across external borders of states are not a new phenomenon.[19] They constitute a "significant feature of political life in Western liberal democracies"[20] and are likely to increase both in scope, complexity, and impact.[21] Migrants move in search of food to survive and also to escape violence, threats to life, and possible death.[22] In many cases, states of departure are either unwilling or genuinely unable to offer protection.[23] Transit and receiving states too, often refrain from tackling the problem until migrants reach their territory.[24] They sometimes deny that they have obligations to deal with cases of migrants reported missing in transnational migration.[25] Such conflicting claims raise serious questions about migration policies and governance and how the problem of missing migrants should be dealt with at the international level. The newly adopted United

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15. *See* International Migration Rep. 2009: A Global Assessment, *supra* note 13, at 1–7.

16. U.N. Dep't of Econ. & Soc. Affairs, International Migration Rep. 2017: Highlights, U.N. Doc. ST/ESA/SER.A/404, at 4 (2017).

17. IOM, WORLD MIGRATION REPORT 2020 10 (2019), https://publications. iom.int/system/files/pdf/wmr_2020.pdf [https://perma.cc/7TXH-439N] (archived Mar. 15, 2021).

18. INTERNATIONAL MIGRATION, HEALTH AND HUMAN RIGHTS, *supra* note 14, at 13.

19. Migration stretches back to the earliest periods of human history. *See* IOM, WORLD MIGRATION REPORT 2018 13 (2017), https://www.iom.int/sites/default/files/ country/docs/china/r5_world_migration_report_2018_en.pdf [https://perma.cc/2JT6-CR NR] (archived Jan. 22, 2021); KHALID KOSER, INTERNATIONAL MIGRATION: A VERY SHORT INTRODUCTION 1 (Oxford Univ. Press 2007); Fatahi Nabi, *The Impact of Migration on Psychosocial Well-Being: A Study of Kurdish Refugees in a Resettlement Country*, 4 J. COMMUNITY MED. & HEALTH EDUC. 1, 1 (2014).

20. David Miller, *Immigrants, Nations, and Citizenship*, 16 J. POL. PHIL. 371, 371 (2008).

21. *See, e.g.*, U.N. DEP'T OF ECON. & SOC. AFFAIRS, EXPERT SYMPOSIUM ON INTERNATIONAL MIGRATION AND DEVELOPMENT (2019), https://www.un. org/en/development/desa/population/migration/events/other/symposium/201902/index.a sp [https://perma.cc/9RT8-P3DE] (archived Jan. 21, 2021); *cf.* Mathias Czaika & Hein de Haas, *The Globalisation of Migration: Has the World Become More Migratory?*, 48 INT'L MIGRATION REV. 283, 283–84 (2015).

22. *See* Lynette M. Parker, *The Ethics of Migration and Immigration: Key Questions for Policy Makers*, MARKKULA CTR. FOR APPLIED ETHICS AT SANTA CLARA UNIV. (May 1, 2007), https://www.scu.edu/ethics/focus-areas/more/resources/the-ethics-of-migration-and-immigration/ [https://perma.cc/R2YC-4X8V] (Jan. 21, 2021).

23. *See* Vassilis P. Tzevelekos & Elena Katselli Proukaki, *Migrants at Sea: A Duty of Plural States to Protect Extraterritorially*, 86 NORDIC J. INT'L L. 427, 428 (2017).

24. *See id.*

25. *See generally* Simon Robins, *Missing in Migration: From Research to Practice*, 40 PRACTICING ANTHROPOLOGY 24 (2018) [hereinafter Robins, *Missing in Migration*].

Nations Global Compact for Safe, Orderly and Regular Migration (GCM) answers a part of the question by recognising that migration generally, and missing migrants specifically, is a transnational social problem which requires greater cooperation amongst states as well as policies with transnational effects.[26] Such declaration in the GCM echoes the sentiments of transnational law, which advocates that transnational social problems that transcend national frontiers, such as migration, must be tackled through a transnational legal and policy response and approach.[27] The United Kingdom was one of the earliest countries to endorse the new GCM, hinting that it respects national sovereignty and the inherent right of sovereign states to determine and implement their own national migration policies and protect their national interest.[28] A petition backed by the UK Independence Party (UKIP)[29] to the House of Commons against the country's accession to the GCM had attracted 131,617 signatures in 2018.[30] The government however argued that the GCM will "support global co-operation on migration without affecting the sovereignty of all countries to control their own borders."[31]

Given the significance of the United Kingdom's commitment to the GCM, this Article asks if the UK policy in relation to missing migrants is transnationally effective, such as to facilitate implementation of the GCM and other relevant international legal instruments nationally. Adopting a transnational law approach, this Article unfolds in the following six sections: Part I first highlights the problem of missing migrants in light of transnational law. It is argued that the problem of missing migrants is a transnational legal and policy issue that requires a transnational response from states. Such a response would require adoption of a transnationally effective national migration policy. But what constitutes a transnationally effective national migration policy in relation to missing migrants is largely undefined in the literature. Therefore, this Article proceeds in Part II to define what is meant by a

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26. *See* Global Compact for Safe, Orderly and Regular Migration, ¶ 24(a)–(f), July 13, 2018, https://refugeesmigrants.un.org/sites/default/files/180713_agreed_outcome _global_compact_for_migration.pdf [https://perma.cc/QZ22-BDAJ] (archived Jan. 21, 2021) (Objective 8(a)–(f)).

27. *See* Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 564 (2007).

28. *See* STEFANO FELLA, BRIEFING PAPER ON THE UNITED NATIONS GLOBAL COMPACT FOR MIGRATION 24–25 (House of Commons Library 2019), https://researchbriefings.files.parliament.uk/documents/CBP-8459/CBP-8459.pdf [https ://perma.cc/5GPZ-VR8M] (archived Jan. 21, 2021).

29. *See id.* at 20.

30. *See The UK Should Not Agree the UN's Global Compact for Migration*, UNITED KINGDOM GOV'T & PARLIAMENT (2018), https://petition.parliament.uk/archived/ petitions/232698 [https://perma.cc/XNF2-47XL] (archived Mar. 15, 2021) (arguing that United Kingdom's accession to the GCM "will make illegal migration legal and make it a human right").

31. FELLA, *supra* note 28, at 21.

transnationally effective national migration policy. It then considers, in general, the policy responses to the problem of missing migrants first at the EU level (Part III) and then at the UK level (Part IV), bearing in mind that the UK policy approach draws more broadly from the wider EU policy perspectives on transnational migration. It then proceeds in Part V to provide the wider justification for the argument for adoption of a transnationally effective national migration policy to address the problem of missing migrants. Part VI considers the relevant provisions of the GCM relating to missing migrants and what obligations the United Kingdom has to implement the GCM in a transnationally effective way. It then proceeds to consider the interface between the legal and moral dimensions of the obligations of states towards migrants given that the benefits of such interface will prove critical when evaluating the transnational effectiveness of state migration policies in relation to missing migrants. Existing evidence in the literature shows limited knowledge about the transnational effects of the UK policies in relation to missing migrants. Therefore, this Article, in its concluding part, highlights the imperatives of strengthening, in order to avoid a future policy vacuum, the transnational effectiveness of UK policies in addressing the increasing cases of people who go missing while attempting to reach international destinations.

II.   TRANSNATIONAL LAW AND THE TRANSNATIONAL PROBLEM OF MISSING MIGRANTS

Transnational legal problems are rarely amenable to simple solutions, not least when a legal subject is missing in migration. When Philip Jessup, in his 1955 influential Storrs Lectures at the Yale Law School, articulated and proposed the term "transnational law" to "include all law which regulates actions or events that transcend national frontiers,"[32] cross-border irregular migration leading to deaths and human disappearances at sea, deserts, borders, and other fragmented spaces must have been one of those transnational events that was high on his thoughts and agenda.[33] Jessup's transnational law theory recognises that externalized domestic laws and policies of states enforced abroad, beyond national frontiers, can at times impact a state's population in more influential ways than when those laws and

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32.   PHILIP JESSUP, TRANSNATIONAL LAW 219 (Yale Univ. Press 1956). *See generally* Carrie Menkel-Meadow, *Why and How to Study Transnational Law*, 1 U.C. IRVINE L. REV. 97 (2011).

33.   *See* E. Tendayi Achiume, *The Fatal Flaw in International Law for Migration*, 56 COLUM. J. TRANSNAT'L L. 257, 257 (2018) (arguing that the transnational problem of irregular migration across the sea to Europe is one that demonstrates the need to reform the current global governance of international migration).

policies are enforced strictly within national legal orders. One typical example of where national policies can produce transnational effects is irregular migration. Not least because states are increasingly adopting externalized migration policies in response to large unauthorized migrant flows into their territories. The adoption and implementation of extra territorialized migration policies and procedures by states in response to migrant movements clearly indicate that migrant and refugee flows across seas and borders of states are transnational legal and policy issues that go right to the heart of any normative discussion of transnationalism.[34] This is so because the aspiration of irregular migrants to reach the territories of states in search of safety and better life is itself a transnational activity.[35] And international migration that involves migrants crossing the borders of states is itself a transnational process.[36] A broader diagnosis of the legal, policy, and practical problem of missing migrants will unveil its transnational dimension. First, with the high seas left wide open, migration journeys have seen several thousands of migrants die while making the deadly sea crossings and thousands more remain missing as a result. The watershed moment came in October 2013 when a boat carrying around 500 migrants capsized off the Italian Island of Lampedusa, killing at least 366 of the migrants on board.[37] This tragic incident marked a turning point in what has become known as the "European Migrant Crisis,"[38] marked by increased deaths at sea. The chilling images of

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34.   *See* Itamar Mann, *Dialectic of Transnationalism: Unauthorised Migration and Human Rights, 1993-2013*, 54 HARV. INT'L L.J. 315, 316, 322, 327 (2013) [hereinafter Mann, *Dialectic*] (arguing that unauthorised migrants and refugees are "an increasingly contentious and paradigmatically transnational policy issue").

35.   Masja Van Meeteren, *Transnational Activities and Aspiration of Irregular Migrants in Belgium and the Netherlands*, 12 GLOB. NETWORKS 314, 314–32 (2012).

36.   *See* Alexander Betts, *Policy Primer: The UK and Global Migration Governance*, MIGRATION OBSERVATORY UNIV. OXFORD, Mar. 29, 2011, at 6, https://migrationobservatory.ox.ac.uk/wp-content/uploads/2016/04/PolicyPrimer-Global _Governance.pdf (last visited Jan. 12, 2021) [https://perma.cc/5R9M-STX5] (archived Jan. 12, 2021) [hereinafter Betts, *Policy Primer*].

37.   *See* Marie Martin, *Prioritising Border Control Over Human Lives: Violations of the Rights of Migrants and Refugees at Sea*, EURO-MEDITERRANEAN HUM. RTS. NETWORK POL'Y BRIEF, June 2014, at 1; J. Coppens, *The Lampedusa Disaster: How to Prevent Further Loss of Life at Sea*, 7 INT'L J. MARINE NAVIGATION & SAFETY SEA TRANSP. 589, 589–95 (2013).

38.   For more on the migrant crisis in the EU context, see Eugene Quinn, *The Refugee and Migrant Crisis: Europe's Challenge*, 105 IRISH Q. REV. 275, 275–85 (2016); *see also* Michael Collyer & Russell King, *Narrating Europe's Migration and Refugee 'Crisis,'* 9 HUM. GEOGRAPHY, no. 2, 2016, at 1, 1–10; Heaven Crawley, *Managing the Unmanageable? Understanding Europe's Response to the Migration 'Crisis,'* 9 HUM. GEOGRAPHY, no. 2, 2016, at 13, 13–21; Philip L. Martin, *Europe's Migration Crisis: An American Perspective*, 13 MIGRATION LETTERS 307, 307–19 (2016); Martin Baldwin-Edwards, Brad K. Blitz & Heaven Crawley, *The Politics of Evidence-Based Policy in Europe's 'Migration Crisis,'* 45 J. ETHNIC & MIGRATION STUD. 2139, 2139–55 (2019); *Europe's Migrant Crisis: A Comprehensive Analysis*, MIGRATION RSCH. INST. (Jan. 2016); *Migration Crisis: Migration to Europe Explained in Seven Charts*, BBC NEWS (Mar. 4,

desperate and stranded migrants making perilous journeys through the Mediterranean Sea in those periods and afterwards have particularly shocked the conscience of humanity and attracted worldwide media coverage.[39] The unseaworthy and overcrowded boats packed with young people, women, and children seeking safety sink in deadly shipwrecks.[40] Yet, many more die of severe weather exposure, dehydration, hypothermia, or other kinds of illness, injury, suicide, murder, violent attacks, accidents, or medical complications during their journeys.[41] The damning data of migrant mortalities recorded by the UNCHR,[42] IOM,[43] and FRONTEX[44] and related authorities, in

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2016), https://www.bbc.com/news/world-europe-34131911 [https://perma.cc/2YB8-67WG] (archived Jan. 21, 2021).

39. *See, e.g.,* Aidan White & Ann Singleton, *Mixed Messages: Media Coverage of Migration and Fatalities*, *in* 3 FATAL JOURNEYS: IMPROVING DATA ON MISSING MIGRANTS 47, 47–60 (Frank Laczko, Ann Singleton & Julia Black eds., IOM 2017); Kerry Moore, Mike Berry & Inaki Garcia-Blanco, *Saving Refugees or Policing the Sea? How the National Press of Five EU Member States Framed News Coverage of the Migration Crisis*, 2 JUST., POWER & RESISTANCE 66, 67 (2018). *See generally* MIKE BERRY, INAKI GARCIA-BLANCO & KERRY MOORE, PRESS COVERAGE OF THE REFUGEE AND MIGRANT CRISIS IN THE EU: A CONTENT ANALYSIS OF FIVE EUROPEAN COUNTRIES (2015); MYRIA GEORGIOU & RAFAL ZABOROWSKI, MEDIA COVERAGE OF THE "REFUGEE CRISIS": A CROSS-EUROPEAN PERSPECTIVE (2017).

40. *See* Tamara Last & Thomas Spijkerboer, *Tracking Deaths in the Mediterranean*, *in* FATAL JOURNEYS: TRACKING LIVES LOST DURING MIGRATION 85, 96 (Tara Brian & Frack Laczko eds., 2014).

41. *See* Williams Lacy Swing, *Foreword* to FATAL JOURNEYS: TRACKING LIVES LOST DURING MIGRATION, *supra* note 40, at 5, 5.

42. *See* United Nations High Comm'r for Refugees [UNHCR], *Operational Portal: Refugee Situations: Mediterranean Situation*, UNHCR, https://data2.unhcr.org/en/situations/mediterranean (last visited Jan. 19, 2021) [https://perma.cc/8ZGB-7RX3] (archived Jan. 19, 2021); UNHCR, *Operational Portal: Refugee Situations: Europe Dead and Missing at Sea*, UNHCR (Jan. 19, 2021), https://data2.unhcr.org/en/dataviz/95?sv=0&geo=0 [https://perma.cc/S5VD-9MX7] (archived Jan. 19, 2021); *see also* UNHCR, REFUGEE & MIGRANT ARRIVALS TO EUROPE IN 2019 (MEDITERRANEAN) (2019), https://data2.unhcr.org/en/documents/download/72161 (last visited Jan. 19, 2021) [https://perma.cc/E7RN-PWV4] (archived Jan. 19, 2021).

43. *See* IOM, *Missing Migrants: Total of Deaths Record in Mediterranean from 01 January to 19 January*, IOM (2021), https://missingmigrants.iom.int/region/mediterranean (last visited Jan. 19, 2021) [https://perma.cc/GD77-4F9V] (archived Jan. 19, 2021); IOM, *Flow Monitoring Europe: Arrivals,* IOM, https://migration.iom.int/europe?type=arrivals (last visited Jan. 19, 2021) [https://perma.cc/73SS-DMTG] (archived Jan. 19, 2021).

44. FRONTEX Risk Analysis Data is based on its own detections of illegal migrant crossings into the EU through sea and land routes. For the risk data analysis of Frontex for the years 2016 and 2019, see FRONTEX, RISK ANALYSIS FOR 2019 (Feb. 2019), https://frontex.europa.eu/assets/Publications/Risk_Analysis/Risk_Analysis/Risk_Analysis_for_2019.pdf (last visited Jan. 19, 2021) [https://perma.cc/U8KA-J43Z] (archived Jan. 19, 2021); FRONTEX, RISK ANALYSIS FOR 2016 (Mar. 2016), https://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf (last visited Jan. 19, 2021) [https://perma.cc/XM5N-WP4F] (archived Jan. 19, 2021).

particular, those of "United Against Refugee Deaths,"[45] "Fortress Europe Blog,"[46] "Deaths at the Borders Database,"[47] "Migrants' Files,"[48] "List of Deaths,"[49] "Watch The Med Initiative,"[50] "Mixed

45.   UNITED Against Refugee Deaths is a European network against nationalism, racism, and fascism and in support of migrants and refugees that has been recording data on migrant deaths since 1993. *See The Fatal Policies of Fortress Europe*, UNITED AGAINST REFUGEE DEATHS, http://unitedagainstrefugeedeaths.eu/ (last visited Jan. 20, 2021) [https://perma.cc/5DYK-E2YK] (archived Jan. 20, 2021).

46.   Fortress Europe Blog, operated by Fortress Europe, provides data and information generated from the media on the location, date and cause of death of migrants. Its operation lasted from 1988 to February 2016. For details, see *Fortress Europe. English Edition*, FORTRESS EUROPE (May 1, 2014), http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe_16.html [https://perma.cc/RAY3-8J7Q] (archived Jan. 20, 2021).

47.   Death at the Borders Database, operated by Vrije University Amsterdam, provides data and information on the location, date, nationality, gender, age and cause of migrant deaths. Their data is derived primary from death certificates and official records. The organization operated from 1990 to 2013. For details, see *Deaths at the Borders of Southern Europe*, VRIJE UNIVERSITEIT AMSTERDAM (2021), http://www.borderdeaths.org/ (last visited Jan. 20, 2021) [https://perma.cc/SUN4-VM6J] (archived Jan. 20, 2021).

48.   The Migrants' Files, operated by various media organisations, records data and information on the location, date and cause of migrant deaths. Its operation lasted from 2000 to June 2016. For details, see MIGRANTS' FILES, http://www.themigrantsfiles.com/ (last visited Jan. 20, 2021) [https://perma.cc/9AWP-BPX6] (archived Jan. 20, 2021).

49.   List of Deaths, operated by an organisation called UNITED for Intercultural Action, provides data and information on the location, date, cause of death and nationality (if available) of migrants. Its data recording is derived primary from the media. Its operation lasted from 1993-2015. For details, see *List of 36,570 Documented Deaths of Refugees and Migrants Due to the Restrictive Policies of "Fortress Europe,"* UNITED FOR INTERCULTURAL ACTION (Apr. 1, 2019), http://www.unitedagainstracism.org/wp-content/uploads/2019/07/ListofDeathsActual.pdf (last visited Jan. 20, 2021) [https://perma.cc/3CCQ-2WEA] (archived Jan. 20, 2021); *The Fatal Policies of Fortress Europe*, UNITED FOR INTERCULTURAL ACTION, http://www.unitedagainstracism.org/campaigns/refugee-campaign/fortress-europe/ (last visited Jan. 20, 2021) [https://perma.cc/QBL5-Z27J] (archived Jan. 20, 2021).

50.   Watch the Mediterranean Sea ("Watch the Med" for short) is an online mapping platform and observatory of the EU maritime borders set up to monitor deaths and violations of migrants' rights at the maritime borders of the EU. It was initiated as part of the 2012 Boat4People Campaign in the central Mediterranean and involves a wide network of organisations, activists and researchers. *See WatchTheMed Alarm Phone Reports*, WATCH THE MED, https://watchthemed.net/ (last visited Jan. 21, 2021) [https://perma.cc/UA73-A2AF] (archived Jan. 21, 2021); *Interview: WatchTheMed Alarm Phone: A Response for Rescue and a Call for Change*, EUR. COUNCIL ON REFUGEES & EXILES (Feb. 14, 2020), https://www.ecre.org/interview-watchthemed-alarm-phone-a-response-for-rescue-and-a-call-for-change/ [https://perma.cc/277B-WLYM] (archived Jan. 21, 2021); *Safety at Sea*, WATCH THE MED, https://watchthemed.net/index.php/page/index/10 (last visited Jan. 21, 2021) [https://perma.cc/6HCT-VALN] (archived Jan. 21, 2021); *see also* Stephan Liebscher & Ina Fisher, *Mapping Safe Passages: Real-Time Interventions at the Maritime Borders of Europe*, *in* THIS IS NOT AN ATLAS 60 (Kollektiv Orangotango ed., 2018); Maurice Stierl, *The WatchTheMed Alarm Phone: A Disobedient Border Intervention*, 1 J. FOR CRITICAL MIGRATION & BORDER REGIME STUD., no. 2, 2015, at 1, 1–15.

Migration Monitoring Mechanism Initiative (4Mi),"[51] and similar initiatives outside Europe[52] all point to the transnational magnitude of the problem.

These figures on migrant mortalities all underline the humanitarian imperatives of tackling migrant deaths and disappearances at sea and borders whilst also facilitating the search, investigation, identification, and repatriation of those already reported dead to their families.[53] And now, with the recent outbreak of the COVID-19 pandemic marked by increased border closures, city lockdowns, and tightened immigration measures across the world,[54] experts fear that a significant number of migrants trapped in COVID-19 hotspots across European borderlines face real threats to their security, health, dignity, and survival,[55] and could compound families'

51. The "Mixed Migration Monitoring Mechanism Initiative (4Mi)" conducts structured interviews with migrants and refugees along various migration routes globally especially those originating from North Africa to Europe. *See 4Mi*, MIXED MIGRATION CTR. (2021), http://www.mixedmigration.org/4mi/ (last visited Jan. 20, 2021) [https://perma.cc/Z4W6-P5GY] (archived Jan. 20, 2021).

52. In addition to these initiatives/projects documenting migrant deaths and other migration issues within the European frontiers, compare also similar projects that documents migrant fatalities in other regions such as: *"The Australian Border Deaths Database." See Australian Border Deaths Database,* MONASH UNIV. (2021)., https://www.monash.edu/arts/border-crossing-observatory/research-agenda/australian-border-deaths-database (last visited Jan. 20, 2021) [https://perma.cc/WHD8-ZPAB] (archived Jan. 20, 2021) (maintaining a record of all known deaths associated with Australian borders since January 2000); *Migrant Death Mapping*, HUMANE BORDERS FRONTERAS COMPASIVAS (2021), https://humaneborders.org/migrant-death-mapping/ (last visited Jan. 20, 2021) [https://perma.cc/6RMB-2BKB] (archived Jan. 20, 2021) (created by Humane Borders, a non-profit organisation to track where each migrant body was found on the US-Mexico border, name and gender of the deceased, and the cause of deaths).

53. *See generally Dead and Missing at Sea:Informative Guide for Families and their Supporters,* LACIMADE (2017), https://www.lacimade.org/wp-content/uploads/2017/05/Cim.B4P.Familles-ANG.pdf (last visited Jan. 20, 2021) [https://perma.cc/Z694-5W4A] (archived Jan. 20, 2021) (discussing the procedure in Italy for search, investigation, identification and repatriation of migrant bodies to their families).

54. For example, recently Italy in response to the COVID-19 outbreak passed a law it called "Inter-Ministerial Decree n. 150 of 7 April 2020" which is targeted at preventing migrants rescued by NGO vessels flying non-Italian flag from landing at Italy ports. *See* Andrea Maria Pelliconi, *COVID-19: Italy is Not a "Place of Safety" Anymore. Is the Decision to Close Italian Ports Compliant with Human Rights Obligations?*, EJIL:TALK! (Apr. 23, 2020), https://www.ejiltalk.org/covid-19-italy-is-not-a-place-of-safety-anymore-is-the-decision-to-close-italian-ports-compliant-with-human-rights-obligations/ [https://perma.cc/EBV8-KH5B] (archived Jan. 20, 2021).

55. *See* Lorenzo Guadagno, *Migrants and the COVID-19 Pandemic: An Initial Analysis*, IOM MIGRATION RESEARCH SERIES, no. 60, 2020, at 3, 9; *see also* Erol Yayboke, *Five Ways COVID-19 is Changing Global Migration*, CTR. FOR STRATEGIC & INT'L STUD. (Mar. 25, 2020), https://www.csis.org/analysis/five-ways-covid-19-changing-global-migration [https://perma.cc/Y7D6-E7DB] (archived Jan. 21, 2021); Erol Yayboke & Joseph S. Bermudez Jr., *Seeking a Path to Europe, Refugees and Migrants Ultimately Turned Back by COVID-19*, CTR. FOR STRATEGIC & INT'L STUD. (Apr. 2, 2020), https://www.csis.org/analysis/seeking-path-europe-refugees-and-migrants-ultimately-tu

search for their missing relatives.**56** The humanitarian crisis of missing migrants, thus, remains a pressing transnational social problem with vast areas of conflicting interests for governments, individuals, families, communities, and international organisations. Yet, relatively little is known about migrants who go missing at sea and across borders, what happens to them while they are missing, and in what ways their deaths or disappearances can be prevented.**57** Missing

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rned-back-covid-19 [https://perma.cc/8VDZ-U8TX] (archived Jan. 21, 2021); Priya Pillai, *COVID-19 Symposium: COVID-19 and Migrants—Gaps in the International Legal Architecture?*, OPINIOJURIS (Apr. 4, 2020), http://opiniojuris.org/2020/04/04/covid-19-symposium-covid-19-and-migrants-gaps-in-the-international-legal-architecture/ [https://perma.cc/N6JG-93XE] (archived Jan. 21, 2021) (arguing that the current outbreak of the COVID-19 pandemic has further exposed the protection gaps in the existing international legal frameworks designed to protect migrants); León Castellanos-Jankiewicz, *COVID-19 Symposium: US Border Closure Breaches International Refugee Law*, OPINIOJURIS (Mar. 4, 2020), http://opiniojuris.org/2020/04/03/covid-19-symposium-us-border-closure-breaches-international-refugee-law/ [https://perma.cc/R8FT-7WFF] (archived Jan. 21, 2021) (arguing that the unprecedented measures marked by border crackdown adopted by global states especially the Trump administration in response to the COVID-19 pandemic is putting migrants in the harm's way and they stand a real "severe risk of kidnapping, torture, rape, and, ultimately, death").

56. *See* Marta Sánchez Dionis, Kate Dearden & Gabriella Sanchez, *COVID-19 Compounds Families' Painful Search for Missing and Disappeared Migrants*, RELIEFWEB (June 24, 2020), https://reliefweb.int/report/world/covid-19-compounds-families-painful-search-missing-and-disappeared-migrants [https://perma.cc/Y8YL-SCC7] (archived Jan. 21, 2021).

57. However, academic research has recently taken steps to address the problem, in particular, the Mediterranean Missing Migrants project carried out by UK academics at the forefront of work on the issue of missing migrants in collaboration with the leading international organisation (IOM) working on the issue. *See, e.g.*, MEDITERRANEAN MISSING PROJECT, MISSING MIGRANTS IN THE MEDITERRANEAN: ADDRESSING THE HUMANITARIAN CRISIS 1–14 (Sept. 2016); MEDITERRANEAN MISSING PROJECT, 'LIKE A PART OF A PUZZLE WHICH IS MISSING': THE IMPACT ON FAMILIES OF A RELATIVE MISSING IN MIGRATION ACROSS THE MEDITERRANEAN 2–13 (Sept. 2016); MEDITERRANEAN MISSING PROJECT, MISSING MIGRANTS: MANAGEMENT OF DEAD BODIES IN SICILY (2016), https://openaccess.city.ac.uk/id/eprint/17795/1/Report-on-Missing-Migrants-in-Italy.pdf [https://perma.cc/4KWB-23FB] (archived Feb. 1, 2021); MEDITERRANEAN MISSING PROJECT ESRC, MISSING MIGRANTS: MANAGEMENT OF DEAD BODIES IN LESBOS 2–10, (2016); STEPHANIE GRANT, DEAD AND MISSING MIGRANTS: THE OBLIGATIONS OF EUROPEAN STATES UNDER INTERNATIONAL HUMAN RIGHTS LAW 4, 6–16 (2016), https://reliefweb.int/sites/reliefweb.int/files/resources/Mediterranean-Missing-Legal-Memo-290816.pdf [https://perma.cc/9PZP-2RGQ] (archived Jan. 23, 2021); VASSILIS KERASIOTIS & MARIA SPILIOTAKARA, MISSING AND DEAD MIGRANTS AT SEA: THE LEGAL FRAMEWORK IN GREECE, GREECE 1, 4–11 (2016); SERENA ROMANO, THE ITALIAN LEGAL FRAMEWORK FOR THE MANAGEMENT OF MISSING PERSONS AND UNIDENTIFIED DEAD BODIES, AND THE RIGHTS OF THE RELATIVES 1, 4–15 (2016); MEDITERRANEAN MISSING PROJECT, MISSING MIGRANTS AND MANAGING DEAD BODIES IN THE MEDITERRANEAN 1–4 (2016); *see also* Simons Robins, Anna Vallianatou & Iosif Kovras, *Missing Migrants and Deaths at EU's Mediterranean Border: Humanitarian Needs and State Obligations*, UK RES. & INNOVATION, https://gtr.ukri.org/projects?ref=ES%2FN01345X%2F1#/tab Overview (last visited Jan. 21, 2021) [https://perma.cc/223G-TZ9C] (archived Jan. 21, 2021); Ottavia Ampuero Villagran, *Identifying Migrant Bodies in the Mediterranean*, 5 U.N. UNIV. POL'Y REP., no. 2, 2018, at 1, 5–10; Amade M'charek & Sara Casarelli, *Identifying Dead Migrants: Forensic Care Work and Relational Citizenship*, 23

migrants are defined using the fact that their families do not have any knowledge about the fates of their missing relatives, or whether they are alive or dead.[58] In principle, the Article refers to seven categories of people as missing "migrants":

    (1) migrants who died and their bodies were never recovered;

    (2) migrants who died and their bodies were actually recovered but no identification was possible due to advanced decomposed state of the dead bodies (the benefits of possible identification through forensic ante-mortem data notwithstanding);

    (3) migrants who died but were buried in unmarked graves with no proper identification from any source—families, friends, or governmental authorities—and, as a result, who they are or where they came from remain unknown;

    (4) migrants who are actually alive but who cannot be found because they lost their way either before, during, or so soon after the completion of their journeys, including "unaccompanied children";[59]

    (5) migrants who went missing due to the actions of others (e.g., migrants who are victims of human trafficking, robbery, migrant smuggling, abductions, or homicide);[60]

    (6) migrants who may have been arrested and detained without access to means of communication, insofar as the circumstances of their detention remain unknown to their relatives followed by a denial

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CITIZENSHIP STUD., Aug. 7, 2019, at 738; Simon Robins, *Migrant Bodies in Europe: Routes to Identifying the Dead and Addressing the Needs of the Families of the Missing*, *in* 3 FATAL JOURNEYS, *supra* note 39, at 64–65 [hereinafter Robins, *Migrant Bodies*]; Stephanie Grant, *Identification and Tracing*, *in* 2 FATAL JOURNEYS: IDENTIFICATION AND TRACING OF DEAD AND MISSING MIGRANTS 31, 37–51 (Tara Brian & Frank Laczko eds., 2016); Catriona Jarvis, *Last Right: Cross-Border Deaths—Towards a New Framework*, 31 J. IMMIGR., ASYLUM & NAT'Y L. 131, 131–50 (2017); CTR. FOR THE STUDY OF HUMAN RIGHTS [CSHR], CROSS-BORDER DEATHS ON THE JOURNEY TO EUROPE: TOWARDS A LEGAL FRAMEWORK 3 (2016).

    58.   *See* Stephanie Grant, *Migrant and Refugee Border Deaths: Defining A Human Rights Framework*, 3 LSE L. REV. 129, 129 (2018); *see also* Iosif Kovras & Simon Robins, *Death as the Border: Managing Missing Migrants and Unidentified Bodies at the EU's Mediterranean Frontier*, 55 POL. GEOGRAPHY 40, 41 (2016).

    59.   For detailed study on obligations of states with regard to child migrant deaths and disappearances, see Jacqueline Bhabha, *Legal Obligations of States with Regard to Child Migrant Death and Disappearances*, *in* 4 FATAL JOURNEYS: MISSING MIGRANT CHILDREN 73, 73–83 (Frank Laczko, Julia Black & Ann Singleton eds., 2019); *see also* Delphine Morales, Presentation at the 3rd International Conference on Missing Children and Adults: Missing Children in Migration: Findings from European Research (June 15, 2017); Eur. Consult. Ass., *Missing Refugee and Migrant Children in Europe*, Doc. No. 15026 (Jan. 7, 2020) (recognising that child migrants are particularly vulnerable to going missing).

    60.   *See generally* Inter-American Comm'n on Human Rights [IACHR], *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, at 50–69, OEA/Ser.L/V/II Doc. 48/13 (Dec. 30, 2013).

of such detention by state authorities (enforced disappearance);[61] and, finally,

(7) migrants who may have entered the territory of a particular state through irregular channels and, therefore, choose as a safety precaution to remain missing and avoid detection by state and immigration authorities.[62]

Worldwide, the International Organisation for Migration (IOM) estimates that, since the year 2000, at least forty thousand migrants have died while making the risky journeys.[63] A recent report puts the figure at more than sixty thousand deaths since 2000.[64] Out of these figures, more than 18,500 are believed to have died crossing the Mediterranean since 2014,[65] with the latest IOM data putting the

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61. For detailed discussion on enforced disappearances in the context of migration, see Ariel E. Dulitzky, *The Latin-American Flavor of Enforced Disappearances*, 19 CHI. J. INT'L L. 423, 429–38 (2019); INT'L COMM. OF THE RED CROSS (ICRC), MISSING MIGRANTS AND THEIR FAMILIES: THE ICRC'S RECOMMENDATIONS FOR POLICY-MAKERS 4 (2017), https://www.refworld.org/docid/59c3c2c54.html [https://perma.cc/GHJ5-DQKD] (archived Mar. 15, 2021) (stating that migrants often go and subsequently remain missing in migration when they are detained without access to means of communication); *see also* Emilio Distretti, *Enforced Disappearances and Border Deaths Along the Migrant Trail*, *in* BORDER DEATHS: CAUSES, DYNAMICS AND CONSEQUENCES OF MIGRATION-RELATED MORTALITY 117, 117–27 (Paolo Cuttitta & Tamara Last eds., Amsterdam Univ. Press 2020). *See generally* G.A. Res. 61/177 (Dec. 20, 2006).

62. In the UK, the practice is usually that if a migrant reported missing is an adult, it should first be determined whether the person in question entered the country illegally and is deliberately evading state and immigration authorities as a safety precaution. In that case, pending conclusion of investigation by the police in collaboration with other responsible agencies—mainly the UK Border Agency—the migrant/asylum seeker is first declared a "wanted person" before they are considered "missing". But if the migrant/asylum seeker is a child, they are declared "missing" ab initio and it is immaterial that the child is believed to be in company of an adult, e.g., children who are victims of human trafficking. *See generally* NATIONAL POLICING IMPROVEMENT AGENCY, GUIDANCE ON THE MANAGEMENT, RECORDING AND INVESTIGATION OF MISSING PERSONS 16, 61–62 (2d ed. 2010), http://library.college.police.uk/docs/npia/missing-persons-guidance-2010.pdf (last visited Jan. 20, 2021) [https://perma.cc/U93W-X4Y9] (archived Jan. 20, 2021).

63. *See* 'LIKE A PART OF A PUZZLE WHICH IS MISSING': THE IMPACT ON FAMILIES OF A RELATIVE MISSING IN MIGRATION ACROSS THE MEDITERRANEAN, *supra* note 57, at 1. If the death toll between 1996 and 2000 through to 2018 are added together, the IOM estimates that the number of deaths may be more than 75,000 deaths. *See* Marta Sánchez Dionis & Kate Dearden, *Missing Migrants Project Data: A Global Overview*, *in* 4 FATAL JOURNEYS: MISSING MIGRANT CHILDREN, *supra* note 59, at 1, 1.

64. *See Latest Global Figures: Migrant Fatalities Worldwide*, MISSING MIGRANTS, https://missingmigrants.iom.int/latest-global-figures (last visited Jan. 20, 2021) [https://perma.cc/3WF4-WJMR] (archived Jan. 20, 2021).

65. Simons Robins, *Analysis of Best Practices on the Identification of Missing Migrants: Implications for the Central Mediterranean*, IOM 6 (2019), https://gmdac.iom.int/node/517 [https://perma.cc/F3TZ-R6KC] (archived Jan. 20, 2021) [hereinafter Robins, *Analysis*].

figure at twenty throusand deaths as of April 2020.[66] Experts report that between 2017 and 2018, some 4,100 people died crossing the Central Mediterranean route, making it the world's deadliest migration route (accounting for about 77 percent of total migrant deaths in the Mediterranean).[67] The actual death toll is most likely to be higher as many migrant fatalities also happen in isolated parts of the world and are never recorded.[68] For many of the dead migrants, their bodies are never recovered and no story is told about their whereabouts. And where dead bodies are recovered, they are in most cases buried in unmarked graves with no proper identification.[69] The net identification rate of migrant bodies between 1990 and 2013 stands at just about 22 percent.[70] In these situations of deaths and loss, international law places "obligations"[71]—derived from human rights

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66. Kate Dearden, Marta Sánchez Dionis, Julia Black & Frank Laczko, CALCULATING "DEATH RATES" IN THE CONTEXT OF MIGRATION JOURNEYS: FOCUS ON THE CENTRAL MEDITERRANEAN 3 (2020), https://publications.iom.int/system/files/pdf/mortality-rates.pdf (last visited Jan. 20, 2021) [https://perma.cc/B9DS-BBSF] (archived Jan. 20. 2021).

67. Robins, *Analysis*, *supra* note 65, at 6.

68. *See* Dionis & Dearden, *supra* note 63, at vii.

69. *See* Robins, *Analysis*, *supra* note 65, at 28.

70. *Id.* at 6; *see also* Tamara Last, Giorgia Mirto, Orçun Ulusoy, Ignacio Urquijo, Joke Harte,Nefeli Bami, Marta Pérez Pérez, Flor Macias Delgado, Amélie Tapella, Alexandra Michalaki, Eirini Michalitsi, Efi Latsoudi, Naya Tselepi, Marios Chatziprokopiou & Thomas Spijkerboer, *Deaths at the Borders Database: Evidence of Deceased Migrants' Bodies Found Along the Southern External Borders of the European Union*, 43 J. ETHNIC & MIGRATION STUD. 693, 693–712 (2017); *cf.* Amelia Tapella, Giorgia Mirto & Tamara Last, *Deaths at the Borders. From Institutional Carelessness to Private Concern*, 5 RIVISTA DI STORIA DELLE IDEE 57, 57–64 (2016).

71. In this article, the term "obligation" is used interchangeably with "responsibility" and "duties" for good and practical reasons. For example, most researchers in the ethics, normative political philosophy, and legal and socio-legal areas often treat the words 'obligations,' 'responsibilities,' and 'duties' as synonymous. *See generally* Michael J. Zimmerman, *Duty and Obligation,* INT'L ENCYCLOPAEDIA ETHICS (Feb. 1, 2013), https://novel-coronavirus.onlinelibrary.wiley.com/doi/epdf/10.1002/9781444367072.wbiee158 (last visited Jan. 18, 2021) [https://perma.cc/GUH2-43UB] (archived Jan. 18, 2021). In keeping with this liberal practice, I will use the terms 'obligations,' 'responsibilities,' and 'duties' interchangeably in this article. This approach is supported by the consistent and frequent use of 'responsibility' to refer to 'obligations' in several international treaties, many of which will be referred to in this article. For example, the use of the phrase "responsibility to protect" in the 2001 report of the International Commission on Intervention and State Sovereignty (ICCSIS) refers to the bundle of primary obligations of states to protect their population from gross and systematic human rights violations. *See* Chelsea O'Donnell, *The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention*, 24 DUKE J. COMPAR. & INT'L L. 557, 558–59; G.A. Res. 60/1, ¶ 4 (Sept. 20, 2005); Astha Pandey, *The Responsibility to Protect ("R2P") in International Law: Protection of Human Rights or Destruction of State Sovereignty?*, 2 NLUJ L. REV. 115, 115 (2013); Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, 101 AM. J. INT'L L. 99, 99–100 (2007). *See generally* Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the World Summit*, 20 ETHICS & INT'L AFF. 143 (2006), https://link.gale.com/apps/doc/A150366712/AONE?u=tel_a_vanderbilt&sid=AO

treaties—on states to not only search for missing migrants, but also investigate migrant deaths and respect the rights of their families.[72] Despite such legal provisions, the EU "Resolution,"[73] and the "European Agenda on Migration,"[74] states sometimes deny that they have legal obligations to "search and rescue,"[75] recover, identify, and, in the case of death, repatriate bodies of dead migrants to their families.[76] This is reflected in the policy agendas of many states. Such denial/noncompliance comes with severe social and psychological consequences for families of missing migrants who are waiting for news on the fates of their missing relatives. Families are often left in the dark, creating ambiguity as to what has become of their missing loved ones.[77] In a situation where migrants die and go missing in transnational migration, the central normative aspiration of transnational law is that such human problems that transcend borders should be tackled through a transnational legal and policy approach. The main argument pursued in this Article is that meeting such normative aspirations of transnational law when responding to the problem of missing migrants would require a transnationally effective national migration policy. As will be pointed out later in this Article, the transborder nature and character of the problem of missing migrants, the externalization of national migration policies and border controls in response thereof, and the extra-territorialization of jurisdiction and positive human rights obligations of states towards missing migrants all justify this argument.

NE&xid=bb791f16 (last visited Jan. 18, 2021) [https://perma.cc/HP4U-D48T] (archived Jan. 18, 2021).   In the legal commentaries annexed to the 2001 International Law Commission Draft Articles on Responsibilities of States for Internationally Wrongful Acts, the term 'responsibility' was used to refer to states *qua* states' 'obligations' internationally. *See* Int'l L. Comm., Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Comments. on its 53d Session, U.N. Doc. A/56/10, at art. 33, ¶ 3 (2001). Also, Principle 21 of the 1972 Stockholm Declaration uses 'responsibility' to refer 'obligations' of all states to prevent transboundary harm to the environment. Rep. of the U.N. Conf. on the Hum. Env't., U.N. A/Conf.48/14/Rev.1, at 5 (1972); *see also* G.A. Res. A/RES/2994, ¶ 1 (Dec. 15, 1972), https://www.refworld.org/docid/3b00f1c840.html (accessed Jan. 18, 2021) [https://perma.cc/TTB3-HW4B] (archived Jan. 18, 2021). This practice is also seen in several other international human rights treaties.

   72.   *See* GRANT, *supra* note 57, at 8, 13.

   73.   *See generally* 2013 O.J. (C 208).

   74.   S*ee generally A European Agenda on Migration*, COM (2015) 240 final (May 13, 2015) [hereinafter *European Agenda on Migration*].

   75.   Like the question of cost of repatriation of migrant bodies, there is also always the question raised by states as to who should bear the cost of rescue of migrants at sea. For more on this question, see David Miller, *Our Responsibilities to Refugees*, *in* PROCEEDINGS OF THE 2018 ZiF WORKSHOP 37, 40 (2018).

   76.   *See* Robins, *Missing in Migration*, *supra* note 25, at 24.

   77.   *See* Grant, *supra* note 58, at 129.

III. WHAT DO WE MEAN BY A TRANSNATIONALLY EFFECTIVE NATIONAL MIGRATION POLICY?

Following from the above characterisation of the problem of missing migrants in light of transnational law, how should we define a transnationally effective national migration policy that meets the normative requirements of transnational law when global states are responding to the problem of missing migrants? The starting premise is that migrants, by crossing national borders in their attempt to reach an international destination, challenge an international system built on the foundation of state sovereignty and national jurisdiction. As such, transnational migrant journeys clearly demonstrate that "people and institutions are no longer constrained by national boundaries."[78] Viewed from this angle, a transnationally effective national policy would mean policies initiated within the domestic legal order, with their impact, positive as it should be, keenly felt by migrant populations outside the territory of the relevant state. If you make a policy at home and its actual impact, effects, and/or practical outcomes save a life abroad or foster cooperative relationships between actors abroad, then, such a policy may be said to be good and transnationally effective. Not least because it is promoting shared values of human dignity and public order beyond borders.[79]

In other words, the policy is made at home, but its implementation by national authorities produces effective and desired results over relevant *subjects*, *territories*, *situations,* and *persons* abroad. Such a transnational policy approach to dealing with pressing human problems should see the executive, judicial, and legislative policy-making competences of national governments in relation to migration unify both within and outside their borders[80] for a common purpose— the safety and protection of migrants. This approach should move us closer to realising the moral and political precepts and pragmatic problem-solving aspiration of international human rights, which promises to "penetrate the impregnable state borders and gradually replace it with the authority of international law."[81] However,

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78.   Georg Vobruba, *The Limits of Borders*, *in* SOCIAL POLICY BEYOND BORDERS 15, 15–49 (Abram de Swaan ed., 1994) (cited in Margaret Sherraden, *Developing Transnational Social Policy: A North American Community Service Program* 1, 1 (Ctr. for Soc. Dev. Glo. Serv. Inst., Working Paper Nos. 1-10, 2001)).

79.   *See generally* Abram de Swaan, *The Receding Prospects for Transnational Social Policy*, 26 THEORY & SOC'Y, no. 4, 1997, at 563 (discussing extensively what a transnational social policy should mean in the context of reducing poverty in the world).

80.   *Cf.* Mann, *Dialectic*, *supra* note 34, at 315–16 (arguing that the policy-making and implementation competences of the various arms of national government are sometimes unified by sovereignty and separated by borders).

81.   SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 1 (2010); *cf.* Paul Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 262 (2004) (hinting at the transnational philosophical belief expressed in the post-Cold War era suggesting that

questions may be asked about what this so defined transnationally effective national migration policy should mean for states in terms of the wider "global migration governance."[82] This is imperative given that the institutional structures that regulate/shape how states deal with transnational migration builds upon transnational legal norms.

Taking the United Kingdom as an example, it will be more appropriate to ask: What aspects of and through what channels should the United Kingdom engage with and promote the global migration governance agenda in relation to missing migrants? Also, how can we measure the transnational effectiveness of a national migration policy that may be initiated by states as part of that migration governance agenda? And where, in particular, in terms of specific places/territories may such a transnationally effective national migration policy be applied and enforced? Addressing these issues matters for the United Kingdom because they will not only determine how the country is going to engage with the transnational migration governance but will also "shape what on the institutional, political and normative level global migration governance should mean for the United Kingdom,"[83] especially now that it is no longer part of the EU. In order to address the transnational problem of missing migrants, the United Kingdom can start by giving full legal effects (beyond political declaration) to those aspects that prioritize the humanitarian imperatives of saving migrant lives at sea. This extends to facilitating transnational investigations into migrant deaths, repatriation of migrant bodies, and addressing the psychosocial needs of their families. The United Kingdom can promote this transnational migration policy approach through bilateral channels; multilateral channels;[84] and informal,

human rights that ground the most basic considerations about international morality are gradually replacing sovereignty "as the foundation of the international legal order").

82.   Alexander Betts & Lena Kainz, *The History of Global Migration Governance* 1,1 (Refugee Working Paper Series No. 122, Refugee Stud. Ctr., Univ. Oxford, Working Paper No. 122, 2017*)* (defining global migration governance as the "norms and organizational that regulate and facilitate states' and other actors' responses to migration"); *see also* Demetrios G. Papademetriou, *The Governance of International Migration: Defining the Potential for Reform in the Next Decade*, COUNCIL STATEMENT, SIXTH PLENARY MEETING OF THE TRANSATLANTIC COUNCIL ON MIGRATION 1, 1 (2011) (defining global migration governance as the "creation of a more or less formal set of norms and rules to regulate the behaviour of states with respect to the movement of people across borders"); Kathleen Newland, *The Governance of International Migration: Mechanisms, Processes and Institutions*, 16 GLOB. GOVERNANCE 331, 331 (2010) (discussing how global migration governance has evolved as a policy issue on the international level over the last decade).

83.   Betts, *Policy Primer*, *supra* note 36, at 2 (asking institutional, political and normative questions about global migration governance and what this should mean for the UK as a global leader).

84.   At the level of "multilateralism", the UK participates on international and regional deliberations about global migration governance in response to irregular migration through the UN and EU. *See id.* at 6.

transnational networks[85] since the country already has a proven record of global migration governance through these channels.

   Next, we determine how we can measure the effectiveness of this proposed transnational migration policy in relation to missing migrants. It is argued that taking into account the normative goals of transnational law, the effectiveness of a such a transnational migration policy can be measured in three ways. The first is to measure it against the extent to which it has been able to realise the desired public intended goal and/or policy outcomes. Thus, it is imperative to know what the specific public goals are that states aim to achieve when responding to the problem of missing migrants. In practical terms and judging from the provisions of the GCM (Objective 8)[86] and UN 2030 Agenda for Sustainable Development (Goal 10.7),[87] it is suggested that states strive for two fundamental and synergic goals when responding to the problem of missing migrants. The first is to promote and realise a *safe*, *orderly,* and *regular* migration world[88] based on the principles of human dignity where migrants are not deliberately ignored, increasing the risk of dying and going missing. And where states are committed to searching for and finding those already reported dead or missing, repatriating their bodies to their families[89] whilst also finding answers to questions about those who subsequently remain missing. The second goal is to secure a migration world based on respect for public order. Hence the use of the term "orderly" in the GCM; that is to say, to prevent and deter violations of "public order"[90] caused by *unsafe, disorderly, irregular,* and *irresponsible* migration. And where

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   85.   At the level of "informal networks", the UK works through organisations like the IOM and the Intergovernmental Consultations on Asylum, Refugees and Migration (IGC) to develop best practices in response to the transnational problem of irregular migration. *See id.*
   86.   *See* Global Compact for Safe, Orderly and Regular Migration, *supra* note 26, objective 8.
   87.   *See* Sustainable Development 2030 Agenda, U.N. Doc. A/Res/70/1, at 23 (2015), https://sustainabledevelopment.un.org/content/documents/21252030%20Agend a%20for%20Sustainable%20Development%20web.pdf (last visited Jan. 20, 2021) [https://perma.cc/88EV-ZE7X] (archived Jan. 20, 2021) (Goal 10.7 provides that part of the agenda of the world states is to "facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies").
   88.   *See* Elspeth Guild, *The UN's Search for a Global Compact on Safe, Orderly and Regular Migration*, 18 GER. L.J. 1780 (2017); *see also* Elspeth Guild, *Unsafe, Disorderly and Irregular Migration? Examining the Assumptions Underlying the United Nations' New York Declaration*, 50 CAN. J. PEACE & CONFLICT STUD., no. 1, 2018, at 53.
   89.   It must be acknowledged that repatriation of migrant bodies is big challenge because of the huge financial cost involved and the lack of political will on the part of states. *See generally* Kovras & Robins, *supra* note 58, at 40–49.
   90.   In this article, I conceive the notion of "public order" as "orderliness" in human society as opposed to "chaos". For wider jurisprudential debate on the different conceptions of public order, see generally Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region and Normative Friction*, 32 YALE J. INT'L L. 331 (2007).

public order has already been violated or is under threat of imminent violation, to suspend and restore order. Also, to correct any decried behaviour of migrants that may generate public order violations whilst also reconstructing the wider social process in society that provide fertile ground for public order violations to occur.[91]

The second way we can judge the transnational effectiveness of a state policy is by looking at the extent to which it has been received, accepted, and/or rejected in terms of its consistency and compatibility with international legal norms and/or treaties to which the relevant state has acceded. However, it should be understood that a legal or policy instrument is not considered transnationally effective merely because it has been accepted internationally, perhaps, because it complies with existing international norms. This is important because state migration policies may, in fact, be legally compliant with transnational legal norms yet produce dreadful results for migrants. So, beyond compliance with international legal norms, normative aspirations of transnational law demand that such policy produces a desired positive result/outcome capable of addressing a problem in remote lands robustly. Not least since states now live in a regime of mutual interdependence.[92] Therefore, the presence of migrants—whether in origin or transit states—can generate external effects that affect the receiving states and vice versa. Thus, as migrants fleeing wars from poor countries increasingly continue to confront the rich ones with protection requests, the rich countries are invited to respond by adopting national policies with cross-border positive effects. Such transnationally effective policies would need to be designed to address issues around the protection of lives of migrants and the investigation of migrant deaths. By the same token, they should also control the persistent and intrusive external effects that the migration crisis might have on states, including those arising from migrant deaths and migrants going missing.

The third way to look at the transnational effectiveness of a state migration policy is to examine the extent to which such policy

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91.   These public order goals outlined herein in relation to migrant journeys are adapted from W.M. Reisman's delineation of seven synergetic goals that the international community seeks to achieve responding to crimes of genocide and other serious violations of human rights in the world. *See generally* W.M. Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 L. & CONTEMP. PROBS., No. 4, 1996, at 75; *see also* Rosa Pati, *Trading in Humans: A New Haven Perspective*, 20 ASIA PAC. L. REV. 140 (2012).

92.   *See, e.g.*, de Swaan, *supra* note 79, at 563 (recognising increasing global interdependencies as a condition for emergence of a transnationally effective social policy); *see also* Christoph Conrad, *Social Policy History After the Transnational Turn*, *in* BEYOND THE WELFARE STATE MODELS: TRANSNATIONAL HISTORICAL PERSPECTIVES ON SOCIAL POLICY 218, 218–21 (Paulli Kettunen & Klaus Petersen eds., 2011) (emphasising the imperatives of mutual interdependence in society when asking "who wants to stay single . . . ?").

recognises the fact that an effective and goal-oriented policy response to the transnational problem of missing migrants would require a close dialogue and synergy in the transnational arena between the legal and moral dimensions of obligations of states towards migrants. By that it is meant that policy responses of states to missing migrants cannot in transnational terms be determined only by what states can do legally but also what they can do morally. Not least since human rights law, from where most of the relevant obligations of states towards missing migrants are derived, also grounds the most basic considerations about international morality.[93] Such policy approach conceived, even if ambitiously, will allow for "extricating human life generally from the false necessities of market dealings"[94] that seem to characterise transnational migration policymaking and enforcement. That is to say, for a national policy to produce the desired transnational effects, there has to be a close interface between the exercise of moral and legal obligations of states towards transborder migrants in a mutually reinforcing and inclusive way, especially when human rights of migrants to life are at issue.

For example, while the duty to rescue migrants at sea is an obligation created by international law of the sea[95] and international human rights law[96] to uphold the right to life, repatriation of migrant bodies is more likely to fall within the moral aspect of state obligations. This is without prejudice to the fact that the duty to repatriate corpses across international borders has both been recognised under the International Arrangement Concerning the Conveyance of Corpses 1937,[97] which remains in force; and the Council of Europe Agreement

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93. *See, e.g.*, Romuald R. Haule, *Some Reflections on the Foundation of Human Rights—Are Human Rights an Alternative to Moral Values?*, 10 MAX PLANCK U.N.Y.B. 367, 388–92 (2006) (discussing extensively the moral foundations of human rights).

94. Alexander Somek, *The Social Question in a Transnational Context*, *in* LSE 'EUROPE IN QUESTION' DISCUSSION PAPER SERIES, Abstract (2011), http://eprints.lse.ac.uk/53215/1/LEQSPaper39.pdf (last visited Jan. 20, 2021) [https://perma.cc/D3RJ-UC4Z] (archived Jan. 20, 2021).

95. *See, e.g.*, United Nations Convention on the Law of the Sea art. 98(1), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UN Convention on the Law of the Sea] (providing that "every state shall require the master of a ship flying its flag . . . (a) to render assistance to *any person* found at sea in danger of being lost, (b) to proceed with all possible speed to the rescue of *persons* in distress . . ." (emphasis added)); *see also* International Convention on Maritime Search and Rescue chs. II, IV, V, Apr. 27, 1979, 1403 U.N.T.S. (recognising the obligations of states to render assistance and establish search and rescue facilities).

96. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, Organization of American States art. 4, Nov. 22, 1969.

97. Arrangement Concerning the Conveyance of Corpses, 1938, League of Nations T.S. 189 Doc. 4391, https://www.auswaertiges-amt.de/blob/248444/db12fd

Concerning the Conveyance of Corpses 1973,[98] which gives the obligation to repatriate a legal efficacy. And also, the 2019 Guiding Principles for the Search for Disappeared Persons stating the need for transnational, concerted efforts into enforced disappearances whereby "states concerned should develop cooperation agreements and establish competent authorities to allow for effective coordination in the search for disappeared persons at each stage of migration."[99] Thus the inextricability and/or interface between legal and moral obligations of states is particularly important. Not least because if we leave it at what states can do legally leaving out the moral aspects of the obligations, we would fall into the familiar trap of accepting the flawed argument that until migrants reach state territories, no state could be legally or morally responsible towards migrants.[100]

In terms of *"where,"* that is, the specific places and territories where a transnational policy may be applied, enforced, and made effective, it is suggested that it is tied to the question of exercise of extraterritorial jurisdiction and migration controls by states.[101] This is no least the case because it raises fundamental issues regarding state responsibility for extraterritorialised and externalised migration controls.[102] In principle and in practice, there are three possible ways

9011dcd9dfded7fe14eda56acb/vertragstextoriginal-data.pdf (accessed Jan. 20, 2021) [https://perma.cc/53DJ-UH2H] (archived Jan. 20, 2021). The initial signatories to the treaty, also known as the Berlin Arrangement, included some major European powers: Germany, Belgium, Chile, Denmark, France, Italy, Switzerland, Czechoslovakia and Turkey. The Berlin Arrangement is complemented by domestic laws and regulations for international repatriation of bodies in each state as well as the International Air Transport Association (IATA) Rules.

98.   Council of Europe Agreement on the Transfer of Corpses, 1973, E.T.S. No. 80, Strasbourg, 26.X. 1973, https://rm.coe.int/168007617d (last visited Jan. 21, 2021) [https://perma.cc/54VU-DEED] (archived Jan. 21, 2021); *see also* Explanatory Report to the Agreement on the Transfer of Corpses, 1973, E.T.S. No. 80, Strasbourg, 26.X. 1973, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?docume ntId=09000016800c96c9 (accessed Jan. 21, 2021) [https://perma.cc/LDX5-MRJM] (archived Jan. 21, 2021).

99.   *See* Guiding Principles for the Search for Disappeared Persons, Principle 9(3), May 8, 2019,   U.N. Doc. CED/C/7, https://www.menschenrechte.org/wp-content/ uploads/2019/12/Guiding-principles-for-the-search-for-disappeared-persons.pdf (last visited Jan. 21, 2020) [https://perma.cc/SC7M-FUVT] (archived Jan. 21, 2021).

100.   *See* Maria Nagore Casas, *The Instruments of Pre-Border Control in the EU: A New Source of Vulnerability for Asylum Seekers*, J. INT'L L. & INT'L REL., no. 7, 2019, at 162.

101.   Mustapha Dikec, *The "Where" of Asylum*, 27 ENV'T & PLAN. D: SOC'Y & SPACE 183, 183–89 (2009) (arguing that the question of "where" in asylum, border management and migration controls matters in contemporary discourses about immigration).

102.   *See also* Violeta Moreno-Lax & Martin Lemberg-Pedersen, *Border-Induced Displacement: The Ethical and Legal Implications of Distance-Creation Through Externalisation*, 56 QUESTIONS INT'L L., no. 1, 2019, at 6 (arguing that places where externalised/extraterritorialised migration distance-creation is practiced by states in a bid to deny responsibility for migration controls "plays a crucial role as a mechanism not only of dispersion of legal duties, blurring the lines of causation and making attribution

in which states can effectively govern or enforce migration measures that affect migrants. The first is through exercising *effective control and jurisdiction* over migrants who enter their territories by any means whether through the sea routes, air, or external borders of the state. The second is through *extraterritorial conduct* in the sense of exercising external control over migrants and the territories where the migrants are and situations facing such migrants abroad.[103] And the third is through *domestic conduct*, in the sense of pursuing and enforcing national migration policies that produce extraterritorial or transnational effects outside the national territory of the states involved.[104] Consequently, when migrant deaths at sea, borders and other migration spaces are alleged, the obligation of states (territorial and extraterritorial) can be triggered and therefore, states can be held responsible for:

i. acts they carry out *within* their own territories (land and water) including where the effects (e.g., migrant deaths and migrants going missing) produced by those acts occur *within* the territory of that state;
ii. acts that occur *inside* the territorial confines of a given state, and those acts produces an effect *outside* the territory of that state;
iii. acts that take place at international sea, or on the internal waters of states.[105]

While there have been no arguments about the right of states to effectively control and exercise jurisdiction over migrants within their own national territories, controversies continue to surround states' exercises of jurisdiction and effective control over migrants outside their own territories. These questions have become pivotal when it comes to invoking or attributing legal responsibility for violations of migrants' rights and also legal responsibility for those who die and go missing as an effect of the implementation of externalised and

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of wrongful conduct a difficult task, but also as an artefact of oppression and displacement in itself").

103. This has been held by the ECtHR in a number of cases including Al-Skeini v. The United Kingdom, App. No. 55721/07, 53 Eur. H.R. Rep. 589 (2011).

104. *See generally* Lorand Bartels, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, 25 EUR. J. INT'L L. 1071 (2015) (discussing the issue in the context of human rights violations of persons by states, inclusive of the EU, EU member states, and EU institutions outside their territories and their implications under EU law); *cf.* Thomas Spijkerboer, *Are European States Responsible for Border Deaths?*, *in* ASHGATE RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY 61, 61–63 (Satvinder S. Juss ed., 2011) [hereinafter Spijkerboer, *Are European States Responsible for Border Deaths?*].

105. *See generally* Spijkerboer, *Are European States Responsible for Border Deaths?*, *supra* note 104, at 63–66.

securitised migration procedures. In this Article, the question of *"where"* implies any place or territory where migrants come under the direct or indirect control and jurisdiction of states whether it is inside their own national territories or outside the territorial borders of the relevant states. This extends to the controlling authority and jurisdiction of the EU and EU states over migrants within the EU and outside the external borders of the EU.[106]

Taking into account the wider EU legal and policy responses to the migrant/refugee crisis, this would include, for example, EU states' exercise of jurisdiction and effective control over migrants in the Mediterranean Sea (the epicentre of the crisis) and other sea routes as well as those at the external borders of states, refugee camps, detention facilities, and other places no matter how distant in time, geography, and space. It is true that transnational migrant journeys, deaths, and disappearances often take place in transit between different national territories, sovereignties, and jurisdictions making it apparently difficult to allocate responsibilities to states to search for missing migrants whilst also identifying and repatriating migrant bodies.[107] However, there is little room to doubt that the externalised migration and border control policies of many states contribute to the clandestine dynamics of such migrant journeys and fatalities. Therefore, responsibility can be attributed to those states in extraterritorial settings.

Specifically, with respect to responsibility of European states for extraterritorial control and jurisdiction over migrants, the European Court of Human Rights (ECtHR) has consistently held that, although the European Convention on Human Rights was intended to function primarily within the *espace juridique* of the European contracting states,[108] certain protective principles in international refugee law, such as the *nonrefoulement* principle apply extraterritorially. This is so because "acts of authorities whether performed within or outside

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106.   *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 3(2), 21, Oct. 26, 2012, 2012 O.J. (C 326) 17, 28 (recognising the legal responsibility of the EU over its internal policies that produces external effects outside the external borders of the EU).

107.   *See* Estela Schindel, *Border Matters: Death, Mourning and Materiality at the European Borderlands*, EUROPE NOW (Apr. 28, 2020), https://www.europenowjournal.or g/2020/04/27/border-matters-death-mourning-and-materiality-at-the-european-borderla nds/ [https://perma.cc/K49U-E9SC] (archived Jan. 19, 2021).

108.   *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 96, art. 1; Banković v. Belgium, 2001-XII Eur. Ct. H.R. ¶ 80. *See generally* Cedric Ryngaert, *Clarifying the Extraterritorial Jurisdiction of the European Convention on Human Rights*, 28 MERKOURIOS: UTRECHT J. INT'L & EUR. L. 57 (2012) (discussing the scope of the European Convention on Human Rights and states' jurisdictions over persons within that state and abroad).

national boundaries produce effects outside their own territory."[109] For Itamar Mann, the transnational obligations of states in the field of migration, when declared by courts with authority as the ECtHR, clearly "figure in the transnational legal consciousness as a law on which all other law must depend; indeed a kind of global [norm]."[110] Such transnational law awareness upholds the fact that obligations of states towards migrants extends extraterritorially especially with regard to search and rescue of migrants trapped at sea but also before migrants reach the sea. And this obligation emanates from provisions of international human rights law, law of the sea, and other international treaties read together, interpreted, and applied in light of the principle and duty of due diligence.[111] This is more so given that the internal and external migration control procedures of states implies/triggers jurisdiction (territorial and extraterritorial) of those states under international law[112]—not least because migration control is consistently assumed to be the primary prerogative of states.[113] Hence, it is not uncommon to attribute legal responsibility to states for

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109. Loizidou v. Turkey, Preliminary Objections, 15318/89 Eur. Ct. H.R. ¶ 62 (1996).

110. Mann, *Dialectic*, *supra* note 34, at 326.

111. Tzevelekos & Proukaki, *supra* note 23, at 429.

112. *See* Ruben Wissing, *Allocating Responsibility for Refugee Protecting to States: Actual and Potential Criteria in International (Case) Law*, *in* MIGRATION ISSUES BEFORE INTERNATIONAL COURTS AND TRIBUNALS 45, 45–64 (Giovanni Carlo Bruno, Fulvio Maria Palombino & Adriana di Stefano eds., 2019) (evaluating solutions for allocations of migrants in international jurisprudence).

113. The fact that immigration control is considered a prerogative right of states is widely recognised in literature. John Rawls, the principal theorist of global justice, was one of the earliest scholars to mention, though quite marginally, in *The Law of Peoples*, the right of states to exercise immigration control. *See* JOHN RAWLS, THE LAW OF PEOPLES: WITH "THE IDEA OF PUBLIC REASON REVISITED" 9, 108 (Harvard Univ. Press 1999). Subsequently, Michael Walzer expanded on the prerogative right of states to exercise immigration control by deciding on their own immigration and admission policies. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31–61 (1983); *see also* Christopher Heath Wellman, *Immigration and Freedom of Association*, 119 ETHICS 109, 109–19 (2008); Michael Blake, *Immigration*, *in* A COMPANION TO APPLIED ETHICS 224 (R.G. Frey & Christopher Heath Wellman eds., 2005); Susan Kneebone, *Controlling Migration by Sea: The Australian Case*, *in* EXTRATERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES 347 (Bernard Ryan & Valsamis Mitsilegas eds., 2010); Nishimura Ekiu v. United States, 142 U.S. 651, 658 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *cf. Musgrove v. Chun Teong Toy* [1891] AC 272; James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983) (challenging states' recognized exclusionary principles). The argument for states to exercise immigration control is consistent with the egalitarian argument for "closed borders." *See* Arash Abizadeh, *Liberal Egalitarian Arguments for Closed Borders: Some Preliminary Critical Reflections*, 4 ÉTHIQUE ET ÉCONOMIQUE [ETHICS & ECONOMICS], no. 1, 2006, at 1, 1–8. *But see* Joseph Carens, *Aliens and Citizens: The Case for Open Borders*, 49 R. POL. 251, 263–70 (1987).

such controls, especially in cases where they result in human rights violations of migrants[114] leading to migrant deaths and migrants going missing at sea, borders, and externalised migration spaces.

IV. POLICY RESPONSES TO THE TRANSNATIONAL PROBLEM OF MISSING MIGRANTS AT THE EU LEVEL

As stated at the beginning of this Article, the UK response to the transnational problem of missing migrants and migration in a wider sense draws more broadly from the EU policy responses to the problem, despite the fact that the United Kingdom is no longer part of the EU. Thus, it is important to start with the analysis of the EU policy responses to the problem and then proceed to the United Kingdom's response, reasoning clearly and consistently from the EU policy standpoint. Generally, between 2015 and 2016, Europe was at the receiving end of what is widely believed to be the most unprecedented influx of migrants and refugees into any region since World War II, with over one million arrivals[115] and many dying and going missing in the process. Thus, the increasing number of migrant arrivals and deaths in the Mediterranean and at EU external borders represents a major European concern that has and continues to play a critical role in framing the EU's legal and policy responses to the problem of missing migrants. However, the question of what should be the appropriate legal and policy response of states to the migrant crisis has been one of "obsession of sorts, not only in Europe, but also in other parts of the so-called developed world."[116] Nonetheless, some may

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114. *See, e.g.*, Giuseppe Pascale, *Is Italy Internationally Responsible for the Gross Human Rights Violations Against Migrants in Libya?*, 56 QUESTIONS INT'L L. 35, 38–41 (2019) (discussing extensively the international legal responsibility of Italy for gross human rights violations against migrants in Libya and for its strategy of outsourcing border control to Libya to stem the tide of migration flows in the Central Mediterranean Sea); Giulia Ciliberto, *Libya's Pull-Backs of Boat Migrants: Can Italy Be Held Accountable for Violations of International Law*, 4 ITALIAN L.J. 489 (2018); Marina Mancini, *Italy's New Migration Control Policy: Stemming the Flow of Migrants from Libya Without Regard for their Human Rights: Notes and Comments*, 27 ITALIAN Y.B. INT'L L. 273 (2017).

115. *See* Jonathan Clayton & Hereward Holland, *Over One Million Sea Arrivals Reach Europe in 2015*, UNCHR (Dec. 30, 2015), https://www.unhcr.org/uk/news/latest/ 2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html [https://perma.cc/YYP6 -6FHR] (archived Jan. 24, 2021); Philippe Fargues & Sara Bonfati, *When the Best Option Is a Leaky Boat: Why Migrants Risk Their Lives Crossing the Mediterranean and What Europe Is Doing About It*, MIGRATION POL'Y CTR. EUR. U. INST. 2 (Oct. 2014), https://cadmus.eui.eu/bitstream/handle/1814/33271/MPC_PB_2014-05.pdf?sequence=1 (last visited Jan. 24, 2021) [https://perma.cc/A7HZ-AGNG] (archived Jan. 24, 2021).

116. ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW 3 (Larissa van den Herik & Jean D'Aspremont eds., Cambridge Univ. Press 2016); *cf.* Dana Schmalz, *Book Review*, 28 EUR. J. INT'L L. 649, 649–53 (2017) (reviewing MANN, *supra* note 116).

argue that the political resolve captured in the phrase "never again"[117] represents the commitment that is highly likely to be the EU's long-term legal and policy response to the problem of missing migrants and the Europe migrant crisis in a wider sense. The EU's response to growing migrant flows to Europe extends to the use of surveillance technologies to monitor and capture migrant mobilities;[118] the use of push-back operations;[119] the interception and interdiction of boat migrants at sea;[120] the border and coastal policing and role of migrant smugglers; as well as the biopolitical perspectives on such response measures in terms of their connections to migrant deaths at sea, borders, and other migration spaces.[121] To enable the EU to enforce these policy response measures through a common regional front, migration policies at the EU level have increasingly been initiated and determined within the EU's Justice and Home Affairs framework.[122]

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117. "Never Again" was a statement of commitment adopted by the international community of states as a response to serious humanitarian crises that have shocked the conscience of humanity. *See* Barbara Stark, *After/word(s): Violations of Human Dignity and Postmodern International Law*, 27 YALE J. INT'L L. 315, 322 (2002) ("'Never again!' swore world leaders after World War II."). *See generally* LANE H. MONTGOMERY, NEVER AGAIN, AGAIN, AGAIN…: GENOCIDE: ARMENIA, THE HOLOCAUST, CAMBODIA, RWANDA, BOSNIA AND HERZEGOVINA, AND DARFUR (Susan Slack ed., 2007) (illustrating how genocides and atrocities continue to occur despite promises made by the public not to allow them to do so).

118. *See* Maria Gabrielsen Jumbert, *Control or Rescue at Sea? Aims and Limits of Border Surveillance Technologies in the Mediterranean Sea*, 42 DISASTERS 674, 674–75 (2018).

119. *See* Mariagiulia Giuffré, *State Responsibility Beyond Borders: What Legal Basis for Italy's Push-backs to Libya?*, 24 INT'L J. REFUGEE L. 692, 692–93 (2013).

120. *See* Violeta Moreno-Lax, Daniel Ghezelbash & Natalie Klein, *Between Life, Security and Rights: Framing Interdiction of 'Boat Migrants' in the Central Mediterranean and Australia*, 32 LEIDEN J. INT'L L. 715, 715–16 (2019).

121. *See generally* Stephanie Grant, *Recording and Identifying European Frontier Deaths*, 13 EUR. J. MIGRATION & L. 135 (2011) [hereinafter Grant, *Recording and Identifying*]; Luiza Bialasiewicz, *Off-Shoring and Out-Sourcing the Borders of EUrope: Libya and EU Border Work in the Mediterranean*, 17 GEOPOLITICS 843 (2012); ANNA TRIANDAFYLLIDOU & THANOS MAROUKIS, MIGRANT SMUGGLING: IRREGULAR MIGRATION FROM ASIA AND AFRICA TO EUROPE (2012) (discussing the role and organisation of migrant smuggling within the phenomenon of irregular migration); Topak E. Özgün, *The Biopolitical Border in Practice: Surveillance and Death at the Greece-Turkey Boderzones*, 32 ENV'T & PLAN. D: SOC'Y & SPACE 815 (2014) (using the Greece/Turkey borderzone as a case study in evaluating borders and their politics); SIMON ROBINS, IOSIF KOVRAS & ANNA VALLIANATOU, ADDRESSING MIGRANT BODIES IN EUROPE'S SOUTHERN FRONTIER (2014).

122. *See* Ben Attia, Tara Brian, Adrian Carrasco Heiermann, Stefanie Grant, Catriona Jarvis, Iosif Kovras, Frank Laczko, Giorgia Mirto, Katerina Polychroni, Simon Robins, Ann Singleton & Amal Shaiah, *Missing Migrants: Management of Dead Bodies in Sicily, Italy Summary Report*, MEDITERRANEAN MISSING PROJECT 4 (2016), http://iosifkovras.com/wp-content/uploads/2015/08/Summary-Report-on-Missing-Migrants-in-Italy.pdf [https://perma.cc/68UJ-GMF4] (archived March 16, 2021) [hereinafter Attia et al.].

Since the adoption of the "Maastricht Treaty,"[123] the "Dublin III Regulation,"[124] the "Schengen Agreement,"[125] the "EU Sea Borders Regulation,"[126] the "European Agenda on Migration,"[127] the "EU-Turkey Joint Action Plan,"[128] and more recently the European Council Strategic Agenda 2019–24,[129] migration policy frameworks in the EU have "increasingly moved from intergovernmental decision making to EU competence."[130] Before 2015 when the migrant crisis reached historic levels, the Maastricht Treaty in particular had completely changed the way migration matters were governed in Europe following the introduction of a common asylum system. Post 2015, the EU states' response to movement of nationals of third countries to Europe has been conducted at the broadest level from either, and sometimes a combination of, two policy bases: the Common Foreign and Security Policy (CFSP) inclusive of the Common Security and Defence Policy (CSDP) and the migration policies (non-CSFP) as well as other areas of the EU external relations legal framework.[131] The CFSP matches an idea of foreign policy pursued at the intergovernmental level through the Council of the European Union and the European Council while the non-CFSP parallels migration and other goals pursued at supranational level through EU institutions.[132]

There has also been a series of other policy measures adopted by the EU prior to, and in the wake of, the growing human tragedies in the Mediterranean Sea to respond to the crisis. The first is the Global Approach to Migration and Mobility (GAMM), which defines some strategic policy priorities under which the EU engages in its external policy dialogue with third countries. It applies to facilitating human mobility and authorised migration, tackling irregular migration and trafficking in humans, promoting transnational protection, improving external asylum policy, as well as harnessing the development benefits of human migration.[133] The second is the Bilateral and Regional

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123. *See* Consolidated Texts of the EU Treaties as Amended by the Treaty of Lisbon, Jan. 2008, CM 7310.

124. Commission Regulation 604/2013, 2013 O.J. (L 180) (EC).

125. The Schengen Agreement, 1985 O.J. (L 239).

126. Commission Regulation 656/2014, 2014 O.J. (L 189).

127. *A European Agenda on Migration*, *supra* note 74, at 2.

128. Council of the EU Press Release 144/16, EU-Turkey Statement (Mar. 18, 2016) [hereinafter EU-Turkey Statement]. For legal analysis of the EU-Turkey Action and its impact on migration to the EU, see generally Roman Lehner, *The EU-Turkey Deal: Legal Challenges and Pitfalls*, 57 INT'L MIGRATION 176 (2019).

129. The European Council, A New Strategic Agenda 2019-2024 (June 2019).

130. Attia et al., *supra* note 122, at 4.

131. *See* Graham Butler, *Legal Responses to the European Union's Migration Crisis*, 19 SAN DIEGO INT'L L.J. 277, 279 (2018).

132. *See id.*

133. *See The Global Approach to Migration and Mobility*, COM (2011) 743 final (Nov. 18, 2011); *see also* General Secretariat of the Council, *Council Conclusions on the Global Approach to Migration and Mobility*, Council Document, SEC (2012) 9417 note

Frameworks for Dialogue and Cooperation (BRFDC). The BRFDC is designed to implement the GAMM through regional dialogue in order to enhance and facilitate the regular channels for movements of nationals of the southern states of the Mediterranean and the EU, as well as dialoguing with the African Union, the Sahel countries, Ethiopia, and Somalia.[134] The third is the EU Readmission Agreements (EURAs). The EURAs are the EU's cooperation agreements with third countries aimed at facilitating the return of people to their origin countries or nationals of third countries to transit countries who are no longer legally permitted to reside in an EU state.[135] The fourth is the Regional Protection Programmes (RPPs) which aims at strengthening the protection of refugees and enhancing asylum capacity of third countries.[136] And finally, there is the Exchange of Information with Third Countries Policy which is an initiative aimed at boosting information exchange with non-EU states in relation to migration governance and policy.[137]

Put together, these policy measures have been geared towards responding to the migrant crisis in four clearly identifiable ways. The first revolves around the need to save migrant lives at sea and borders, establish measures for "management, identification and repatriation of deceased migrant bodies,"[138] and respect the human dignity and

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(May 29, 2012). *See generally* Directorate-General for External Policies, *Migrants in the Mediterranean: Protecting Human Rights*, EUR. PARLIAMENT 1, 47–55 (Oct. 29, 2015), https://www.europarl.europa.eu/RegData/etudes/STUD/2015/535005/EXPO_STU(2015) 535005_EN.pdf [https://perma.cc/9V3M-QTES] (archived Mar. 16, 2021).

134. *See A Dialogue for Migration, Mobility and Security with the Southern Mediterranean Countries*, at 3, COM (2011) 292 final (May 24, 2011); *see also Managing the Refugee Crisis: State of Play of the Implementation of the Priority Actions Under the European Agenda on Migration*, at 7, COM (2015) 510 final (Oct. 14, 2015); Directorate-General for External Policies, *supra* note 133.

135. *See* Marc Lilienkamp & Susan Saliba, EU Readmission Agreements: Facilitating the Return of Irregular Migrants, Briefing, Eur. Parliamentary Res. Serv., at 1 (Apr. 2015); Directorate-General for External Policies, *supra* note 133.

136. *On Regional Protection Programmes*, COM (2005) 388 final (Jan. 9, 2005); *see* Directorate-General for External Policies, *supra* note 133.

137. *See* Commission Regulation 493/2011, 2011 O.J. (L 141) 13; Directorate-General for External Policies, *supra* note 133.

138. Villagran, *supra* note 57, at 13–14. *See generally* M'charek & Casarelli, *supra* note 57 (discussing the forensic practices and challenges of identifying bodies washed ashore from the Mediterranean's migration crisis); Robins, *Migrant Bodies*, *supra* note 57 (discussing measures for identification, collection, and repatriation of dead bodies shipwrecked trying to enter the EU); Valentina Zagaria, Grave Situations: The Biopolitics and Memory of the Tombs of Unknown Migrants in the Agrigento Province (2012) (unpublished MA Thesis, Department of Anthropology, London School of Economics and Political Science) (cited in Iosif Kovras & Simon Robins, *Missing Migrants: Deaths at Sea and Unidentified Bodies in Lesbos*, in MIGRATING BORDERS AND MOVING TIMES: TEMPORALITY AND THE CROSSING OF BORDERS IN EUROPE 157, 160–63 (Hastings Donnan, Madeleine Hurd & Carolin Leutloff-Grandits eds., 2017)); *cf.* Timothy P. Gocha, M. Katherine Spradley & Ryan Strand, *Bodies in Limbo: Issues in Identification and Repatriation of Migrant Remains in South Texas*, in SOCIOPOLITICS

rights of migrants (*humanitarianism* response). The second approach revolves around the policy of deterrence[139] and combating illegal migration and migrant smuggling[140] across international sea and EU borders in order to prevent deaths (*securitisation* response).[141] The third approach is the EU decision to establish mechanisms for transnational cooperation with third states and states of first arrival in order to stem the tide of increasing migrant flows leading to avoidable deaths (*externalisation* response).[142] And the fourth approach relates to the EU collective decision to establish a burden-sharing responsibility regime between the EU and its member states in order to tackle the rising migrant flows into Europe (*solidarity* response).

It must be recognised that these response approaches were not specifically designed with missing migrants in mind; instead, they were designed to respond to migration flows into the EU more generally. It can therefore be rightly argued that the EU's legal and policy responses to the transnational problem of missing migrants exist at the level of what Alexander Betts refers to as *"embeddedness."*[143] By embeddedness, it is meant that while these response approaches may not have been specifically designed to directly deal with the problem of missing migrants as such, EU legal and policy responses to the issue of missing migrants are nonetheless embedded in them and, as such, they also regulate, influence, and facilitate how states deal with the issue of missing migrants.[144] Because of their centrality to the EU's management of the migrant crisis and the problem of missing migrants, these response approaches are considered in more detail below.

OF MIGRANT DEATH AND REPATRIATION 143 (Alyson J. O'Daniel & Krista E. Latham eds., 2018).

139.   *See* Thomas Gammeltoft-Hansen, *The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration*, *in* 'BOAT REFUGEES' AND MIGRANTS AT SEA: A COMPREHENSIVE APPROACH 60, 60–61 (Violeta Moreno-Lax & Elfthymios Papastavridis eds., 2016).

140.   *See* Jean-Pierre Gauci & Patricia Mallia, *The Migrant Smuggling Protocol and the Need for a Multi-faceted Approach: Intersectionality and Multi-actor Cooperation*, *in* 'BOAT REFUGEES' AND MIGRANTS AT SEA: A COMPREHENSIVE APPROACH, *supra* note 139, at 117.

141.   *See* Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein & Brian Oppeskin, *Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia*, 67 INT'L & COMPAR. L.Q. 315, 315–51 (2018).

142.   *See* Andrea Terlizzi, *Border Management and Migration Controls in Italy,* (Univ. of Florence, Working Paper No. 17, 2019) (discussing these broad legal and policy responses in the context of border management and migration controls in Italy).

143.   Betts, *Policy Primer*, *supra* note 36, at 3 (referring to migration governance at the level of "embeddedness" as a situation whereby "a range of institutions exist that may not be explicitly labelled as migration institutions, but nevertheless regulate and facilitate states' responses to migration").

144.   *See id.*

A. *Humanitarianism Response*

At the EU level, humanitarian responses to the problem of migrant deaths and migrants going missing in transnational migration have been expressed and interpreted in different ways by scholars.[145] While some believe that it is purely about saving lives and providing aid and relief to those suffering human catastrophes, others believe that it extends to protection of human rights more generally, especially promotion of human wellbeing.[146] Nonetheless, whether viewed from the traditional perspective of saving lives and ending human suffering or viewed from the broader perspective of protecting human rights, humanitarianism would ultimately underlie the "fundamental belief in the value of human life and dignity and in the moral imperative to protect and relieve suffering in the wake of natural disasters or man-made crises."[147] In light of the migrant crisis and in what appears to be an allusion to the life-saving humanitarian goal of states, Stierl argues that framing migration governance in Europe as purely humanitarian requires adopting military-humanitarian measures in response to migrant deaths at the high sea if further drownings of boat migrants are to be prevented.[148] For the EU, operationalising humanitarianism has to inevitably involve its member states adopting measures to contain risky boat migration and irregular border crossings in the first place so as to prevent unnecessary loss of migrant lives at sea and borders.

According to Carling and Hernández-Carretero, the humanitarian life-saving response is operationalised in two ways: the first is preventing and dissuading migrants from embarking on life-threatening journeys in the first place; and the second is using surveillance capacity to rescue those already in distress at sea.[149] The Italian *Mare Nostrum policy* and the EU's *Triton operation* were both

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145. *See, e.g.*, BRITISH RED CROSS, INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), RED CROSS EU OFFICE, SWEDISH RED CROSS & SWISS RED CROSS, HUMANITARIAN CONSEQUENCES OF FAMILY SEPARATION AND PEOPLE GOING MISSING 6–44 (Nina Piquer & Maite Zamacona Aguirre eds., 2019) (perspectives of British & EU Red Cross organizations on the humanitarian consequences of family separation due to war and migration and how to best address these consequences).

146. *See* Paolo Cuttitta, *The Central Mediterranean Border as a Humanitarianism Space*, *in* WHEN HUMAN WELFARE MEETS THE POLITICAL AND SECURITY AGENDAS: GLOBAL PERSPECTIVES ON HUMANITARIANISM 15, 18 (Ninna Nyberg Sørensen & Sine Plambech eds., 2019).

147. Ninna Nyberg Sørensen & Sine Plambech, *Introduction* to WHEN HUMAN WELFARE MEETS THE POLITICAL AND SECURITY AGENDAS: GLOBAL PERSPECTIVES ON HUMANITARIANISM, *supra* note 146, at 5, 6.

148. *See* Maurice Stierl, *A Fleet of Mediterranean Border Humanitarians*, 50 ANTIPODE 704, 704 (2018).

149. *See* Jørgen Carling & María Hernández-Carretero, *Protecting Europe and Protecting Migrants? Strategies for Managing Unauthorised Migration from Africa*, 13 BRIT. J. POL. & INT'L RELS. 42, 45 (2011).

aimed at rescuing and saving the lives of numerous stranded migrants in the Mediterranean Sea and capture the latter understanding.[150] Beyond these two humanitarian operationalisation strategies, it is argued that the humanitarian life-saving goal of states extends to management of migrant bodies, although, Tamara Last contends that what happens to migrant bodies in Europe is very much in the dark as it has never been included in any EU migration policy agenda.[151] The imperatives of the management of dead bodies, whether in war or migration contexts, are deeply rooted in international humanitarian law as expressed in the four Geneva Conventions (GCs) of 1949.[152] The GCs obligate states to prevent people from going missing,[153] search for those missing in war, recover their bodies if confirmed dead, and reach out to their families.[154]

The humanitarian response of the EU and EU states to dead body management through their policies and laws is no trivial matter to consider because experts generally agree that migrant mortalities arising from unsafe, disorderly, and irregular migration across seas and border zones are inevitable outcomes of migration. In the current literature on management of migrant bodies, M'charek and Black canvass the point that when migrants are reported dead in migration and their bodies are found, the dead bodies have to be engaged with as

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150. Paolo Cuttitta, *Delocalisation, Humanitarianism, and Human Rights: The Mediterranean Border Between Exclusion and Inclusion*, 50 ANTIPODE 783 (2017) (discussing extensively the life-saving and humanitarian goal of the Italian government's Mare Nostrum policy from the perspective of delocalized inclusive humanitarianism).

151. *See* Tamara Last, *Who is the 'Boat Migrant'? Challenging the Anonymity of Death by Border-Sea*, *in* 'BOAT REFUGEES' AND MIGRANTS AT SEA: A COMPREHENSIVE APPROACH, *supra* note 139, at 79, 79–80.

152. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), *adopted* Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950) [hereinafter GC I]; Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), *adopted* Aug. 12, 1949, 75 UNTS 85 (entered into force Oct. 21, 1950) [hereinafter GC II]; Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), *adopted* Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950) [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), *adopted* Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force 21 October 1950) [hereinafter GC IV].

153. *See* GC I, *supra* note 152, arts. 16–17; GC II, *supra* note 152, arts. 19–20; GC III, *supra* note 152, arts. 122–24; GC IV, *supra* note 152, arts. 136–41; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 32–33, *adopted* June 8, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter AP I].

154. See GC I, *supra* note 152, arts. 15–17; GC II, *supra* note 152, arts. 18–20; GC III, *supra* note 152, arts 120–21; GC IV, *supra* note 152, art. 16; AP I, *supra* note 153, arts. 33–34; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 8, *adopted* June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter AP II].

a matter of care, dignity, and respect.[155] This is in order to produce proximity with the dead and establish ways of counting and accounting for deaths during migration.[156] The belief that death is inevitable when migrants are allowed to make the transnational journeys across the seas has often prompted EU states and politicians to argue that part of the humanitarian obligation of states in response to the migrant crisis is to first and foremost secure the border and stop the boats in order to prevent further loss of lives.[157]

It is apparently unclear what is the exact nature of the perceived relationship between humanitarianism and border control policies for purposes of responding to human disappearances through migration. It is also unclear whether the effect of this relationship prevents the realisation of the humanitarian objective of saving lives. Literature has only explored the relationship between humanitarianism, security, and human rights on the broadest level. For example, Little and Vaughan-Williams contend that the humanitarian imperatives of saving lives at sea whilst at the same time controlling and policing state borders represent an overlapping point where humanitarianism and securitisation response approaches often get entangled.[158] Franko and Gundhus[159] and Nina Perkowski[160] admit that there is now a growing convergence of doctrines of humanitarianism, security, and human rights in the European border governance, although these scholars are not very explicit as to whether this convergence could have any adverse effect on the realisation of the life-saving goal of humanitarianism. Regardless of whether or not the so-called entanglement and/or convergence enhances or stymies the realisation of the humanitarian goal of saving migrant lives, it is still nonetheless hard to accept that the current humanitarian legal regime in the world allows for unhindered humanitarian assistance to migrants facing threats to their lives without being caught up in the inherent risk of breaching existing national criminal laws prohibiting migrant smuggling and sheltering of irregular migrants.[161] Scholars are more

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155. *See* Amade M'charek & Julia Black, *Engaging Bodies as a Matter of Care: Counting and Accounting for Death During Migration*, *in* BORDER DEATHS: CAUSES, DYNAMICS AND CONSEQUENCES OF MIGRATION-RELATED MORTALITY, *supra* note 61, at 85.

156. *See id.*

157. *See* Adrian Little & Nick Vaughan-Williams, *Stopping Boats, Saving Lives, Securing Subjects: Humanitarian Borders in Europe and Australia*, 23 EUR. J. INT'L RELS. 533, 533 (2017).

158. *See id.*

159. *See* Katja Franko Aas & Helene O.I. Gundhus, *Policing Humanitarian Borderlands: Frontex, Human Rights and the Precariousness of Life*, 54 BRIT. J. CRIMINOLOGY, no. 6, 2014, at 1, 1.

160. *See* Nina Perkowski, *Frontex and the Convergence of Humanitarianism, Human Rights and Security*, 49 SEC. DIALOGUE 457, 457 (2018).

161. *See* Shalini Bhargava Ray, *Saving Lives*, 58 B.C. L. REV. 1225, 1226 (2017).

likely to agree that the humanitarian responses of states to missing migrants are expressed in various ways and forms that include, but are not limited to, legitimisation of state interventions at sea, border controls (border humanitarianism), as well as adoption of surveillance technologies (securitisation) and other operational responses[162] to migrant flows.

B. *Securitisation Response*

How does securitisation as a response measure prevent loss of lives or migrants going missing in transnational migration, some may ask? For states, the answer should be simple: secure the sea and borders by deploying security apparatuses of states and those of regional authorities, like the EU, to police and regulate the unauthorised journeys of migrants often ending in tragic deaths at the high sea and other spaces of migration. Although, Ghezelbash *et al* criticises the EU's securitised response to people facing perils at sea for compromising the humanitarian objective of search and rescue in the name of maintaining border security,[163] for the EU and other states, the basic premise of securitisation remains that securitising migration routes will dissuade and deter migrants from even attempting or making the deadly life-taking journeys in the first place. So, securitisation could be understood or conceived of as a preventive response measure. However, as highlighted above, the framing of human events through the lens of securitisation is increasingly becoming more pervasive in society than ever before,[164] and the deployment of securitisation techniques to govern "precarious lives" such as migrants is not left out.[165] As argued by Bigo, "[m]igration is increasingly interpreted as a security problem"[166] in which the irregular migrants are viewed as an "element of insecurity".[167]

The securitisation theory first appeared in the literature of the Copenhagen School of Critical Security Studies in the mid-1990s. This School viewed securitisation as a form of "speech act" or linguistic

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162. In support, see Polly Pallister-Wilkins, *The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evros*, 9 INT'L POL. SOCIO. 53, 54 (2015).

163. *See* Ghezelbash, Moreno-Lax, Klein & Oppeskin, *supra* note 141, at 315.

164. *See generally* ZYGMUNT BAUMAN, LIQUID FEAR (2006).

165. Luca Mavelli, *Governing Populations Through the Humanitarian Government of Refugees: Biopolitical Care and Racism in the European Refugee Crisis*, 43 REV. INT'L STUD. 809, 809 (2017).

166. Didier Bigo, *Security and Immigration: Toward a Critique of the Governmentality of Unease*, 27 ALTERNATIVES 63, 63 (2002).

167. Susana Ferreira, *From Narratives to Perceptions in the Securitisation of the Migratory Crisis in Europe*, *in* CRITICAL PERSPECTIVES ON MIGRATION IN THE TWENTY-FIRST CENTURY 57, 59 (Marianna Karakoulaki, Laura Southgate & Jakob Steiner eds., 2018).

representation that designated some particular issues "such as irregular migration" as existential security threats.[168] Viewed from this perspective, securitisation in relation to migration becomes a response approach that is informed by some underlying factors. The first is the expression of fear/anxiety amongst national citizens that their national governments are unable to control irregular migration flows and, therefore, states attempt to allay such fears by taking firm actions in the face of adversity and threats to security of their citizens.[169] Second, the fact that irregular/unauthorised migrants carry no identity documents throughout their journeys is always a point of reference when framing insecurity to citizens.[170] Third, at the supranational level, institutional decision-making, especially within the EU, is often dominated by increased debates on security matters whereby security is presented as the most viable and common consensus agenda of EU member states.[171] For Waever, this has turned the EU into a security actor[172] in matters of migration, and this is reflected in the European Council Strategic Agenda 2019-2024 seeking to protect EU citizens against security threats posed by illegal migration.[173]

According to Kochenov and Amtenbrink, the prioritisation of security objectives by the EU and its institutions has significantly changed the migration governance approaches of its neighbours in ways that enable enactment of stricter policies.[174] On the institutional level, law enforcement agencies of states deploy their security apparatuses or surveillance tools to police human mobility to such extent that, as Foucault argued, security becomes biopoliticised.[175] Thus, in securitisation terms, it can be argued that despite the seeming consensus among states about the legal and moral imperatives of preventing loss of lives at sea by securing and securitising the sea and borders, when it comes to migration, and specifically when the word

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168. Ole Wæver, *Securitization and Desecuritization*, *in* ON SECURITY 46, 52 (Ronnie D. Lipschutz ed., 1995). *See generally* BARRY BUZAN, JAAP DE WILDE & OLE WÆVER, SECURITY: A NEW FRAMEWORK FOR ANALYSIS (1998).

169. *See* Carling & Hernández-Carretero, *supra* note 149, at 44.

170. *Id.*

171. *See* Meng-Hsuan Chou, *EU and the Migration-Development Nexus: What Prospects for EU-Wide Policies?* 15–17 (Univ. of Oxford Ctr. on Migration, Pol'y & Soc'y, Working Paper No. 37, 2006).

172. Ole Wæver, *The EU as a Security Actor: Reflections from a Pessimistic Constructivist on Post-Sovereign Security Orders*, *in* INTERNATIONAL RELATIONS THEORY AND THE POLITICS OF EUROPEAN INTEGRATION: POWER, SECURITY AND COMMUNITY 250 (Morten Kelstrub & Michael C. Williams eds., 2000).

173. *See* A New Strategic Agenda 2019-2024, *supra* note 129.

174. *See* THE EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER 280 (Dimitry Kochenov & Fabian Amtenbrink eds., 2014).

175. *See generally* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977-1978 (Michel Senellart ed., Graham Burchell trans., Palgrave Macmillan 2009).

"migrant" or "refugee" is mentioned, the humanitarian imperative to save lives provokes not so much moral sympathy as it does fear, suspicion, and antipathy. Thus, states, in an attempt to allay such fears, seek to securitise migration, often in the form of driving migrants back to clandestine routes that increase the risk of loss of lives instead of saving lives. It is submitted that, in the same vein, migrant bodies are also often implicitly framed by the EU and EU states as a threat to the moral security and conscience of Europe—the impression that it is a dent on the image and identity of a democratically professed Europe[176]—and thus, it requires an urgent response from states to change the narrative.

The tensions, fear, and suspicion that irregular migration often ignites in the collective psyche of national citizens and societies increases the tendency of states to label such journeys as a security risk. Given the tendency of state authorities to label migrant journeys as a security threat, Bigo's notion of "governmentality of unease"[177] and Huysmans's notion of "politics of insecurity"[178] both warn us not to leave uncritical the *process* through which events as migration are framed as a security threat directly or indirectly.[179] This is because the "popularity of this security prism is not an expression of traditional responses to a rise of insecurity, crime, terrorism, and the negative effects of globalisation; it is the result of the creation of a continuum of threats and general unease in which many different actors exchange their fears and beliefs in the process of making a risky and dangerous society."[180] It is contended that the governmental problematisation and exceptionalisation of migration by the EU and EU states as a security issue that is serious and alarming, followed by adoption of securitised techniques to control and police migrants during their perilous journeys, is more likely to lead to migrant deaths and

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176. Compare Bangladesh Prime Minister Sheikh Hasina saying that illegal migrants taint the national image. *Bangladesh PM Says Illegal Migrants Taint National Image*, BBC NEWS (May 14, 2015), https://www.bbc.co.uk/news/world-asia-32867221 [https://perma.cc/84WK-5NPQ] (archived Jan. 15, 2021).

177. *See* Bigo, *supra* note 166, at 63; Didier Bigo, *Globalised-In-Security: The Field and the Ban-Opticon*, *in* TRANSLATION, BIOPOLITICS, COLONIAL DIFFERENCE 109 (Naoki Sakai & Jon Solomon eds., 2006); Didier Bigo, *Globalised (In)security: The Field and the Ban-Opticon*, *in* TERROR, INSECURITY AND LIBERTY: ILLIBERAL PRACTICES OF LIBERAL REGIMES AFTER 9/11 10 (Didier Bigo & Anastassia Tsoukala eds., 2008).

178. JEF HUYSMANS, THE POLITICS OF INSECURITY: FEAR, MIGRATION AND ASYLUM IN THE EU 1–2 (2006) (ebook).

179. *See* Jef Huysmans, *The European Union and the Securitization of Migration*, 38 J. COMMON MKT STUD. 751 (2000).

180. Didier Bigo, *Security and Immigration: Toward a Critique of the Governmentality of Unease*, 27 ALTS.: GLOB., LOC., POL. 63, 63 (2002); *cf.* Ilse Van Liempt & Stephanie Sersli, *State Responses and Migrant Experiences with Human Smuggling: A Reality Check*, 45 ANTIPODE 1029, 1029 (2013).

migrants going missing at securitised sea and border spaces than saving lives.[181]

The designation of boat migrants as figures of fear, and their framing as security threats, often comes at an enormous human cost and may further widen the patterns or structures of exclusion of migrants from legal protection and/or access to legal migration routes. The framing of the migrant as a security threat has contributed to and is highly likely to continue to contribute to the steady rise in the number of border-related deaths. Closely related to the states' securitisation response to migration is the practice of institutionalised externalisation. Per this practice, the EU and EU destination states attempt to set up structures abroad to assist states located in the spaces of origin and transit to control migration and prevent migrants from undertaking risky and life-taking transborder journeys in the first place.

C. *Externalisation Response*

Externalisation response is a preemptive or presumptive control of migration[182] whereby states adopt a range of measures and practices from extension of border controls abroad to other broader measures that are targeted at tackling the drivers of migration.[183] Although externalisation has been a policy of the EU and EU states for decades now,[184] it turned into a matter of serious debate in the wake of the migrant crisis marked by increased migrant drownings and deaths at sea and the borders of the EU. It implies a situation whereby states and regional supranational bodies like the EU and its member states seek to strike deals with third states (deemed safe third states), mostly origin, transit, and states of first arrival, to act as border guards in order to control flow of migrants into their territories.[185] Through such

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181. *Cf.* Helen Hintjens, *Failed Securitization Moves During the 2015 'Migration Crisis,'* 57 INT'L MIGRATION 181 (2019).

182. Martin Lemberg-Pedersen, *Losing the Right to Have Rights: EU Externalization of Border Control*, *in* EUROPE AND THE AMERICAS: TRANSATLANTIC APPROACHES TO HUMAN RIGHTS 393, 398 (Erik André Andersen & Eva Maria Lassen eds., 2015).

183. Inka Stock, Ayşen Üstübici & Susanne U. Schultz, *Externalization at Work: Responses to Migration Policies from the Global South*, 7 COMPAR. MIGRATION STUD. 1, 1 (2019).

184. Synnøve K.N. Bendixsen, *The Refugee Crisis: Destabilizing and Restabilizing European Borders*, 27 HIST. & ANTHROPOLOGY 536 (2016).

185. *See* Ayşen Ustübici, *The Impact of Externalized Migration Governance on Turkey: Technocratic Migration Governance and the Production of Differentiated Legal Status*, 7 COMP. MIGRATION STUD. 1, 1 (2019); *see also* Sarah Katz, *A More Acceptable Solution: The Proposed European Union Agency of Asylum and Refugees* 49 CASE W. RES. J. INT'L L. 303, 310 (2017); Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. MIGRATION & HUM. SEC. 190, 193–94 (2016).

externalisation practices, states attempt to buy the executive and legislative policy-making competences of third states in order to prevent or intercept migrants from arriving at destination states, all in the belief that such measures have the capacity to reduce migrant deaths and going missing through migration. Nora Markard for example, believes that the externalised practice of coastal states acting in the interest of EU destination states to prevent migrant departures by sea serves at least two key purposes: first, to restrict border crossing that stops unauthorised migrants from entering the EU; and second, to prevent smuggling through the sea in order to "protect the life and health of migrants generally."[186]

While some scholars have argued that externalisation policies are a justifiable measure to prevent migrant deaths and migrants going missing at sea and borders, others contend that such actions are a direct result of ineffectiveness and politicisation of national migration policies.[187] It is argued that although interpreting externalisation as a measure to prevent migrant deaths may have a legal basis under any law obligating states to protect lives, such measures could not be used to justify interception of migrants who are genuinely fleeing conflict, violence, and persecution in their states of origin as it could violate the nonrefoulement obligation of states under international refugee law. Although framing migrant drownings and deaths at sea and borders of states as a violation of international law has never been a straightforward task,[188] it is also true that the failure to frame it as such, at least within the meaning of the right to life, will not assist in bridging the current accountability gap in the international legal frameworks relating to the issue of missing migrants. In the circumstances, it is suggested that a delicate balance needs to be struck between the so-called humanitarian obligation of saving lives at sea through the measure of externalisation and the obligation of states to respect, protect, and fulfil the rights of migrants to leave territories threatening their lives and to seek protection in other territories. It could be claimed that striking this balance requires solidarity, partnership, and greater cooperation between states at both the national and international levels of policy making and implementation, more so, as some migration scholars have argued, that response to migration flows through externalisation facilitates solidarity between EU member states.[189]

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186. Nora Markard, *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, 27 EUR. J. INT'L L. 591, 602 (2016).

187. *See, e.g.*, Frelick, Kysel & Podkul, *supra* note 185, at 193–94.

188. Itamar Mann, *The Right to Perform Rescue at Sea: Jurisprudence and Drowning*, 21 GERMAN L.J. 598, abstract (2020) [hereinafter Mann, *Right to Perform*].

189. Martin Lemberg-Pedersen, *Solidarity (In)action?*, 14 TIDSSKRIFTET POLITIK [MAGAZINE POL.] 27, 28 (2011).

D. *Solidarity Response*

It can be argued that the transnational problem of missing migrants is a crisis of solidarity.[190] For Brändle *et al*, the refugee crisis was not only a litmus test for EU solidarity but also a reflection of the solidarity gap between member state actors due to the seeming exclusive application and interpretations of the notion of solidarity among its member states.[191] This would of course be a major source of concern for states, given that implementation of these response approaches is governed by the understanding that all states must join hands together to solve the problem at hand; therefore, implementing the core principle of solidarity encapsulated in "EU founding documents"[192] is a pathway forward in this regard. Literature recognises that in many EU states, the migrant crisis is widely framed as a European problem and not one of any particular state and, therefore, should be dealt with through solidarity of EU member states,[193] even though policies on irregular migration differ widely across EU member states[194] and state responses to missing migrants have been largely determined by national law and practice.[195] Nonetheless, solidarity response remains a consensus understanding amongst states that suggests that it is required to deal with increasing cases of people going missing in migration.

For example, the New York Declaration for Refugees and Migrants, adopted by the UN in 2016, captures this consensus of states when stating "we acknowledge a shared responsibility to manage large

190. *See* Ban Ki-moon, *Refugees and Migrants: A Crisis of Solidarity*, UNITED NATIONS UNIV. (Dec. 8, 2020), https://unu.edu/publications/articles/refugees-and-migrants-a-crisis-of-solidarity.html#info [https://perma.cc/K3YJ-VKB5] (archived Jan. 19, 2021) (arguing that the migrant crisis is not a crisis of numbers but a crisis of solidarity); *cf.* Marianne Takle, *Is the Migration Crisis a Solidarity Crisis?*, *in* THE CRISIS OF THE EUROPEAN UNION 116, 116–29 (Andreas Grimmel ed., 2018) (asking a similar question if the Europe migrant crisis could in fact be a crisis of solidarity).

191. Verena K. Brändle, Olga Eisele & Hans-Jörg Trenz, *Contesting European Solidarity During the 'Refugee Crisis': A Comparative Investigation of Media Claims Making in Denmark, Germany, Greece and Italy*, 22 MASS COMM. & SOC'Y. 708 (2019); *cf.* ÓSCAR GARCÍA AGUSTÍN & MARTIN BAK JØRGENSEN, SOLIDARITY AND THE REFUGEE CRISIS IN EUROPE 1–21 (2019).

192. See, for example, Treaty on the Functioning of the European Union art. 80, 2007 O.J. (C 202) 78 (TFEU, otherwise known as the Lisbon Treaty), which provides that migration policies shall be "governed by the principle of solidarity and fair sharing of responsibility." *See also id.* art. 67, 2007 O.J. (C 202) 73.

193. Francesco Pasetti & Blanca Garcés-Mascareñas, *Who is Responsible, for What and to Whom? Patterns of Politicisation on Refugees and the European Solidarity Crisis* 12 (Ceaseval, Working Paper No. 16, 2018).

194. ANNA TRIANDAFYLLIDOU, UNDOCUMENTED MIGRATION: COUNTING THE UNCOUNTABLE. DATA AND TRENDS ACROSS EUROPE 18 (2009), https://cordis.europa.eu/docs/results/44/44103/126625701-6_en.pdf [https://perma.cc/CHR5-E8JR] (archived Jan. 21, 2021).

195. GRANT, *supra* note 57, at 4.

movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner."[196] That is to say, "protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times."[197] However, with the framing of the migrant crisis as a crisis of solidarity in current literature,[198] it can be argued that the missing migrants' problem remains a matter for serious debate at the national and EU level. This is particularly with regard to whether the principle of solidarity would ever work when it comes to investigation of migrant deaths, search and rescue of seaborne migrants, and identification and repatriation of migrant bodies to their families.

E. *On the Effectiveness of the EU Response Measures and Policies*

The lack of a specific and direct EU response to the issue of missing migrants means that "what happens to the bodies of dead migrants in the Mediterranean is very much in the dark; [as] it has . . . never been on any national or EU institution's agenda."[199] As can be observed from the foregoing analysis of the four response measures, the closest the policies came to addressing the problem of missing migrants was the declaration made by EU states in the European Agenda on Migration pledging to rescue and save lives at sea[200]—a step that may be perceived as crucial to enforcing migrants' human dignity, in particular their right to life and security. That step towards effective implementation of the policy succeeded in rescuing and saving hundreds of lives in the Mediterranean Sea before the EU turned its back to further implementation.

The next most effective EU policy after the European Agenda is the "EU Triton"[201] rescue mission, which was initiated as part of the

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196. *See generally* G.A. Res. 71/1, New York Declaration for Refugees and Migrants, pmbl. ¶ 11 (Sept. 19, 2016). .

197. *See id.* pmbl. ¶ 41.

198. *See* Jean-Pierre Gauci & Eleni Karageorgiou, *Solidarity "A La Carte": The EU's Response to Boat Migration*, OPINIO JURIS (Aug. 9, 2019), http://opiniojuris.org/2019/08/09/solidarity-a-la-carte-the-eus-response-to-boat-migratio n/ [https://perma.cc/7X5D-LHDC] (archived Jan. 21, 2021).

199. Last, *supra* note 139, at 79–80.

200. *See A European Agenda on Migration*, *supra* note 74, at 2.

201. In November 2014, the Triton rescue program (heavily criticised by experts and international organisations for its ineffectiveness) was launched by the EU to be implemented by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex). *See Amnesty International's "Blueprint for Action" to End Refugee and Migrant Deaths in the Med*, AMNESTY INT'L (Apr. 22, 2015), https://www.amnesty.org/en/latest/news/2015/ 04/amnesty-international-s-blueprint-for-action-to-end-refugee-and-migrant-deaths-in- the-med/ [https://perma.cc/W9UF-P9S2] (archived Jan. 21, 2021); *cf. A Safer Sea: The Impact of the Increased Search and Rescue Operations in the Central Mediterranean*,

non-CFSP policy. The Triton policy implemented through "Frontex"[202] is more of a preventive effort to reduce migrant deaths at sea, police the Mediterranean coast, and clamp down on the activities of people smugglers. At the member-state level, Italy way back in October 2013, in the aftermath of the boat mishap that greeted its island of Lampedusa, launched the "Operation Mare Nostrum (OMN)"[203] rescue mission. The programme was aimed at search and rescue of migrants trapped in the Mediterranean Sea, and it was widely regarded as a huge success. The operation alone had rescued well over one hundred thousand migrants stranded in the high sea[204] (with many other sources putting the figures at around one hundred fifty thousand)[205] while also assisting in the arrest of 330 people smugglers in 421 operations just within the first year of the program's implementation by the Italian government. The *Mare Nostrum* program also rendered crucial legal and humanitarian assistance to people in serious need. The problem, however, was that the Italian government, in agreement with the EU,[206] was forced to end the program in October 2014 as it was costing the European country over €9 million per month.[207] This situation was worsened by a lack of coordinated support to Italy from

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AMNESTY INT'L (July 9, 2015), https://www.amnesty.org/en/documents/eur03/2059/ 2015/en/ [https://perma.cc/R3X9-6479] (archived Jan. 21, 2021).

202. The European Border and Coast Guard Agency (Frontex) was established by Regulation (EU) 2016/1624 of 14 September 2016 on the European Border and Coast Guard. *See* Commission Regulation 2016/1624, 2016 O.J. (L 251) 1; *see also* Commission Regulation 2016/1624 on the European Border and Coast Guard and Amending Regulation (EU) 2016/399 of the European Parliament and of the Council and Repealing Regulation (EC) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC, 2016 O.J. (L 251) 1.

203. Experts estimate that the Mare Nostrum program led to the rescue of well over 100,000 migrants stranded in the high sea. *See* Carlo Motta, *Italy's Rescue Operation Mare Nostrum Shuts Down with No Real Replacement: EU's Triton Instead Might Put Lives at Risk*, EUR. STING POL. NEWSPAPER (Nov. 4, 2014), https://europeansting.com/2014/11/04/italys-rescue-operation-mare-nostrum-shuts-dow n-with-no-real-replacement-eus-triton-instead-might-put-lives-at-risk/ [https://perma.c c/R8AT-6KAV]. Some other sources put the number of those rescued through the Mare Nostrum at around 150,000 whilst also assisting in the arrest of 330 people smugglers in 421 operations. *See, e.g.*, Jim Yardley, *Migration Crisis Puts Europe's Policy Missteps into Focus, Experts Say*, N.Y. TIMES (Apr. 24, 2015), https://www.nytimes.com/2015/04/ 25/world/europe/europes-migration-crisis-cannot-be-solved-at-sea-analysts-say.html [ht tps://perma.cc/TKH4-JM85] (archived Jan. 21, 2021). The problem, however, was that the Italian government was forced to end the program in October 2014, as it was costing the recession-hit country over 9 million euros per month. *See Europe's Sinking Shame: The Failure to Save Refugees and Migrants at Sea*, AMNESTY INT'L (Apr. 22, 2015), https://www.amnesty.org/en/documents/eur03/1434/2015/en/ [https://perma.cc/6DKY-TFPA] (archived Jan. 21, 2021).

204. Motta, *supra* note 203.

205. *See, e.g.*, Yardley, *supra* note 203.

206. *Europe's Sinking Shame: The Failure to Save Refugees and Migrants at Sea, supra* note 203.

207. Yardley, *supra* note 203.

other European states. So, other than the positive effects of the European Agenda on Migration and Triton rescue policy and Italy's Operation *Mare Nostrum*, the policies have generally not been effective when it comes to addressing cases of migrant deaths and migrants going missing in transnational migration.

There are numerous factors that may account for this ineffectiveness. First, while there may be acceptable legal and political rationales for the EU in adopting the various policy measures, the practical approaches to enforcement of the policies appear to shift focus away from the intended public goals described earlier against which the transnational effectiveness of the policies can be measured. For example, the role played by diverse surveillance technologies,[208] push-back operations,[209] and border policing (including clamp down on activities of migrant smugglers in the Mediterranean) may have all contributed to migrant deaths[210] at sea and borders rather than saving lives. Second, there is no regional or global decision-making process that is so consistently certain, predictable, and effective as to command the same level of authority and compliance as would a national policy governance system where there is a sovereign, authoritative decision maker capable of enforcing compliance. As a result, at the EU and global level "the 'ownership' of public problems is often characterized by a policy vacuum."[211] As there is no such thing as a regional or global state, implementation of transnational policies is often predicated on the implicit, sometimes misleading, assumption that states will comply, cooperate, recognise, or act in a manner not inconsistent with the objectives and aspirations pursued through such policies. Third is the issue of lack of political will on the part of EU states[212] and the EU

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208. *See generally* Maria Gabrielsen Jumbert, *Control or Rescue at Sea? Aims and Limits of Border Surveillance Technologies in the Mediterranean Sea*, 42 DISASTERS 674 (2018).

209. *See generally* Giuffré, *supra* note 119.

210. Grant, *Recording and Identifying*, *supra* note 121, at 135–56; Bialasiewicz, *supra* note 121, at 843–66; Thomas Spijkerboer, *Moving Migrants, States and Rights: Human Rights and Border Deaths*, 7 L. & ETHICS HUM. RTS. 213 (2013); Özgün E. Topak, *The Biopolitical Border in Practice: Surveillance and Death at the Greece-Turkey Borderzones*, 32 ENV'T & PLAN. D: SOC'Y & SPACE 815 (2014); ROBINS, KOVRAS & VALLIANATOU, *supra* note 121, at 2–16; Iosif Kovras & Simon Robins, *Missing Migrants: Deaths at Sea and Unidentified Bodies in Lesbos*, *in* MIGRATING BORDERS AND MOVING TIMES: TEMPORALITY AND THE CROSSING OF BORDERS IN EUROPE 157, 160–63 (Hastings Donnan, Madeleine Hurd & Carolin Leutloff-Grandits eds., 2017). *See generally* TRIANDAFYLLIDOU & MAROUKIS, *supra* note 121.

211. Diane Stone, Global Public Policy, Transnational Policy Communities, and Their Networks 13 (2008) (unpublished manuscript) (on file with the University of Warwick Institutional Repository).

212. *See* Jeremy Sarkin, *Respecting and Protecting the Lives of Migrants and Refugees: The Need for a Human Rights Approach to Save Lives and Find Missing Persons*, 22 INT'L J. HUM. RTS. 207, 220, 222 (2018); *see also* Mann, *Right to Perform*, *supra* note 188, at 599 (arguing that European states have not shown the political willingness to put an end to preventable irregular migrant deaths at sea; instead,

as a body to implement the existing policies in such a way that would be relevant to addressing the problem of missing migrants.

And the fourth relates to the unresolved debates about the negative impacts that state migration policies are having on migrant journeys, and what legal and political steps states should take to deal with the problem transnationally. One view is that the high human cost of migration is a direct result of deterrent border control and externalisation policies of some states.[213] It is also claimed that migrant deaths have significantly increased following migrants' clandestine movements along the more treacherous routes as a reaction to tighter border controls.[214] The stringent border controls mean that migrants are constrained to "patronise the services of people smugglers"[215] who they believe will help them facilitate their

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punishes the decision of private actors like NGOs and the civil society to prevent deaths through rescue of migrants at sea).

213. For works that extensively discussed the human cost of migration, border control as well as deterrence, securitisation, and non-assistance policies of states, *see* MARIA JIMENEZ, HUMANITARIAN CRISIS: MIGRANT DEATHS AT THE U.S.-MEXICO BORDER 21–23 (2009); *see also The Human Cost of Fortress Europe: Human Rights Violations Against Migrants and Refugees at Europe's Borders*, AMNESTY INT'L 5, 20–29 (2014), https://reliefweb.int/sites/reliefweb.int/files/resources/EUR%20050012014_%20Fortress %20Europe_complete_web.pdf [https://perma.cc/5FFT-69CN] (archived Jan. 21, 2021); JASON DE LEÓN, LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL 23– 37 (Robert Borofsky & Naomi Schneider eds., 2015); Peter Shields, *The Human Cost of European Union's External Border Regime*, 27 PEACE REV.: J. SOC. JUST. 82, 82–90 (2015); Didier Bigo, *The (in)Securitization Practices of the Three Universes of EU Border Control: Military / Navy—Border Guards / Police—Database Analysts*, 45 SEC. DIALOGUE 211–12 (2014); Charles Heller & Lorenzo Pezzani, *Liquid Traces: Investigating the Deaths of Migrants at the EU's Maritime Frontier*, *in* THE BORDERS OF EUROPE: AUTONOMY OF MIGRATION, TACTICS OF BORDERING 657 (Nicholas De Genova ed., Duke Univ. Press 2017); Charles Heller & Lorenzo Pezzani, *Ebbing and Flowing: The EU's Shifting Practices of (Non-)Assistance and Bordering in a Time of Crisis,* ZONE BOOKS NEAR FUTURES ONLINE 1, 1–13 (2016), http://nearfuturesonline.org/wp-content/uploads/ 2016/03/Heller_Pezzani_Ebbing_2016.pdf [https://perma.cc/3UWW-KJCH] (archived Jan. 21, 2021); Sophie Hinger, *Transformative Trajectories—The Shifting Mediterranean Border Regime and the Challenges of Critical Knowledge Production*, 4 MOVEMENTS 193 (2018). *See generally* G.A. Res. 71/198 (Aug. 15, 2017). In addition, United Against Refugee Deaths, a European network against nationalism, racism, fascism and in support of migrant and refugees have documented and attributed deaths of about 36,570 migrants and refugees between 1993 and April 2019 to the restrictive policies of Fortress Europe. *See Death by Policy: Time for Change!*, UNITED FOR INTERCULTURAL ACTION (July 2019), http://www.unitedagainstracism.org/wp-content/uploads/2019/07/Listof DeathsActual.pdf [https://perma.cc/R2UG-AUVU] (archived Jan. 21, 2021).

214. Thomas Spijkerboer, *The Human Cost of Border Control*, 9 EUR. J. MIGRATION & L. 127, 127–39 (2007) [hereinafter Spijkerboer, *Human Cost of Border Control*]; *see also* Spijkerboer, *Are European States Responsible for Border Deaths?*, *supra* note 104, at 63–66; Robyn Sampson, *Does Detention Deter? Reframing Immigration Detention in Response to Irregular Migration*, INT'L DETENTION COALITION, Apr. 2015, at 1, 4.

215. *See* Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policy*, 27 POPULATION & DEV. REV. 661 (2001); Wayne A. Cornelius, *Controlling 'Unwanted' Immigration: Lessons from the United States, 1993-2004*, 31 J. ETHNIC & MIGRATION STUD. 775 (2005); Derek Lutterbeck,

perfidious journeys and circumvent stringent border entry conditions—a development which not only increases existing death risks but also creates new ones.[216] A different perception, however, contends that strict migration policies actually prevent migrants from going missing or risking death by deterring, dissuading, or discouraging migrants from embarking on risky and life-taking journeys in the first place.[217] Adherents of this perspective suggest that migration policies such as the *EU's Operation Triton,* which focuses on the search and rescue of migrants trapped at sea, operates as a "magnet"[218] and "bridge to Europe"[219] which tend to motivate more migrants to jump on unseaworthy boats leading to huge loss of lives. Thus, bringing the risks involved in deadly journeys to the knowledge and awareness of the migrants is believed to be a realistic way of curbing irregular migration and preventing unnecessary loss of lives.

Perspectives are also increasingly divergent as to what steps states should take or what measures should be adopted to prevent migrant deaths and migrants from going missing. One view is that the problem should be addressed from a "human rights perspective" with the utmost concern being protection and respect for the migrants' rights to life and human dignity as encapsulated in international human rights law.[220] This perspective supports the idea of rescue operations in the Mediterranean Sea and other migratory routes around the world where migrants may be trapped. Proponents of this view also argue that opening up more legal channels would drastically

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Policing Migration in the Mediterranean, 11 MEDITERRANEAN POL. 59 (2006); Spijkerboer, *Human Cost of Border Control*, *supra* note 214, at 127–39; Mathias Czaika & Hein De Haas, *The Effectiveness of Immigration Policies*, 39 POPULATION & DEV. REV. 487, 503 (2013).

216. *See* Maarten Den Heijer, Jorrit Rijpma & Thomas Spijkerboer, *Coercion, Prohibition, and Great Expectations: The Continuing Failure of the Common European Asylum System*, 53 COMMON MKT. L. REV. 607, 616–17 (2016).

217. *See, e.g.*, Saskia Bonjour, *The Power and Morals of Policy Makers: Reassessing the Control Gap Debate*, 45 INT'L MIGRATION REV. 89 (2011); Jørgen Carling, *Migration in the Age of Involuntary Immobility: Theoretical Reflections and Cape Verdean Experiences*, 28 J. ETHNIC & MIGRATION STUD. 5 (2002).

218. *See* Nicholas Farrell, *Italy is Killing Refugees with Kindness: The Mare Nostrum Policy Has Acted as a Magnet for Boat People; The Crisis Is Only Growing*, SPECTATOR (Sept. 6, 2014), https://www.spectator.co.uk/2014/09/italys-decriminalising-of-illegal-immigration-has-acted-as-a-green-light-to-boat-people/ [https://perma.cc/NL 3Q-PTS3] (archived Jan. 15, 2021).

219. *See* Christoph Hasselbach, Opinion, *Is Refugee Rescue Attracting More?*, DEUTSCHE WELLE (Oct. 28, 2014)*,* https://www.dw.com/en/opinion-is-refugee-rescue-attracting-more/a-18026378 [https://perma.cc/38V4-8T67] (archived Jan. 15, 2021). *See generally* MARIANNE RIDDERVOLD, THE MARITIME TURN IN EU FOREIGN AND SECURITY POLICIES: AIMS, ACTORS AND MECHANISMS OF INTEGRATION (Palgrave Macmillan ed., 2018).

220. *See, e.g.*, UDHR, *supra* note 96, art. 14; European Convention on Human Rights and Fundamental Freedoms arts. 2–3, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

reduce deaths[221] since migrants would not necessarily risk death if more channels of legal migration exist.[222] An opposite view, however, stresses that state migration policies focusing on "search and rescue operations"[223] tend to "encourag[e] more migrants to make the journey and lead to further deaths."[224] The direct result of these unresolved legal and political debates is escalation of the so-called Europe or Mediterranean migrant crisis.

According to Crawley *et al*, many years after the migrant crisis erupted, signs of a long-term coordinated response have yet to be seen.[225] Issues connected to the crisis of migrant deaths and disappearances at sea and borders stem from a disconnect between the duties of national authorities and a policy void at the international and EU levels.[226] The crisis poses a particular kind of challenge for transnational law and international decision-making. This is especially in regard to the multiplicity of perspectives as what should be the appropriate response of states to the problem (e.g., responses through legislations/law-making, policies, litigation/judicial strategies, or through consensus building and action plans).[227] So, in light of the migrant crisis at hand marked by increased deaths and migrants going missing and the EU's responses to it, what has been the United

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221. *See* Sarah Wolff, *Migration and Refugee Governance in the Mediterranean: Europe and International Organisations at a Crossroads* 11 (Istituto Affari Internazionali (IAI), Working Paper No. 15/42, 2015).

222. *See* Frank Laczko, *New Directions for Migration Policy in Europe*, Phil. Transactions Royal Soc'y London B 599, 604 (2002); *see also* Mattia Toaldo, *Libya's Migrant Smuggling Highway: Lessons for Europe*, Eur. Council on Foreign Rels. 1, 8 (Nov. 2015); *cf.* Matthias M. Mayer & Mehrdad Mehregani, Vision Europe Summit: Beyond Crisis Management: The Path Towards an Effective, Pro-active and Fair European Refugee Policy 30, 34 (2016).

223. At present, the obligation of states to rescue people facing distress at sea is still a subject of heated debate among scholars. *See* Guy S. Goodwin-Gill, The Refugee in International Law 157 (Clarendon Press 2nd ed. 1996) (arguing in favour of a duty to rescue); Seline Trevisanut, *Is There a Right to be Rescued at Sea? A Constructive View*, 4 Questions Int'l L. 3, 3, 5–8 (2014) (arguing in favour of a duty to rescue and the right of individuals to be rescued); *cf.* Efthymios D. Papastavridis, *Is There a Right to be Rescued at Sea? A Skeptical View*, 4 Questions Int'l L. 17, 21, 23 (2014) (expressing a skeptical view about the duty of states to rescue and individual right to be rescued).

224. Alan Travis, *Migrant Rescue Operations Must Be Stopped at Earliest Opportunity-Minister*, Guardian (Oct. 30, 2014), https://www.theguardian.com/uk-news/2014/oct/30/home-office-minister-rescue-migrants-must-be-stopped-mediterranea n [https://perma.cc/WY4X-KTFZ] *(*archived Jan. 15, 2021).

225. Heaven Crawley, Franck Düvell, Katharine Jones, Simon McMahon & Nando Sigona, Destination Europe: Understanding the Dynamics and Drivers of Mediterranean Migration in 2015, Final Report 6 (2016).

226. *See* Attia et al., *supra* note 122, at 3.

227. *See generally* Bernard Ryan, *The EU Migration Crisis and International Law* (presented at Migrants' Rights at a Crossroads: Seizing the Moment(um) of the UN Global Compact for Migration and the SDGs 2030 to Forge a New Path for the Protection of Migrants Rights International Conference, 2019) (slides presentation on file with author).

Kingdom's policy response to the problem of missing migrants at the national level? Also, to what extent has such a response been transnationally effective?

V.   POLICY RESPONSES TO MISSING MIGRANTS AT THE UK LEVEL AND THE QUESTION OF THEIR TRANSNATIONAL EFFECTIVENESS: WHAT WE KNOW SO FAR

A good way to start any discussion on the transnational policy responses to the problem of missing migrants at the state level is to first diagnose the wide variety of views held by states which may converge together and find expression at regional levels, such as the EU as discussed above. This is important because, as positional adherence theory[228] holds, the most significant determinant of why states behave the way they do in the international system is the "position" that any state takes in regard to issues of transnational importance.[229] First of all, for many of the migrants entering or seeking to enter the EU in search of refugee, the United Kingdom is their preferred final destination, but not all arrive.[230] For example, a 2016 study by the IOM about the top destination states for migrants moving across the Central Mediterranean route showed that the United Kingdom (6 percent), Italy (55 percent), Germany (9 percent) and France (3 percent) are among the top destination states for migrants fleeing wars and seeking refuge in Europe.[231] In terms of migrant flows

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228.   Positional theory of adherence seeks to understand state behaviour towards international legal regimes and why states adhere to them. According to the proponents Sarah Elizabeth Kreps and Anthony Clark Arend, the nature of a treaty regime, for example, as well as the extent to which the regime infringes on state sovereignty, normativity of the treaty regime, and enforcement arrangements of that regime all influence the decisions of states to behave in a particular way. *See* Sarah Elizabeth Kreps & Anthony Clark Arend, *Why States Follow the Rules: Toward a Positional Theory of Adherence to International Legal Regimes*, 16 DUKE J. INT'L & COMP. L. 331, 332, 404 (2006).

229.   *See id.*

230.   *See Calais and Clandestine Migration into the UK: Concerns and Context*, MIGRATION OBSERVATORY (Oct. 24, 2014), https://migrationobservatory.ox.ac.uk/resources/commentaries/calais-and-clandestine-migration-into-the-uk-concerns-and-context/ [https://perma.cc/4KTV-SVSP] (archived Jan. 21, 2021); BASTIAN VOLLMER, BRIEFING: IRREGULAR MIGRATIONS IN THE UK: DEFINITIONS, PATHWAYS AND SCALE (Migration Observatory 2011); *see also* Duncan Leatherdale, *Why Do People Risk Their Lives to Get to the UK?*, BBC NEWS (Oct. 23, 2019), https://www.bbc.co.uk/news/uk-england-50155073 [https://perma.cc/7SWF-N6VL] (archived Jan. 15, 2021). For example, the UK received the highest number of asylum applications in Europe in 2017 behind Germany, Italy, France and Greece. *See Migration to Europe in Charts*, BBC NEWS (Sept. 11, 2018), https://www.bbc.co.uk/news/world-europe-44660699 [https://perma.cc/XCC5-9GUN] (archived Jan. 15, 2021).

231.   *See* IOM, MIXED MIGRATION FLOWS IN THE MEDITERRANEAN AND BEYOND: FLOW MONITORING DATA ANALYSIS 9 (2016), https://migration.iom.int/docs/Analysis%20-

by nationality, Eritreans fleeing conflicts in their own state of origin mentioned the United Kingdom (26 percent) as their intended destination and Germany (18 percent).[232] Another study also showed that the United Kingdom is a priority destination for many migrants from African and Middle East states.[233] These migrant flows require an effective UK transnational policy response. Generally, the United Kingdom's national migration policymaking and enforcement in response to these transnational movements of migrants seeking to reach its shores covers a broad range of areas. These areas include, in particular, border controls and coastal policing, integration, legal entry, legal exit, and asylum processing procedures. Of these policy areas, evidence about the transnational effects of the UK national policy has been seen and felt more in the area of extraterritorial asylum processing than in any other.

For example, in 2004, the United Kingdom proposed the third country "transit processing centres" (TPCs) and "regional processing zones" (RPZs).[234] The former is a policy that sought to transfer asylum seekers arriving in the United Kingdom and EU to transit processing centres in countries outside the EU where they would be kept until their claims were processed and assessed. The proposal (later dropped following international criticisms)[235] was widely believed to be an attempt by the United Kingdom and other participating EU states to deterritorialise refugee protection and stem the tide of spontaneous migrant arrivals in Europe. The TPC initiative was greatly inspired by the Australian "Pacific Solution."[236] The UNHCR subsequently came up with a different proposal it called "Convention Plus"[237] (dubbed as

%20Flow%20Monitoring%20and%20Human%20Trafficking%20Surveys%20in%20the%20Mediterranean%20and%20Beyond%20-%207%20September%202016.pdf#page=9 [https://perma.cc/GTW7-A46W] (archived May 1, 2021).

232. *Id.*

233. *See* GABRIELLA SANCHEZ, REZART HOXHAJ, SABRINA NARDIN, ANDREW GEDDES, LUIGI ACHILLI & REZART SONA KALANTARYAN, A STUDY OF COMMUNICATION CHANNELS USED BY MIGRANTS AND ASYLUM SEEKERS IN ITALY WITH A PARTICULAR FOCUS ON ONLINE AND SOCIAL MEDIA 6, 17 (Eur. Comm'n 2018), https://missingchildreneurope.eu/Portals/0/Docs/publication%20hub/Comm%20channels%20used%20by%20migrants%20in%20Italy.en.pdf [https://perma.cc/GKX8-CDBR] (archived Jan. 15, 2021).

234. Alexander Betts, *The International Relations of the New Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR*, 22 REFUGE: CANADIAN J. ON REFUGEES 58 (2004) [hereinafter Betts, *International Relations*].

235. *See id.* at 59–60 (dropping the TPC and pushing on with the RPZ idea).

236. The "Pacific Solution" is an Australian Migration Policy under which the Australian Navy were allowed to intercept irregular maritime arrivals and transfer them to offshore processing centres on Nauru and Manus Island in Papua New Guinea. *See* Janet Phillips, Background Note, *The 'Pacific Solution' Revisited: A Statistical Guide to the Asylum Seeker Caseloads on Nauru and Manus Island*, DEPT. PARLIAMENTARY SERV., Sept. 4, 2012, at 1, 2.

237. *See id.* at 58.

such because of the UNHCR's belief that its own proposal is more consistent and compliant with the Refugee Convention and thus a plus to it) to counter the UK position. The Convention Plus sought to separate groups believed to be coming from countries that hardly produce any refugees and send them to reception facilities inside the EU where their asylum claims would be assessed by a joint team of the EU.**238** The UK approach implies the country's extraterritorial human rights obligations to migrants. Although there were credible arguments in several quarters that the motivations behind the UK proposals would give rise to negative outcomes (illegality and nonviability)**239** and create potential conflict with international law,**240** they nonetheless demonstrate how migration policies initiated nationally can produce external effects abroad.

However, there is little or no equivalent evidence to explain the transnational effects of the United Kingdom's policies in relation to dead and missing migrants. Understandably, the issue of missing migrants is connected with the wider question of migration more generally where the UK global migration governance position is "relatively fragmented."**241** In addition to the fragmented nature of UK global migration governance, the reason for this policy gap may also be linked to the earlier arguments about how best to deal with the crisis of missing migrants internationally. The United Kingdom appears to accept the idea that until migrants reach state territories, no state has any obligations and that they can only be in breach of human rights obligations if migrants go missing within their territorial jurisdiction. Again, the United Kingdom appears to accept the idea that state policies focusing on search and rescue operations at sea tend to "encourage[e] more migrants to make the journey and lead to further deaths"**242** and migrants going missing. For example, in 2014, the UK government announced that it would not participate in future search and rescue operations of migrants trapped in the Mediterranean Sea,

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238. *See* Ruud Lubbers, *Put an End to their Wandering*, GUARDIAN (June 20, 2003), https://www.theguardian.com/politics/2003/jun/20/immigration.immigrationand publicservices [https://perma.cc/H7WV-B2PJ] (archived Jan. 15, 2021).

239. *See* AMNESTY INTERNATIONAL, UNLAWFUL AND UNWORKABLE—AMNESTY INTERNATIONAL'S VIEWS ON PROPOSALS FOR EXTRATERRITORIAL PROCESSING OF ASYLUM CLAIMS 1–37 (2003), https://www.amnesty.org/download/Documents/108000/ior6100420 03en.pdf [https://perma.cc/Q3NF-9KLJ] (archived Jan. 15, 2021).

240. Betts, *International Relations*, *supra* note 234, at 59–62.

241. Betts, *Policy Primer*, *supra* note 36 (arguing that the UK current governance approach is fragmented because different government departments, such as the Foreign and Commonwealth Office, Department for International Development, Home Office and Office of the Prime Minister, all have different responsibilities when it comes to engaging with transnational migration and the different aspects of the global migration governance even though, in most cases, such fragmentation of responsibilities are unified through works of the Home Office).

242. Travis, *supra* note 224.

owing to what it called the "pull factor" motivating a significant of migrants to make the risky sea crossings.[243] The government's policy is that avoiding a rescue assistance would be saving more lives, rather than taking lives. Baroness Anelay, then Minister of State at the Foreign & Commonwealth Office, in written answer to the House of Lords defended the United Kingdom's position thus:

> We do not support planned search and rescue operations in the Mediterranean. We believe that they create an unintended "pull factor," encouraging more migrants to attempt the dangerous sea crossing and thereby leading to more tragic and unnecessary deaths. The government believes the most effective way to prevent refugees and migrants attempting this dangerous crossing is to focus our attention on countries of origin and transit, as well as taking steps to fight the people smugglers who wilfully put lives at risk by packing migrants into unseaworthy boats.[244]

Although this decision was subsequently reversed following "international criticisms,"[245] the government did so on the condition that the rescued migrants would be taken to the nearest seaport and would not be allowed to "claim asylum in the United Kingdom."[246] The assumption underlying the UK action expresses the political belief, shared by not only EU member states but also governments around the world, that it is possible for states to control migration and, therefore, prevent people from going missing through migration. Given that the United Kingdom is a world leader with the capacity to shape future direction of international legal discourses, standards, and policy in relation to missing migrants, experts and critics fear that the UK policy approach could worsen the already existing negative public perception about migrants worldwide; a perception often expressed in phrases like "sorry but the UK is full to capacity"[247] or "let the migrants

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243. HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, MIGRATION CRISIS, 2016–17, HC 24, at 26 (UK).

244. *See* Georgia Graham, *UK Will Not Support Rescue of Mediterranean Migrants*, TELEGRAPH (Oct. 28, 2014), http://www.telegraph.co.uk/news/uknews/immigration/11192027/UK-will-not-support-rescue-of-Mediterranean-migrants.html [https://perma.cc/BDH7-QFUS] (archived Jan. 15, 2021).

245. *See e.g., UK Government Refuses to Help Rescue People at Sea*, REFUGEE COUNCIL (Oct. 28, 2014), https://www.refugeecouncil.org.uk/latest/news/4183_uk_government_refuses_to_help_rescue_people_at_sea/ [https://perma.cc/7LWU-K2Q7] (archived Jan. 15, 2021); *see also* Amnesty International Press Release, Amnesty Condemns UK Opt Out of Search and Rescue for Refugees and Migrants (Oct. 28, 2014), https://www.amnesty.org.uk/press-releases/amnesty-condemns-uk-opt-out-search-and-rescue-refugees-and-migrants [https://perma.cc/FZ87-A7GL] (archived Jan. 15, 2021).

246. *See* HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, MIGRATION CRISIS, *supra* note 243, at 23.

247. *See* Andy Beckett, *Is Britain Full? Home Truths About the Population Panic*, GUARDIAN (Feb. 9, 2016), https://www.theguardian.com/world/2016/feb/09/is-britain-full-home-truths-about-population-panic [https://perma.cc/JR2C-G5SF] (archived Jan. 15, 2021).

drown; we have lost our sense of common humanity."[248] According to Sarah Teather, the UK Liberal Democrat Chair of the All-Party Parliamentary Committee on Refugees:

> [W]e cannot pretend that this problem has nothing to do with us and wash our hands as people die. It is the policies we are pursuing, attempting to turn Europe into a fortress with no safe routes in, that is forcing migrants into risking their lives. We are forcing people to choose between dying in their own war-torn country and drowning in the sea.[249]

Interestingly, the United Kingdom, through the Royal Navy, has played and continues to play a key role in enforcing the EU's "*Operation Sophia,*"[250] the EU's naval policy operation implemented by Frontex,[251] which was set up in 2015 at the height of the Mediterranean migrant crisis, to destabilise the business activities of migrant smugglers and trafficking in persons in the Southern Central Mediterranean.[252] Although, the United Kingdom only holds an observer status on the Frontex management board given that it is not part of the Schengen Agreement,[253] it has participated in several joint

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248. *See* Anish Kapoor, *Let the Migrants Drown in the Mediterranean: We Have Lost Our Sense of Common Humanity*, GUARDIAN (Oct. 28, 2014), https://www.the guardian.com/world/2014/oct/28/let-migrants-drown-mediterranean-lost-sense-of-comm on-humanity [https://perma.cc/B3BD-V5KR] (archived Jan. 15, 2021).

249. *See* Rowena Mason, *Outcry as the UK Opts Out of Migrant Rescue—As it Happened*, GUARDIAN (Oct. 28, 2014) https://www.theguardian.com/politics/live/2014/ oct/28/outcry-as-the-uk-opts-out-of-migrant-rescue-politics-live-blog?page=with%3Abloc k-544f84aae4b01631ca85f5b2 [https://perma.cc/9D4C-B7GS] (archived Jan. 15, 2021) (quoting UK Liberal Democrat Chair of the All-Party Parliamentary Committee on Refugees, Sarah Teather); *see also* DAVID MILLER, STRANGERS IN OUR MIDST: THE POLITICAL PHILOSOPHY OF IMMIGRATION 158 (Harvard Univ. Press 2016).

250. *See* Council Decision 2015/778, 2015 O.J. (L 122), 31–35. For detailed information on the historical genealogy of the Operation Sophia program, see Niklas Nováky, *The Road to Sophia: Explaining the EU's Naval Operation in the Mediterranean*, 17 EUR. VIEW 197, 204 (2018). The UK has consistently expressed its support for the EUNAVOR MED Sophia Operation to fight migrant smugglers from Libya across and in the Mediterranean. *See* Foreign Policy and Development Compact, U.K.-Fr., Jan. 18, 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attac hment_data/file/674884/Foreign_Policy_and_Development_Compact.pdf [https://perma .cc/R2MZ-SZH8] (archived Jan. 14, 2021).

251. For details on the historical genealogy of Frontex and its works in the EU, *see* Nina Perkowski, *A Normative Assessment of the Aims and Practices of the European Border Management Agency Frontex* 10–17 (Univ. of Oxford Refugee Studies Ctr. Working Paper Series, Paper No. 81, 2012).

252. *See Operation Sophia*, ROYAL NAVY (2021), https://www.royalnavy.mod.uk/ news-and-latest-activity/operations/mediterranean-and-black-sea/operation-sophia [htt ps://perma.cc/5WPW-DAM3] (archived Jan. 14, 2021).

253. BEN TAYLOR, HOUSE OF LORDS LIBRARY, LEAVING THE EUROPEAN UNION: FRONTEX AND UK BORDER SECURITY COOPERATION WITHIN EUROPE 2 (2017) (UK).

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Frontex operations.[254] The Royal Navy's presence on the world stage implies the extraterritorial jurisdiction of the United Kingdom and "sends a powerful message that the UK is committed to global affairs and provides a stabilising influence."[255] However, with the country having left the European Union on 30 January 2020, citing national desire and resolve to take back control of its borders, money, and laws,[256] it is not yet clear what will be the nature of United Kingdom's participation in the future of Europe. Yet, with the pressing problem of missing migrants reaching historic levels, the fate of migrants who go missing while attempting to cross the Mediterranean is not only geographically linked to Europe but also politically and legally linked to the United Kingdom as a European state. In addition to migrant flows through the Mediterranean routes, very recently, the rising "attempts by migrants to reach the UK via the English Channel in small boats and dinghies"[257] was declared a "major incident" by the then-Home Secretary,[258] prompting the House of Commons Home Affairs Committee to take oral evidence on the crisis in the Channel from different national authorities and groups.[259] The migrant crisis

254. Ryan Bernard, *Brexit and Borders: Schengen, Frontex and the UK*, FREE MOVEMENT (June 8, 2016), https://www.freemovement.org.uk/brexit-and-borders-schengen-frontex-and-the-uk/ [https://perma.cc/D6XW-9438] (archived Feb. 3, 2021).

255. *Operation Sophia*, *supra* note 252. *See generally* EUROPEAN UNION COMMITTEE, OPERATION SOPHIA, THE EU'S NAVAL MISSION IN THE MEDITERRANEAN: AN IMPOSSIBLE CHALLENGE 2015–16 HL 144 (UK).

256. HM GOVERNMENT, EU EXIT: TAKING BACK CONTROL OF OUR BORDERS, MONEY AND LAWS WHILE PROTECTING OUR ECONOMY, SECURITY AND UNION, 2018, Cm. 9741, at 3–13 (UK).

257. DAVID WOOD, CONTROLLING BRITAIN'S BORDERS: THE CHALLENGE OF ENFORCING THE UK'S IMMIGRATION RULES 5–6 (2019), http://www.civitas.org.uk/content/files/controllingbritainsborders.pdf [https://perma.cc/7CBU-B7BG] (archived Jan. 18, 2021); *see also* Megan Specia, *Migrants Crossing the English Channel to the U.K. Increased Sixfold in 2019*, N.Y. TIMES (Jan. 3, 2020), https://www.nytimes.com/2020/01/03/world/europe/migrant-boats-uk.html [https://perma.cc/VLV6-DSHG] (archived Jan. 18, 2021) (arguing that "[d]espite stepped up patrols, more than 1800 people successfully crossed in small vessels, up from fewer than 300 the year before").

258. *Channel Migrants: Home Secretary Declares Major Incident*, BBC NEWS (Dec. 28 2018), https://www.bbc.co.uk/news/uk-46705128 [https://perma.cc/ZV9Y-QZ2E] (archived Jan. 18, 2021). *See generally* Melissa Macdonald, *Migrants Crossing the English Channel*, HOUSE OF COMMONS LIBRARY (Nov. 4, 2019), https://commonslibrary.parliament.uk/home-affairs/immigration/migrants-crossing-the-english-channel/ [https://perma.cc/MDV8-U8S7] (archived Jan. 18, 2021).

259. *See Oral Evidence: English Channel Migrant Crossing, HC 1900, Before the Home Affairs Comm.* (Feb. 26, 2019) (UK) (evidence given by Alan Pughsley QPM, Chief Constable of Kent Police; Steve Rodhouse, Director General of Operations, National Crime Agency; Julie-Anne Wood, Head of Maritime Operations, Maritime and Coastguard Agency), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/english-channel-crossings/oral/97246.pdf [https://perma.cc/CM48-3U4B] (archived Jan. 14, 2021); *Oral Evidence: English Channel Migrant Crossing, HC 1900, Before the Home Affairs Comm.* (Jan. 22, 2019) (UK) (evidence given by Maddy Allen, Field Manager, Help Refugees; Olivia Long, Project Co-ordinator, Help Refugees; Judith Dennis, Policy Manager, Refugee Council; Clare

in the English Channel is a clear indication that the migrant crisis has reached British soil.**260** However, more recently, the United Kingdom, through the combined work of its national agencies, has dealt with the problem of migrant deaths *within* the United Kingdom in ways that demonstrate successes that can be achieved when national migration policies become transnationally effective. Such national agencies include the U.K. Missing Persons Bureau, the National Crime Agency U.K. Missing Persons Unit (MPU),**261** the U.K. Missing Persons

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Moseley, Founder, Care4Calais), http://data.parliament.uk/writtenevidence/committee evidence.svc/evidencedocument/home-affairs-committee/english-channel-crossings/oral/ 95434.html [https://perma.cc/5JKJ-7YEC] (archived Jan. 14, 2021); *see also Written Evidence Submitted by UNCHR (ECM0006), by Rossella Pagliuchi-Lor, UNCHR Representative to the United Kingdom, to the Home Affairs Comm.*, (Mar. 2019) (UK), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/ho me-affairs-committee/english-channel-crossings/written/98632.pdf [https://perma.cc/6P SD-8D27] (archived Jan. 14, 2021); *Written Evidence Submitted by Care4Calais to the Home Affairs Comm.* (Feb. 2019) (UK), http://data.parliament.uk/writtenevidence/ committeeevidence.svc/evidencedocument/home-affairs-committee/english-channel-cros sings/written/96742.pdf [https://perma.cc/L7E5-986L] (archived Jan. 14, 2021); *Supplementary Written Evidence from the National Crime Agency, by Stephen Rodhouse, Director General (Operations), National Crime Agency, to the Home Affairs Comm.*, Feb. 2019 (UK), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidence document/home-affairs-committee/english-channel-crossings/written/97296.pdf [https:// perma.cc/W2UH-MWV2] (archived Jan. 14, 2021); *Supplementary Written Evidence Submitted by Help Refugees (ECM0001) to the Home Affairs Comm.* (Jan. 2019) (UK), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/ho me-affairs-committee/english-channel-crossings/written/95368.pdf [https://perma.cc/93 K8-RCEN] (archived Jan. 14, 2021). *See generally* Letter from Sir Philip Rutnam KCB, Permanent Sec'y, Home Office, to the Home Affairs Select Comm. (Mar. 5, 2019), https://www.parliament.uk/documents/commons-committees/home-affairs/Corresponde nce-17-19/19-03-05-Letter-from-Sir-Philip-Rutnam-KCB-Permanent-Secretary-Home-O ffice-Migrant-boats-in-the-channel.pdf [https://perma.cc/WK5K-3D7W] (archived Jan. 14, 2021).

260. *See generally* Joint Action Plan by the UK and France on Combating Illegal Migration Involving Small Boats in the English Channel, U.K.-Fr., Jan. 24, 2019, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachmen t_data/file/773403/UK_France_declaration_24_Jan_13.00.pdf [https://perma.cc/6H6U-9RE4] (archived Jan. 14, 2021); Joint Action Plan by the United Kingdom (UK) and France on Combating Illegal Migration Involving Small Boats in the English Channel Addendum, U.K.-Fr., Sept. 2019, https://assets.publishing.service.gov.uk/govern ment/uploads/system/uploads/attachment_data/file/839500/Small_Boats_Action_Plan_ Addendum_-_26th_September_consolidated_text__2019.10.01___002_.pdf [https://per ma.cc/95EA-9Q66] (archived Jan. 14, 2021); JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS, SAFE AND LEGAL ROUTES OF ENTRY TO THE UK (Oct. 24, 2019), https://www.jcwi.org.uk/Handlers/Download.ashx?IDMF=d3f59e02-3ffa-4cb7-a33e-d11 53c4fd517 [https://perma.cc/4B7L-V3CH] (archived Jan. 14, 2021).

261. "The National Crime Agency UK Missing Persons Unit (MPU) is the UK national and international point of contact for all missing person and unidentified body investigations." CATHERINE FAIRBAIRN, HOUSE OF COMMONS LIBRARY, MISSING PERSONS, GUARDIANSHIP AND THE PRESUMPTION OF DEATH, Nov. 12, 2019, Briefing Paper No. 04890, at 4 (UK).

Taskforce,[262] the U.K. Border Agency, and the British Police. A good example of a case involving the works of these agencies is the tragic case of the twenty-three irregular Chinese migrants who were swept aside and drowned picking cockles in Morecambe Bay.[263] According to Simon Robins, the UK authorities deployed not just an enormous amount of resources to identify the twenty-one bodies that were recovered of the drowned migrants but also sought crucial information that involved making a trip to China whilst also collecting relevant information within the United Kingdom.[264] The British authorities also funded the subsequent repatriation of the migrant bodies to China.[265] There have also been reported cases of smuggled and stowaway migrants falling from the landing gears of airplanes within the United Kingdom, some of which have been identified by the UK authorities and others whose identities are still under investigation put on the U.K. Missing Persons Database.[266] A more recent example is the identification of the bodies of the thirty-nine Vietnamese migrants who died in a refrigerated trailer attached to an Essex lorry as they were being smuggled into the United Kingdom. Not long after the tragic incident, the UK authorities announced:

> We are in direct contact with a number of families in Vietnam and the UK, and we believe we have identified families for some of the victims whose journey ended in tragedy on our shores . . . the evidence is being gathered across a number of jurisdictions worldwide.[267]

These cases demonstrate feats that can be achieved in relation to investigation of deaths and identification and return of migrant bodies when states have the political will to adopt national migration policies that are transnationally effective. Thereby, honouring their obligations towards dead and missing migrants and their families. Although, it may be argued that these cases were addressed in such an effective manner because the migrants involved died on British soil and national image was at stake, they nonetheless show that it is not impossible for states to facilitate through their national migration policies the transnational investigation, identification, and

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262. "The Missing Persons Taskforce was launched in December 2009 and set itself a remit of improving the multi-agency response during the period in which persons are missing." *Id.* at 5.

263. ROBINS, KOVRAS & VALLIANATOU, *supra* note 121, at 14; *see also* Robins, *Migrant Bodies*, *supra* note 57, at 72.

264. ROBINS, KOVRAS & VALLIANATOU, *supra* note 121, at 14.

265. *Id.*

266. *Id.*

267. *All 39 Migrants Found Dead in Essex Lorry Confirmed as Vietnamese Nationals*, TELEGRAPH (Nov. 2, 2019, 2:59 AM), https://www.telegraph.co.uk/news/2019/11/02/39-migrants-found-dead-essex-lorry-confirmed-vietnamese-nationals/ [https://perma.cc/L8GM-GRAE] (archived Jan. 14, 2021).

repatriation of migrant bodies to families abroad whilst also addressing other needs of affected families beyond the shores of any particular state.

Although, some successes have been achieved when dealing with cases of dead and missing migrants *within* the United Kingdom, the country still faces a real and challenging problem of management of migrant bodies. This may not be on a scale comparable to those of EU's Mediterranean states but are nonetheless analogous to those confronted in Lesbos.[268] It is suggested that dealing with this problem in a more transnationally effective way would require greater transnational cooperation between the United Kingdom and EU. Although the United Kingdom has left the EU, the government has said it still wants to continue to collaborate with its European partners after Brexit to tackle irregular migration[269] in order to find a European solution to the migrant crisis. This is more so given that the obligations of the United Kingdom towards migrants under the European Convention on Human Rights and Fundamental Freedoms remains in force.[270] Such political commitment, which was reaffirmed in the 2018 UK–France Sandhurst Treaty,[271] and the 2019 Post-Brexit Political Declaration reached between the EU and the United Kingdom,[272] and most recently in the 2020 UK–EU Trade Deal[273] demonstrates that migration is a key state interest for the United Kingdom and will remain so for most of the future; meaning that the transnational effects of its national migration policies will continue to be keenly felt by

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268.   ROBINS, KOVRAS & VALLIANATOU, *supra* note 121, at 14.

269.   UK PARLIAMENT, FOREIGN AND COMMONWEALTH OFFICE ¶¶ 29, 64 (2019), http://
data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/finding-a-diplomatic-route-european-responses-to-irregular-migratio
n/written/97127.html [https://perma.cc/29VT-Z488] (archived Jan. 18, 2021); *see also* FOREIGN AFFAIRS COMMITTEE, RESPONDING TO IRREGULAR MIGRATION: A DIPLOMATIC ROUTE, 2019, HC 107, at 7 (UK).

270.   Although, the UK has left the European Union, it is not leaving the European Convention because the European Convention was negotiated within the Council of European, which the UK is still part of and is not within the EU.

271.   Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic Concerning the Reinforcement of Cooperation for the Coordinated Management of their Shared Border, U.K.-Fr., Jan. 18, 2018, Gr. Brit. T.S. No. 1 (Cm. 9568); *see also* United Kingdom-France Summit Communique, Royal Military Academy Sandhurst, Jan. 18, 2018, ¶¶ 44, 48–55, https://assets.publishing.service.gov.uk/government/uploads/
system/uploads/attachment_data/file/674880/2018_UK-FR_Summit_Communique.pdf
[https://perma.cc/652G-HFEF] (archived Jan. 18, 2021).

272.   *See* Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom, ¶ 116, 2019 O.J. (C 384).

273.   *See* Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part, 2020 O.J. (L 444) 14.

migrant populations worldwide. The subject of migration will continue to be a critical challenge for the United Kingdom with net immigration.[274] It links the United Kingdom to international global events such as armed conflicts and systematic human rights abuses in the territory of its former colonies that have triggered unprecedented migrant flows into Europe and the United Kingdom.[275] With the global migration governance now at a crucial stage in its institutional development, Alexander Betts argues "there is a strong case for the UK to develop a coherent 'global migration governance policy'"[276] that, as this Article argues, takes the issue of missing migrants into account.

VI. So, Why National Migration Policies with Transnational Effects?

In line with the definition of transnational effectiveness of a national policy offered at the start of the Article, this Part examines the wider rationale that underlies arguments for a transnational approach in dealing with cases of missing migrants. Generally, there may be numerous reasons why dealing with the global problem of missing migrants requires national migration policies with transnational effects. However, this Part only deals with three such reasons: (a) the transnational nature of migration, (b) the extraterritorial reach and effects of positive human rights obligations of states, and (c) the externalisation of migration policies and border controls.

A. *The Transnational Nature of Migration*

As stated at the beginning of this Article, the cornerstone of transnational law is its recognition of the fact that transnational problems, such as missing migrants, require a transnational response that includes, but is not limited to, transnational responsibility sharing and greater cooperation between states.[277] The very nature of the

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274. *See* GEORGINA STURGE, HOUSE OF COMMONS LIBRARY, MIGRATION STATISTICS, Dec. 2, 2020, Briefing Paper No. CBP06077, 8–13 (outlining the UK government's net immigration targets).

275. *See* JOSEPHINE LIEBL, ANNA MUSGRAVE & RACHEL MARANTO, OXFAM GB, A SAFE HAVEN? BRITAIN'S ROLE IN PROTECTING PEOPLE ON THE MOVE 2 (2016), https://oxfamilibrary.openrepository.com/bitstream/handle/10546/605192/bn-safe-haven -140416-en.pdf;jsessionid=F24952404B1FBFA477E37E11BE5B9B54?sequence=1 [http s://perma.cc/43AB-CMYY] (archived Jan. 18, 2021).

276. *See* Betts, *Policy Primer*, *supra* note 36, at 6.

277. *See* E. Tendayi Achiume, *Syria, Cost Sharing, and Responsibility to Protect Refugees*, 100 MINN. L. REV. 687, 703 (2015) (discussing failure of international cooperation and equitable responsibility sharing between states in the context of the Syrian refugee crisis).

phenomenon of missing migrants implies involvement of origin, transit, and destination states who are all caught up in the transnational nature of migration. Generally, when migrants are driven out of their homes, they go in search of new homes. In searching for new homes, they cross borders of states with multiple states exercising territorial jurisdiction over them.[278] That being the case, it is contended that states, especially origin, transit, and arrival states, are under a plural obligation to protect migrants and to take measures to prevent migrants from going missing. The idea of creating a plural obligation for plural states to protect migrants stems from the fact that until migrants complete their journeys and reach their destination, origin, transit, and arrival states would still be expected to exercise jurisdiction in a row.

In that way, two possible jurisdictional networks of states are created with each network of states seeking to exert control over the movement of migrants.[279] The first would be a weak queue of states with marginal obligations to protect migrants and the second would be a solid chain of states with a robust and more effective obligations to protect migrants.[280] Distinguishing between a chain of states and a queue of states in the context of the plural duty of states to protect migrants, V.P. Tzevelekos and E.K. Proukaki write:

> The difference between a queue and a chain is that the latter implies interconnection. For a chain to exist, a link between its rings is needed . . . rather than a detached queue of states that exercise, one after another, exclusive jurisdiction in a row, on the basis and within the confines of national territory, the scheme that describes migration is that of overlapping and interlinked jurisdiction of more than one state over the same person and the situation that person is facing. What makes the jurisdiction of multiple states to cross, i.e. what establishes the connection between the rings of our fictional jurisdictional chain is the transnational nature of migration.[281]

It is suggested that the chain of states analogy for the purpose of establishing state jurisdiction over the subject of transnational migration works better for the understanding of the migration issues. Any concerns arising from it can easily be resolved through the instrumentality of international cooperation and consensus building between states. It is a fact of common knowledge that migrants move through the high sea routes, a territory that is open to all states and where no particular state claim exclusive jurisdiction or sovereignty.[282] That being the case, plural states involved—origin, transit, and arrival states—all share a plural responsibility to protect migrants "to the

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278. Tzevelekos & Proukaki, *supra* note 23, at 442.
279. *See id.* at 441–42.
280. *See id.*
281. *Id.*
282. *Id.* at 441.

extent that each one of them can"[283] and to adopt "collective" measures to prevent migrant disappearances.[284] This is an "interlinked responsibility (in the sense of a duty) to protect and, possibly, concurrent state responsibility (in the sense of liability) for failure to protect."[285] Thus, plural states have shared responsibility to protect migrants including "rescue at sea,"[286] and may be required to exercise parallel concurrent jurisdiction in this regard. This is so because in an era of increasing externalisation of migration policies and border controls, it is hard to think of any other realistic and effective way to deal with migrant deaths and disappearances at sea and borders than to press and prevail on states to exercise concurrent jurisdiction to protect migrants beyond state borders.

B. Extraterritorial Reach and Effects of Positive Human Rights Obligation of States

Generally, as a matter of positive law, human rights obligations apply only internally within the territory of a state, for their own population's benefits.[287] Modern trends, however, tilt in favour of expanding states' human rights obligations extraterritorially.[288] With significant numbers of migrants dying and missing at sea and borders and their families in most cases residing abroad, it is clear that an extraterritorial (transnational) legal and policy approach to tackling the crisis is required. However, the new trend of extraterritorial expansion of human rights obligations of states has been highly

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283. *Id.*

284. *Id.* at 469.

285. *Id.* at 441.

286. GOODWIN-GILL, *supra* note 223, at 157; Trevisanut, *supra* note 223, at 5–8; *see also* UN Convention on the Law of the Sea, *supra* note 95, art. 98; *cf.* Papastavridis, *supra* note 223, at 21, 23.

287. *See* Monica Hakimi, *Toward a Legal Theory on the Responsibility to Protect*, 39 YALE J. INT'L L. 247, 261 (2014); *see also* United Nations International Convention on Civil and Political Rights, art. 2, ¶ 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

288. *See* MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 1 (2011); *cf.* Banković v. Belgium, 2001-XII Eur. Ct. H.R. ¶¶ 61, 67 (holding that state jurisdiction under international law is primarily territorial and that extraterritorial jurisdiction of states can only apply in very exceptional circumstances).

controversial, keenly contested,[289] and "under-theorised."[290] Human rights courts that apply human rights law extraterritorially justify their decisions by reference to state control. That is, effective control of *territories* by states often referred to as the *spatial model* of extraterritorial human rights obligation.[291] And also effective authority or control over *persons* abroad,[292] often referred to as the *personal model* of extraterritorial human rights obligation. The idea is that "the more control a state exercises in an extraterritorial setting, the greater the likelihood that the state will be held to its human rights duties."[293] However, there are still disagreements about: (1) why control matters;[294] (2) the type and level of control extraterritorially that can activate human rights responsibilities of states; (3) whether, apart from control, other factors can activate these responsibilities; and (4) whether the obligations can be triggered concurrently or in stages having regard to the facts and circumstances of each case.[295] For the ECtHR, the general rule is territorial because Article 1 of the European Convention on Human Rights refers to jurisdiction which is normally at international law defined by reference to the recognised territory of a state; and, further, limited to the *espace juridique* of the Convention. Therefore, the extraterritorial application of the Convention is seen as an exception to the general rule and based on "special factors" including an appropriate sense of control. From the

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289.   *See* Colette Connor, *Recent Development: The United States' Second and Third Periodic Report to the United Nations Human Rights Committee*, 49 HARV. J. INT'L L. 509, 516–17 (2008) (highlighting the UN Human Rights Committee's disagreements with the US government's view that the ICCPR treaty does not apply extraterritorially, its failure to ensure the rights prescribed by the Covenant, and its disagreement on the scope of substantive provisions of the covenant); *see also Second and Third Periodic Report of the United States of America to the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights*, U.S. DEPARTMENT OF STATE Annex I (Oct. 21, 2005), https://2009-2017.state.gov/j/drl/rls/55504.htm [https://perma.cc/D8Y6-25Q5] (archived Jan. 21, 2021); Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant ¶14, U.N. Doc. CCPR/C/GBR/CO/6/Add.1 (Nov. 3, 2009); Hakimi, *supra* note 287, at 261.

290.   Hakimi, *supra* note 287, at 261; *see* MILANOVIC *supra* note 288, at 264.

291.   *See* Al-Skeini v. United Kingdom, App. No. 55721/07, ¶¶ 134–38 (July 7, 2011), http://hudoc.echr.coe.int/eng?i=001-105606 [https://perma.cc/27Z6-ZWGD] (archived Jan. 21, 2021) (stating that where a state's diplomatic or consular agents carry authority or control over a person, or where it carries out all or some of its public powers based on the consent, invitation, or acquiescence of the local government, or exercises physical control and power over people through the use of force, the extraterritorial jurisdiction of the state concerned is implied).

292.   *Id.*

293.   Hakimi *supra* note 287, at 262.

294.   *Id.*

295.   Debates around these issues are beyond the scope of this paper, but for more information, see *id.*

decision in *Al-Skeini v. United Kingdom*, those range of special factors are indeterminate and depend on the facts of cases.[296]

In any case, and for our context, the exercise of extraterritorial obligations and migration control by states will always likely be tied to the question of jurisdiction. The question of jurisdiction itself serves as a threshold criterion for invoking the extraterritorial obligations of states over persons, situations, and territories abroad as well as applying human rights treaties. Jurisdiction, as we know it, is the traditional power that states exercise over their own territories and subjects. It is central to state sovereignty, the right to make and enforce one's own laws and protect national interests. As such, it concerns the reach of a state's law (territorial or extraterritorial) and what link (internal or external), if any, is required for state laws to apply to persons and situations.[297] Regardless of which model of extraterritorial human rights jurisdiction and obligation is invoked by states in relation to migrants outside their territories, it has been argued that in cases involving migrants in distress at sea and at border zones, plural states have legal obligations under human rights law and law of the sea to render assistance to migrants facing distress at sea and other death zones regardless of whether the traditional routes or links for establishing jurisdiction under international law such as territory and nationality exist or not.[298] Put differently, there is a plurality of human rights duties placed on states to protect migrants from going missing and such duties extend extraterritorially, regardless of whether migrants have reached state territories or not.

The ECtHR reiterated this position in *Hirshi Jamaa v. Italy* where it found against the practice of *preventive refoulement* of migrants by some states and further stressed that *nonrefoulement* human rights obligations of states apply extraterritorially.[299] This extraterritorial obligation extends even to the high sea, especially when a state's coastguard intercepts or interdicts migrants and seeks to return them to unsafe places. With thousands of migrants already dead or missing while attempting to cross the Mediterranean Sea into Europe, the failure of frontline states to take action to save human lives would be incompatible with existing and binding provisions of human rights law, while also amounting to a moral failure. While the ECtHR's respective decisions in *Al-Skeini* and *Hirsi Jamaa* expressly

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296. *See Al-Skeini*, ¶¶ 130–42.

297. For a detailed discussion on the concept of jurisdiction, see generally Alex Mills, *Rethinking Jurisdiction in International Law*, 84 Brit. Y.B. Int'l L. 187; Cedric Ryngaert, Jurisdiction in International Law 18; Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145, 145 (1972–1973).

298. *See* Tzevelekos & Proukaki, *supra* note 23, at 427.

299. *See* Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 186 (Nov. 16, 2016), http://hudoc.echr.coe.int/eng?i=001-109231 [https://perma.cc/TL46-5R5V] (archived Jan. 21, 2021).

reflect the current position of human rights law and practice in the EU, they also implicitly reflect the understanding that human migration is a transnational phenomenon wherein externalised migration policies and border controls have increasingly become a major response approach by states.

C. Externalisation of Migration Policies and Border Controls

The United Kingdom has always provided protection to people who reached their territories and presented legitimate claims to international protection.[300] While granting international protection to people fleeing persecution and armed conflict is most commendable, a parallel disturbing development is that, over the years, the United Kingdom and other European states have increasingly aspired to adopt bilateral and multilateral externalisation policies to control migration. These controls, as mentioned earlier in this Article, seek to strike deals with third countries—mostly origin, transit, and countries of first arrival—to act as border keepers in order to control flow of migrants seeking refuge in their territories. Through such externalisation practices, states attempt to prevent, intercept, or interdict migrants from arriving at destination states. Italy's ill-fated deal with Libya to intercept and pull back migrants is often cited as the most obvious example.[301] Such extraterritorial actions to curb migrant and refugee flows have been linked to politicisation of national migration policies.[302] A few examples of externalisation of border controls and migration policies include the much-criticised EU–Turkey Action Plan[303] and the "Australia Pacific Solution"[304] as well as the "EU–Africa Joint Valletta Action Plan"[305] (to be monitored by the Khartoum and Rabat Process respectively).[306] But then, the EU and other states

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300.   *See* House of Commons Home Affairs Committee, Immigration Policy: Basis for Building Consensus, 2017-19, HC 500, at 25 (UK), https://publications. parliament.uk/pa/cm201719/cmselect/cmhaff/500/500.pdf (last visited Sept. 27, 2020) [https://perma.cc/X7MF-KJGE] (archived Jan. 21, 2021).

301.   *See generally Hirsi Jamaa*, App. No. 27765/09.

302.   *See* Frelick, Kysel & Podkul, *supra* note 185, at 193–94.

303.   EU-Turkey Statement 2016, *supra* note 128.

304.   *See* Phillips, *supra* note 236, at 2.

305.   African Union, *EU-Africa Joint Valletta Action Plan—Conclusions 2018*, Africa EU P'ship (Nov. 15, 2018), https://www.africa-eu-partnership.org/en/stay-informed/news/joint-valletta-action-plan-conclusions-2018 [https://perma.cc/2DGL-6R WA] (archived Jan. 21, 2021).

306.   The Khartoum Process is the "EU-Horn of Africa Migration Route Initiative," which seeks to create a common understanding of human trafficking and smuggling of migrants, creating opportunities for balanced partnership in the spirit of shared responsibility and enhanced cooperation on migration and mobility between the EU and Africa. *See generally EU-Horn of Africa Migration Route Initiative (Khartoum Process)*, IOM, https://www.iom.int/eu-horn-africa-migration-route-initiative-khartoum-process (last visited Jan. 21, 2021) [https://perma.cc/K38E-UPK2] (archived Jan. 21, 2021). The

consistently claim that externalisation policies are actually devised with good intentions—to protect lives and achieve safe, orderly and regular migration.

For example, the EU–AU Action Plan declares that it aims to stop migrant smuggling and trading in humans in order to effectively tackle the humanitarian crisis occasioned by irregular migration originating from Africa to Europe. But the result in practice seems not to always reflect the supposed protection and life-saving humanitarian goals. For example, the hitherto obscure negative impact of externalisation policies came to the global limelight for the first time when border communities like Calais, Lampedusa, and Lesbos emerged as the twilight zones of indeterminate migration regulation, with migrants seeking to arrive to those zones going missing in the process. However, even though externalisation policies may not always be devised with the best of motives by states, they nonetheless demonstrate the capacity of frontline states to deal with problems abroad. If states deploy a little of the percentage of resources used in implementing and operationalising externalisation policies to also set up transnational communication channels to search for missing migrants and reach out to their families, the crisis of missing migrants may well be half solved.

Whatever is the case, the argument here is that some policy and border externalisation practices have human rights implications for migrants. For instance, some of them tend to militarise the borders and make migration routes become even more dangerous,[307] thereby increasing the risk of migrant deaths and disappearances. Others appear to be fuelling human rights abuses outside Europe.[308] And others still seem to be promoting repressive regimes[309] since most of the third countries used as border guards are governed by nondemocratic governments with proven records of human rights abuses. In these circumstances, it would be valid to claim that externalisation implicates the extraterritorial human rights obligation of states to deal with migration risks arising from such practices. Such risks would require parallel national policies with transnational effects to deal with. The increasing need to adopt such a transnational

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Rabat Process, on the other hand, is the Euro-African Dialogue on Migration and Development bringing together countries of origin, transit, and destination of the migration routes linking Central, West and North Africa with Europe. For more information on the Rabat Process, see *The Rabat Process*, RABAT PROCESS, https://www.rabat-process.org/en/about/rabat-process (last visited Jan. 21, 2021) [https://perma.cc/89CT-SJR6] (archived Jan. 21, 2021).

307. *See* MARK AKKERMAN, EXPANDING THE FORTRESS: THE POLICIES, THE PROFITEERS AND THE PEOPLE SHAPED BY EU'S BORDER EXTERNALISATION PROGRAMME 34 (Nick Buxton & Wendela de Vries eds., 2018).

308. *See id.* at 35.

309. *See id.*

approach reflects the principle of "shared responsibility of states"[310] and "greater state cooperation"[311] in dealing with human problems and such shared undertaking is the cornerstone of the newly adopted UN Global Compact for Safe, Orderly and Regular Migration (GCM) which is examined below.

VII. THE UN GLOBAL COMPACT (GCM) AND MISSING MIGRANTS

In 2016, the UN General Assembly adopted the New York Declaration on Refugees and Migrants, comprising of two compacts: Global Compact for Refugees (GCR) and Global Compact for Safe, Orderly and Regular Migration (GCM). Both Compacts represent intergovernmental nontreaty, nonbinding agreements which set out principles, objectives, and partnerships for refugees and migration governance at the international level. This Article, with its focus on UK policies in relation to missing migrants, concentrates on the GCM and specifically Objective 8(a-f) which seeks to address the humanitarian challenges arising from the perilous journeys of migrants who died and went missing in an attempt to reach safe international destinations. While this Article limits its consideration of the GCM to Objective 8, the provision is itself not exhaustive and cannot be read in isolation of other relevant provisions of the compact.

The Compact is a complementarity instrument built on the framework of global partnerships and solidarity. It is clear from the totality of the texts used in the compact that Objective 8 alongside other objectives[312] are mutually inclusive and reinforcing and should

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310.   For detailed discussion on shared responsibility, see Andre Nollkaemper, *The Duality of Shared Responsibility*, 24 CONTEMP. POL. 524, 528 (2018); *see also* Andre Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT'L L. 359, 366 (2013); Marion Smiley, *Collective Responsibility*, STAN. ENCYCLOPEDIA OF PHIL. (Aug. 8, 2005), https://plato.stanford.edu/entries/collective-responsibility/ [https://perma.cc/56UU-39U2] (archived Jan. 21, 2021).

311.   It is important to mention that neither international law nor the global compact clearly specifies what level or kind of cooperation is required of states in any case, nor does either prescribe how to distribute or allocate the duty to cooperate. David Miller, while discussing this problem in the context of national responsibility and global justice, stated that "an undistributed duty . . . to which everybody is subject is likely to be exercised by nobody unless it can be allocated in some way." *See* DAVID MILLER, NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE 98 (Oxford Univ. Press 2007); *see also* Douglas Guilfoyle, *The Legal Challenges in Fighting Piracy*, *in* THE INTERNATIONAL RESPONSE TO SOMALI PIRACY 130 (Bibi Van Ginkel & Frans-Paul Van Der Putten eds., 2010) (discussing the same problem in the context of suppressing piracy at sea, Guilfoyle stated that "while a duty to cooperate to the fullest possible extent may seem a strong obligation, the international community has not agreed that it has any specific minimum content. Identifying a breach of a duty to cooperate is notoriously difficult . . .").

312.   See, in particular, Global Compact for Safe, Orderly and Regular Migration, *supra* note 26, objectives 1, 3, 4, 7, 9, 10, 17, 21.

be read in that light.[313] In sum, the main aim of Objective 8 is to save lives[314] and "establish coordinated international efforts on missing migrants."[315] It enjoins states to commit to prevention of migrant fatalities through individual and joint search and rescue of migrants,[316] exchange and collection of information in a standardised way,[317] as well as identification of the dead[318] and family outreach.[319] Particularly relevant is the requirement that states should review their migration policies and laws to ensure that their impacts "do not raise or create the risk of migrants going missing."[320] The goals advanced by Objective 8 are central to effectively dealing with the crisis of missing migrants at the international level, but what is not so clear is how states, given the nontreaty legal status of the Compact, might implement its contents nationally, and what would be the consequences of states' failure to implement.

A. The Legal Status of the GCM and Prospects of National Implementation: The Way Forward for the United Kingdom

The key reason why the United Kingdom and other European states endorsed the GCM is that it is a "non-treaty,"[321] nonlegally binding instrument which respects state sovereignty and allows states to adopt their own migration policies. The GCM does not create a right to migration or new rights for migrants, it does not create or impose new obligations on states, and it does not even provide for regularisation of irregular migrants.[322] The GCM "is [not] declaratory

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313. *See* Syd Bolton & Catriona Jarvis, *Objective 8: Save Lives and Establish Coordinated International Efforts on Missing Migrants*, *in* The UN's Global Compact for Safe, Orderly and Regular Migration: Analysis of the Final Draft, Objective by Objective 25 (Elspeth Guild & Tugba Basaran eds., 2018). *See generally* Syd Bolton & Catriona Jarvis, *Objective 8: Save Lives and Establish Coordinated International Efforts on Missing Migrants*, *in* First Perspectives on the Zero Draft (5 February 2018) for the UN Global Compact on Safe, Orderly and Regular Migration (Elspeth Guild & Tugba Basaran eds., 2018).

314. *See* Global Compact for Safe, Orderly and Regular Migration, *supra* note 26; *see also* Jane McAdam, *The Global Compacts on Refugees and Migration: A New Era for International Protection*, 30 Int'l J. Refugee L. 571, 571–74 (2018).

315. Global Compact of Safe, Orderly and Regular Migration, *supra* note 26, ¶ 24.

316. *See id.* ¶ 24(a).

317. *See id.* ¶ 24(e).

318. *See id.* ¶ 24(f).

319. *See id.* ¶ 24(c)–(d).

320. *Id.* ¶ 24(b).

321. *See* Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (defining a treaty; the convention's provisions are generally accepted as being declaratory of customary international law).

322. *See generally Global Compact for Safe, Orderly and Regular Migration*, French Ministry for Europe and Foreign Affairs, France Diplomacy (2018), https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/global-compact-

of, or establishes customary international law relating to safe, orderly and regular migration."[323] In determining the status of an international instrument, the decisive factor is whether the negotiating states intend the document to be binding.[324] This intention is to be gleaned from the explicit terms of the document itself as well as the surrounding circumstances under which it was concluded.[325] The form, content, language, and surrounding negotiating history of the GCM clearly confirm that states do not intend it to be binding. The GCM itself declares that it is nonbinding;[326] that it upholds state sovereignty;[327] and that implementation will be based on "national realities, capacities, and levels of development, and respecting national policies and priorities."[328] It also cannot apply directly to proceedings in domestic courts, although it can be a persuasive guideline for interpretation of existing international norms. Since it lacks a definite legal status,[329] what transnational effect, if any, might the GCM have? It is clear the GCM is a cooperative multilateral framework which consolidates and builds on existing norms of international human rights law (which is already binding on states),[330] in particular, the principles of nondiscrimination and nonregression. The principle of nonregression specifically requires that existing norms already adopted by states not be revised by any state if doing so implies retreating or going backwards on the standards of human rights protection.[331]

While the GCM is not legally binding *stricto sensu*, it is politically binding.[332] This is evident in the consistent use of the phrase "we

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for-safe-orderly-and-regular-migration/article/global-compact-for-safe-orderly-and-regu lar-migration [https://perma.cc/X9YN-288H] (archived March 16, 2021).

323. Letter from Virginia Hardy, Deputy Solicitor-General, and Victoria Hallum, International Legal Advisor, to Winston Peters, N.Z. Minister of Foreign Affs. ¶ 14 (Dec. 17, 2018).

324. *Id.* ¶ 7.

325. *See*, *e.g.*, Maritime Delimitation and Territorial Questions Betweeen Qatar and Bahrain (Qatar v Bahr.), Jurisdiction and Admissibility, Judgment, 1994 I.C.J. 112, ¶¶ 26–27 (July 1).

326. Global Compact for Safe, Orderly and Regular Migration, *supra* note 26, ¶ 7.

327. *Id.* ¶ 15.

328. *Id.* ¶ 41.

329. *See* Alessandro Bufalini, *The Global Compact for Safe, Orderly and Regular Migration: What Is Its Contribution to International Migration Law?*, 58 QUESTIONS INT'L L. 5, 7–11 (2019).

330. The Migration Compact contains over 45 references to human rights. *See* Elspeth Guild, *The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?*, 30 INT'L J. REFUGEE L. 661, 661 (2019).

331. ALAN MILLER, RECOMMENDATIONS FOR A NEW HUMAN RIGHTS FRAMEWORK TO IMPROVE PEOPLE'S LIVES, REPORT TO THE FIRST MINSTER 68–69 (2018).

332. Kathryn Allinson, Paul Erdunast, Elspeth Guild & Tugba Basaran, *GCM: The Legal Status of the UN's Global Compact for Safe, Orderly and Regular Migration in International Law and UK Law*, REFUGEE L. INITIATIVE BLOG ON REFUGEE L. & FORCED MIGRATION, SCH. ADVANCED STUD., UNIV. OF LONDON (Jan. 31, 2019),

commit"**333** throughout the GCM. When a state politically commits to a course of action within an international cooperative framework, it signifies the intention to respect the commitments and actionable objectives created by that framework. By all indications, whether states intend it or not, the GCM can be treated as soft law. Soft law, as we know it, plays a key part in the transnational lawmaking process**334** although, as a social phenomenon, it transcends the gamut of the "classical and familiar legal categories by which scholars usually describe and explain both the creation and the legal authority of international norms."**335** It can have direct, qualifying, interpretative, and political effects.**336** Generally, when the obligations created by international soft law are implemented nationally, soft law, like the GCM, can actually play hardball. Such can be used to counter, confirm, affirm, or reaffirm the existence and/or validity of existing hard laws**337** as well as existing soft laws.**338** Whether binding or otherwise, the most significant questions to determine are: (1) What would be the long-term impact of the GCM? And, (2) how can it be implemented nationally and to what extent can it influence national migration policies?

Even though the GCM lacks a well-defined legal status, its norms, contents, and objectives can actually be imported by national authorities for lesson-drawing to improve the quality of policymaking at the national level—what experts call "policy transfer." Policy transfer according to Dolowitz and Marsh is the "process in which knowledge about policies, administrative arrangements, institutions and ideas in one political setting (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political setting."**339** It is about "lesson-drawing" as Rose puts it,**340** but also about learning, knowledge, and adaptation

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https://rli.blogs.sas.ac.uk/2019/01/31/gcm-commentary-the-legal-status/ [https://perma. cc/Q5RT-YPXW] (archived Feb. 3, 2021).

333. *See* Global Compact for Safe, Orderly and Regular Migration, *supra* note 26, ¶¶ 17–39.

334. Nagihan Cihangir, *The Role of Soft Law and the Interplay Between Soft Law and Hard Law in the Context of International Human Rights*, 8 L. & JUST. REV. 201, 202 (2017).

335. Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 420 (1991).

336. Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law,"* 30 MCGILL L.J. 37, 52 (1984).

337. *See* Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 788 (2010).

338. *See id.*

339. David P. Dolowitz & David Marsh, *Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making*, 13 GOVERNANCE: INT'L J. POL'Y & ADMIN. 5, 5 (2000). Please note that scholars like Richard Ross, Dolowitz and Marsh discussed the concept of policy transfer and/or lesson-drawing in broader terms than I can include here.

340. Richard Rose, *What is Lesson-Drawing?*, 11 J. PUB. POL'Y 3, 3 (1991).

of evidence[341] at all levels—national, regional, and international. In the United Kingdom, policy transfer/lesson-drawing from international frameworks to enhance national policymaking is not new. The Cabinet office consistently advises the UK government to undertake "outward-looking policy-making that learns lessons from other countries and takes account of developments in the European and international spheres."[342]

The fact that the GCM is negotiated at the UN level (a unifying globalising force) enhances the "opportunity structures"[343] for such transfer/lesson-drawing to occur. However, looking at the form, content, language, and negotiating history of the GCM, and given that it is built on global partnerships and cooperation between states, one wonders how states can meaningfully implement its objectives domestically without adopting national policy frameworks that are transnationally effective. The central argument put forward in this Article is that the UK migration policies in relation to missing migrants must become more transnationally effective to facilitate the implementation of Objective 8 and other relevant provisions of the GCM nationally. The rationale, as noted earlier, for promoting such a transnationally relevant national policy, stems from the extraterritorial nature of human rights obligations of states, the transnational nature of modern migration, and the externalisation of border controls and migration policies. However, despite the provisions of the GCM, states, as highlighted earlier, sometimes argue that until migrants reach their territories, they do not have any legal obligations towards them or their families, and lending a helping hand in such a situation is at most a matter of morality for which states are not necessarily legally bound or responsible. So, are states' obligations towards missing migrants under the GCM and other international legal norms moral but not legal?

B. *Are States' Obligations Towards Missing Migrants Under the GCM and Other International Legal Norms Moral but Not Legal?*

The question whether the obligations of states towards migrants under the GCM and other international legal norms are moral but not legal should be answered in the negative. It is argued that, although several aspects of the problem of missing migrants concerns moral obligations of states, those obligations—especially the duty to save lives of migrants at sea and borders—are also legal. The moral-legal

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341. Timothy Legrand, *Overseas and Over Here: Policy Transfer and Evidence-Based Policy-Making*, 33 POL'Y STUD. 329, 341–42 (2012).

342. *See* STRATEGIC POLICY MAKING TEAM, BRITISH CABINET OFFICE, PROFESSIONAL POLICY MAKING FOR THE TWENTY FIRST CENTURY ¶ 5.1 (1991).

343. Legrand, *supra* note 341, at 335.

character of the obligations has been acknowledged by the EU in its 2015 statement on developments in the Mediterranean.[344] One expert argued that "the fact that people attempting to reach the European Union are paying with their lives in the thousands is a moral scandal."[345] International human rights law that creates and imposes the legal obligations on states to protect migrants is often consistently claimed to be an international legal instrument that grounds the most basic considerations about international morality.[346] Thus, international human rights law, in addition to being the primary source of states' legal obligations towards migrants, also constitutes a source of moral obligations of states towards migrants in need of safety and protection. In addition, the relevant obligations of states towards missing migrants are not only a creation of international human rights instruments, refugee laws, and sea treaties (which implies their legal character and enforceability), they are also a result of different political declarations on missing migrants such as those contained in the Compact (which lends credence to its moral character). Legal obligation seeks to attribute responsibility to states based on existing laws—mainly, international law of responsibility and international human rights law. Both laws constitute the main sources of law with the greatest relevance when it comes to the obligation of states to redress issues around international and forced migration.[347]

The foundational value upon which legal responsibility is based is that, the law having created a system of reasonable expectations in society, there is a need for the legal ordering of society based on those expectations. Where those expectations such as the state duty to protect migrant lives are not met, it could amount to a moral failure. This clearly suggests that moral obligations of states are always engraved in the law creating the obligations. Generally, moral obligation implies the blameworthiness and/or praiseworthiness that we may attribute to actors (states) for their actions or conducts[348] in relation to any matter at all, including the issue of missing migrants.

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344. *See European Commission Statement on Developments in the Mediterranean*, EUR. COMM'N (Apr. 19, 2015), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_15_4800 [https://perma.cc/R84E-UW98] (archived Feb. 3, 2021); *see also Bomberger: Accounting for the Missing Is Our Moral but Also a Legal Obligation*, FENA NEWS (Aug. 30, 2020), https://www.fena.news/international/bomberger-accounting-for-the-missing-is-our-moral-but-also-a-legal-obligation/ [https://perma.cc/3SBA-DP4R] (archived Feb. 3, 2021).

345. Katharina Senge, *Who Bears Responsibility? Models and Perspectives of European Refugee Policy*, *in* MIGRATION AND REFUGEES 10, 12 (Gerhard Wahlers ed., 2015).

346. *See* Haule, *supra* note 93, at 388–92.

347. MEGAN BRADLEY, REFUGEE REPATRIATION: JUSTICE, RESPONSIBILITY AND REDRESS 36 (2013).

348. Alexa Zellentin, *Outcome Responsibility: Fallible Beings Acting in an Uncertain World* 6 (UCD Sch. of Pol. & Int'l Rels., Working Paper No. 7, 2018).

The moral significance of the risks that state actions and restrictive migration policies may impose on migrants gives rise to legal obligations for which the states are bound. Thus, for moral responsibility, our focus is on the moral character of states, and it involves the opinions and judgments in the form of "appraisal or censure we may form regarding the behaviour of others in matters of morality."[349] It is argued that states fulfilling their moral obligations to account for the missing not only aids and enhances the development of international law generally, but also specifically strengthens the international law of human rights and dignity. This argument can be grounded in the current international law of state responsibility and general principles of international law.

However, the point must not be missed that part of the reason why states sometimes fail to accept their legal obligation to protect migrants is the apparent lack of clarity as to the territorial scope of the states' obligations towards migrants. This is especially in relation to cases where they are still in transit at sea and pre-border zones and have yet to reach the borders or territory of states of transit and destination.[350] The general principle of law is that jurisdiction of states is primarily territorial, and viewed from this perspective, states do not become responsible to take on migrants until they reach their territory. Consequently, if migrants die or go missing in transit at sea and borders before they reach state territories, that is, outside the frontiers of states, then states are not responsible to search for, recover, and bury their bodies or repatriate their bodies to their families in the origin states. But scholars like Nagore Casas have raised questions regarding the plausibility of this argument against the background of the significant increase in extraterritorial activities of states targeted at preventing migrants from reaching their territories so as not to invoke their territorial jurisdiction and obligations over and towards such migrants.[351]

The argument that states have no obligations to migrants until they reach state frontiers may be attributed to three key factors which indicate a normative gap in the international law of state responsibility in relation to missing migrants. First, the high seas where the migrants are drowning represents a complex and highly fragmented space of migration where refugee, human rights, and maritime law impose various obligations on states, including the duty to render

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349. Nimrod Z. Kovner, Migration in a Warming World: On the Responsibility and Obligations of States Towards Climate Change Immigrants 53 (Apr. 2017) (unpublished Ph.D. Thesis, London School of Economics and Political Science) (on file with the London School of Economics and Political Science).

350. María-Teresa Gil-Bazo, *The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited*, 18 INT'L J. REFUGEE L. 571, 571–72 (2006).

351. Casas, *supra* note 100, at 162–63.

assistance to migrants and others facing perils at sea, yet, the "precise division and content of these sovereign responsibilities remain contested and subject to varying interpretations."[352] The international law of the sea it would appear does not explicitly create a reciprocal relationship between migrants facing distress at sea and state flagged ships, not least since the circumstances under which migrants' boats get into distress at sea are not those for which the sea treaties were originally negotiated.

As a result, the drowning irregular boat migrants find themselves in an increasingly hostile sea space of migration where law, geo-politics, and sovereign power clash and where multiple states are keen to deconstruct, shift, and trade off obligations in relation to seaborne migrants. The legal difficulty caused by a lack of a reciprocal relationship between the migrants and state-flagged ships leaves room for and contributes to the denial and/or failure of states to acknowledge their responsibility. When responsibility denial happens, Cuttitta argues that states attempt either to shift the responsibility for migrant deaths and disappearances to other agents, such as people smugglers and human traffickers, or blame the migrants themselves for their own deaths, having attempted the dangerous sea and border crossings despite warnings.[353] The shifting of responsibility may allow states to delocalise migrant deaths, whilst also disconnecting any linkage of state migration and border policies to migrant deaths. The second is the lack of clarity regarding the essential elements of applicable legal frameworks to be applied, the status of journeying migrants under international law, and under what circumstances the obligations of states towards such migrants can be engaged.[354] And the third issue is the absence of a clear and explicit rule on how obligations should be properly distributed, shared, or allocated to multiple states in practice in the context of missing migrants. These limitations in the law notwithstanding, it is contended that, under international law of human rights and dignity, states have a general obligation to protect migrant lives at risk whether at sea, borders, or other migration spaces.

VII. CONCLUSION

This Article has stressed that regional and national migration policies require a degree of global governance and, therefore, when

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352. Thomas Gammeltoft-Hansen & Tanja E. Aalberts, *Sovereignty at Sea: The Law and Politics of Saving Lives in the Mare Liberum* 6 (Danish Inst. Int'l Stud., Working Paper No. 18, 2010).

353. Paolo Cuttitta, *Preface: The Increasing Focus on Border Deaths*, *in* BORDER DEATHS: CAUSES, DYNAMICS AND CONSEQUENCES OF MIGRATION-RELATED MORTALITY, *supra* note 61, at 9, 11–12.

354. Casas, *supra* note 100, at 162.

issues about missing migrants are raised, the first question should not be "so then, in whose territory did the migrants die or disappear." Rather, it should be addressed from a transnational human rights perspective. It is concluded that this should be the way forward for the United Kingdom and other frontline EU states as it can only take a transnationally effective policy to reach the international community's goal of preventing migrant deaths and migrants going missing at sea and EU external borders. The United Kingdom and EU policy initiatives should, for example, specifically address issues around investigation, search and rescue of migrants, identification, management and repatriation of migrant bodies, and family outreach.

The United Kingdom's current policies are insufficient to address the issue of missing migrants, but by adopting a transnationally effective national migration policy that is international law and GCM compliant, the United Kingdom could shape international legal discourses on migration, standards, and policy. The country can lead by example. As a permanent member of the UNSC (a position of significant political influence on the world stage), it can actively adopt a transnational policy stance geared towards optimising compatibility, setting important agendas for the future whilst catering effectively to those that already have reached its shores. This might be contrary to current policies that are more interested in pushing migrants away and discouraging them from undertaking journeys, but an approach is needed that will take international legal provisions seriously through policies and the resultant practices. With measurable national targets to achieve the GCM's Objectives, it has been suggested that the GCM could become a vitally important international legal instrument in the future.[355] The key purpose of the GCM is realisation of *safe, orderly, and regular* migration in the world and, as such, transnationally effective national migration policies must be designed with these broader objectives in mind. Therefore, revised policies that are transnationally effective will ensure that the number of migrants trapped in death zones abroad is reduced and investigate, if not prevent, tragic deaths. Not least since migrants are a key contributor to the UK economy,[356] thus their well-being is in the state's interest.

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355. *See* Kevin Appleby, *Global Compact on Migration: Issues at Play*, *in* INTERNATIONAL MIGRATION POLICY REPORT: PERSPECTIVES ON THE CONTENT AND IMPLEMENTATION OF THE GLOBAL COMPACT FOR SAFE, ORDERLY, AND REGULAR MIGRATION 110, 114 (Kevin Appleby & Donald Kerwin eds., 2018).

356. Gareth Mulvey, *When Policy Creates Politics: The Problematizing of Immigration and the Consequences for Refugee Integration in the UK*, 23 J. REFUGEE STUD. 437, 447 (2018) (quoting Charles Clarke's statement contained in the Home Office Press Release of 7 February 2005).