

OBJECTIVE 8 AT THE CROSSROADS BETWEEN HUMAN RIGHTS AND NATIONAL SOVEREIGNTY

*Victoria Priori**

ABSTRACT

High numbers of people still go missing or die during migration journeys. In light of this, the essay discusses how Objective 8 of the 2018 Global Compact for Migration dealing with missing and dead migrants may contribute to the protection of migrants and the establishment of more adequate search and rescue operations. The work demonstrates how Objective 8, despite being carefully drafted to uphold states' prerogatives and sovereignty, represents an important restatement of the right to life and its application in the context of irregular migration. Ultimately, it is clear that Objective 8 and the Compact represent milestones at the international level, setting minimum standards able to shape respectively, the fate of missing or deceased migrants, their families and international migration law.

I. Introduction

'Migrants do not die by accident but by design'.² These very basic yet powerful words perfectly grasp the reality in which the Global Compact for Safe, Orderly and Regular Migration (GCM) shall be understood and analysed. The Compact adopted in 2018 is the result of an effort started years before. Historically, despite being more general and less comprehensive, the Cairo Conference of 1994,³ the Berne Initiative launched in 2001 as the first consultative process for inter-state cooperation⁴ and the High-Level Dialogue on Migration and Development of 2013⁵ represented attempts to deal with migration at the international level. Furthermore, the GCM refers back to the UN agenda and more specifically to Goal 10.7 of the Sustainable Agenda 2030.⁶ It was in 2016, with the world leaders explicitly committing to the protection of human rights for

* *PhD Candidate in International Law at the Graduate Institute of Geneva (IHEID).*

² S. Bolton and C. Jarvis, 'GCM Commentary: Objective 8: Save Lives and Establish Coordinated International Efforts on Missing Migrants', at: <https://rli.blogs.sas.ac.uk/2018/10/18/gcm-commentary-objective-8/> (accessed 15th November 2020).

³ UN General Assembly, Programme of Action of the International Conference on Population and Development, A/CONF.171/13, 1994.

⁴ The Berne Initiative, 'International Agenda for Migration Management', at: <https://publications.iom.int/system/files/pdf/iamm.pdf> (accessed 21st november 2020).

⁵ United Nations, Making Migration Work: An Eight Point Agenda for Action, 2013. Point 1 is about the human rights of migrants and point 8 is about enhancing cooperation.

⁶ UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015.

all migrants, regardless of their status that the negotiation process for the GCM started. The objective was to save lives.⁷ Yet, despite two years passed since the GCM's adoption, a total of 3891 migrants died or went missing in 2020.⁸ These estimates provide a clear snapshot of the global situation but should be taken cautiously, as they are not compiled on official estimates and data. Moreover, 'for the most part the names of the missing and dead are unknown; their families have not been traced: and where bodies have been found, they are too often buried in unnamed graves'.⁹ Similarly, the families – who are also victims of such humanitarian disasters – are invisible, and the impacts on them not acknowledged.¹⁰

In this context, the GCM symbolises a sign of political commitment but also the first all-embracing world pact on migration.¹¹ Besides its non-binding nature, legal effects may still arise and the impact of such multilateral document at the international level should not be disregarded. Precisely for this reason, this work discusses the role of the GCM in relation to missing and dead migrants. Objective 8 of the Compact deals specifically with this and hence the paper focuses on this commitment. The ultimate objective of this work is to strengthen our understanding of Objective 8 and the role that it could potentially have *vis-à-vis* the protection of migrants and the establishment of adequate search and rescue procedures. With this as the *fil rouge* of the work, the first part of the paper discusses the drafting history of Objective 8 and its related actions to address the reasons behind the adoption of the final wording compared to other versions submitted during negotiations. Then, the work proceeds analysing Objective 8 in relation to the well-established and universally accepted right to life. In doing so, the analysis carefully examines case-law and documents by human rights' monitoring bodies. Thirdly, the work highlights the importance of having negotiated such a commitment at the international level to remedy the fact that migrants are still going missing and dying. Subsequently, the paper presents some limitations of Objective 8. After having discussed Objective 8 in more general terms, the paper also deals with the specific example of confrontations in the high seas and obligations arising for states in relation to the right to life, as in this case, international human rights law, international migration law and maritime law all intertwine, providing a complex web of obligations. Lastly, some best practices are put forward together with an overall assessment of this Objective and more in general of the GCM.

II. The Drafting History of Objective 8

⁷ UN General Assembly, New York Declaration adopted on 19 September 2016, A/RES/71/1, 3 October 2016.

⁸ IOM, 'Missing Migrants: Tracking Deaths along Migratory Routes, at: <https://missingmigrants.iom.int> (accessed 21st November 2020).

⁹ UN General Assembly, Unlawful death of refugees and migrants Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, A/RES/72/335, 15 August 2017, at 65.

¹⁰ S. Robins, *Analysis of Best Practices on the Identification of Missing Migrants - Implications for the Central Mediterranean*, Central Mediterranean Route Thematic Report Series 2018.

¹¹ F. Perocco, 'The Potential and Limitations of the Global Compact for Safe, Orderly and Regular Migration: A Comment', *Quarterly Journal on Rehabilitation of Torture Victims and Prevention of Torture* 2019 -29, pp. 127 132.

Having briefly sketched out the structure of the work, this section deals with the drafting history of the GCM and more specifically Objective 8. During the Marrakesh conference in December 2018, Paragraph 24 introduced Objective 8 of the GCM with the following wording:

‘We commit to cooperate internationally to save lives and prevent migrant deaths and injuries through individual or joint search and rescue operations, standardised collection and exchange of relevant information, assuming collective responsibility to preserve the lives of all migrants, in accordance with international law. We further commit to identify those who have died or gone missing, and to facilitate communication with affected families’¹²

Subsequently, Paragraph 24 sets forth six actions listed in order to fulfil the commitment. Briefly, the actions refer to search and rescue agreements and humanitarian assistance (a), review of migration-related policies (b), communication between migrants and their families (c), creation of contact points and coordination challenges (d), data collection and systematisation (e) and deceased migrants’ remains collection and repatriation (f).¹³ Importantly, with Objective 8, for the first time, states recognised the risks people face during migration journeys and the related possibility of going missing or dying.¹⁴ Interestingly, the wording of this commitment has been at the centre of the negotiation process, with many different versions discussed and ultimately disregarded.

First, it is crucial to outline how the paragraph reports that states ‘commit to cooperate internationally to save lives’,¹⁵ while in the Zero Draft of February 2018 the commitment simply mentioned ‘to save lives’.¹⁶ Bolton and Jarvis when discussing Objective 8 claim that ‘whilst cooperation internationally is of course laudable and indeed necessary [...], the final text language puts that obligation at one remove, arguably distancing the individual states onus to prevent deaths and save lives’.¹⁷

Additionally, the Zero Draft, when introducing the actions for this commitment, provided that ‘in this regard the following actions are instrumental’,¹⁸ whereas the Final Draft simply mentions ‘to realise this commitment, we will draw from the following actions’.¹⁹ This change of wording has very relevant consequences *vis-à-vis* the implementation of the commitment. In fact, while in the Zero Draft, by claiming that all the listed actions were instrumental, these appeared as a bundle to be taken together, this is no longer the case in the Final Draft. The final words adopted by states appear to favour an *à la carte* approach, according to which states have the power to implement

¹² 2018, Global Compact for Safe, Orderly and Regular Migration.

¹³ *Ibid.*

¹⁴ Bolton and Jarvis, *supra* note 2. For the first time, the consequences of these dangerous migration journeys have been put forward.

¹⁵ Global Compact for Safe, Orderly and Regular Migration, *supra* note 12.

¹⁶ 2018, Global Compact for Safe, Orderly and Regular Migration Zero Draft. Specifically, this is provided for in para. 22 of the Draft.

¹⁷ Bolton and Jarvis, *supra* note 2.

¹⁸ Global Compact for Safe, Orderly and Regular Migration Zero Draft, *supra* note 16.

¹⁹ Global Compact for Safe, Orderly and Regular Migration, *supra* note 12.

some actions rather than others.²⁰ Moreover, the final wording also downgrades the importance of the listed actions.

Having commented upon Paragraph 24 *per se* and its wording, it is now worth investigating some of the listed actions. As a matter of fact, action (a) in the Final Draft, after mentioning search and rescue operations and migrants' right to life, provides that states must 'ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful'.²¹ Importantly, states have been careful in nuancing the words used, as in the Zero Draft a much stronger sentence claimed that 'the provision of humanitarian assistance for migrants is never criminalised'.²² Notably, the introduction of the word exclusively in the Final Draft is problematic. Are there precise criteria to distinguish between humanitarian and non-humanitarian assistance in an emergency context as for instance a search and rescue operation? Or further, can we even speak of non-humanitarian assistance in these specific situations?²³ This unclear wording has very concrete and negative implications when it comes to search and rescue vessels for instance. States have already been detaining vessels as the Sea Watch 4, holding them on apparent irregularities and technical deficiencies.²⁴ Clearly, this final formulation adopted creates confusion in regard to what accounts for humanitarian assistance in this setting, without providing any useful and very much needed guidance nor standards to navigate the concept.

On a positive note however, the final provision adopted recognises how it is not only the criminalisation of humanitarian assistance that impairs an effective response in the context of search and rescue operations. Therefore, 'the deliberate and disproportionate use of civil law and legal obstacles, both domestic and supra-national to render humanitarian assistance unlawful for non-compliance must also be prevented'.²⁵

In relation to paragraph 24(a), it is fundamental to point out another remarkable achievement of the negotiation process. Indeed, while the Zero Draft refers to procedures that 'refrain from push

²⁰ Bolton and Jarvis, *supra* note 2. The final wording adopted in Marrakesh seems to favour some pick and mix approach, according to which states can choose which elements of Objective 8 to focus upon rather than seeing all the actions as a minimum prerequisite of good practice.

²¹ Global Compact for Safe, Orderly and Regular Migration, *supra* note 12. This is reported in paragraph 24(a).

²² Global Compact for Safe, Orderly and Regular Migration Zero Draft, *supra* note 16. The weakening of the protection for humanitarian actors is also mentioned by E. Guild, T. Basaran and K. Allinson, 'From Zero to Hero? An Analysis of the Human Rights Protections within the Global Compact for Safe, Orderly and Regular Migration (GCM)', *International Migration* 2019-57, pp. 43-59. They specifically mention this at page 50 while discussing how the protection of civil and humanitarian actors is unevenly dispelled throughout the GCM. For instance, despite the weak wording this protection is mentioned in Objective 8 but not in Objective 9 or 11.

²³ Bolton and Jarvis, *supra* note 2. These are points that the authors raise. Indeed, what accounts for non-humanitarian assistance in an immediate rescue operation or in a less urgent setting that is nonetheless necessary for migrants' safety and well-being is unclear. They conclude that the addition of the word exclusively is very confusing, blurring the lines between humanitarian and non, without providing any useful criteria.

²⁴ Medecins sans Frontieres, Five Things to Know about the Mediterranean Search and Rescue Crisis, at: <https://www.msf.org/five-things-know-about-search-and-rescue-crisis> (accessed 13th April 2021).

²⁵ *Ibid.*

backs at sea and land borders’,²⁶ the final version explicitly mentions the prohibition of collective expulsion and calls for individual assessment of situations. Whether this reference to collective expulsion and individual assessment, as opposed to the more general term push backs aimed at enhancing legal clarity is unclear.²⁷ Nonetheless, this addition brings consistency between the GCM and the interpretation given by the Grand Chamber of the European Court of Human Rights (ECtHR) in one of the very few cases dealing with border deaths decided up to this moment – *Hirsi Jamaa and Others v. Italy*.²⁸

Additionally, action 24(f) is a significant addition states made during the negotiation process as it goes one step beyond the mere collection of forensic data and clearly acknowledges the importance of repatriation to the country of origin always respecting the family of the deceased migrants and its wishes.

Notwithstanding the importance of Objective 8 in mentioning the deceased and missing migrants, referring to their families and the cruciality of collecting data, it is sad that the commitment refers to ‘corpses’. Apart from being inconsistent with the language used in other provisions of the GCM, this word is very much insensitive to the families of the deceased migrants²⁹ and contributes to distance states from the human dimension of the issue, treating migrants as mere numbers. The reference to corpses is made in paragraph 24(e) which was not inserted in the Zero Draft.

Overall, Objective 8 of the GCM has a double role, a preventative and a remedial one. The preventative goal aims at saving lives through, among other measures, the creation of alternative journeys to reduce life-threatening travel, as well as the establishment of tracking facilities. The remedial role instead calls states to implement strategies related to the missing and deceased migrants, as search and rescue operations but also collection of data.³⁰

III. Objective 8 – a Restatement of the Right to Life

Notably, Objective 8 puts the lives of migrants at the centre. However, the right to life is well-established in international law and thus this section analyses how the Objective appears as an important restatement of such right. For instance, a relevant body of legal rules – both of customary

²⁶ Global Compact for Safe, Orderly and Regular Migration Zero Draft, *supra* note 16.

²⁷ Bolton and Jarvis, *supra* note 2. The authors recognise that the motivations behind the adoption of a more precise wording are unknown but argue that the positive downside is the coherence created by the adoption of this provision with the ECtHR case law in relation to collective expulsion.

²⁸ *Hirsi Jamaa and Others v. Italy*, Decision of 23 February 2012, [2012] ECHR. Relevant for the discussion on collective expulsion and the right to an individual assessment are paras. 177-178-194 and pp. 69 and 77.

²⁹ Bolton and Jarvis, *supra* note 2.

³⁰ F. Laczko, J. Black and A. Singleton, *Fatal Journeys Volume 4 Missing Migrant Children*, IOM’s Global Migration Data Analysis Centre 2019, pp. 73-85. The authors provide an interesting analysis of the remedial and preventative goals of Objective 8 while putting forward many measures that states can implement to fulfil these goals. Given the subject matter of the report, the authors are very focused on children, but nonetheless their analysis of the Objective can be transposed to a more general discourse, valid for all migrants.

and treaty nature – deals with the deceased and missing during armed conflicts.³¹ Notwithstanding the little attention devoted to the treatment of individuals dying or going missing for causes other than an armed conflict, these rules of international humanitarian law (IHL) can be transposed and applied also during peace times, as they are rooted in fundamental human values not limited to notions of reciprocity among parties to a conflict.³² In fact, the values underscoring the treatment of the dead in IHL, *i.e.* human dignity, do not derive from this concept of reciprocity among parties, but are instead of universal reach and thus some of the principles applied during armed conflicts can be easily applied to human rights law (IHRL). This is an extremely important consideration as the rights of those who die or go missing are not at the heart of IHLR. Indeed, ‘there is an assumption that human rights end with death – [and moreover] where legal rules addressing the treatment of the dead or the missing exist, they do not directly apply to the particular context of irregular migration and border deaths’.³³

However, despite the lack of human rights norms specifically addressing those gone missing or deceased in the context of migration, it is wrong to assume that IHRL has no role to play. Importantly, the idea that the body of the dead must be treated with respect and dignity ‘existed as a fundamental human value long before there were any attempts to identify and codify international law’.³⁴ Human dignity and the related right to life are universal and non-derogable rights that nowadays lay at the centre of human rights law.³⁵ As mentioned by the Special Rapporteur on extrajudicial, summary or arbitrary executions Agnes Callamard, the right to life is a *jus cogens* norm, well-established both at the treaty and customary level and that applies to everyone at all time and in all circumstances.³⁶

³¹ The Last Rights Project, ‘The Dead, the Missing and the Bereaved at Europe’s International Borders - Proposal for a Statement of the International Legal Obligations of States’, at: https://www.ohchr.org/Documents/Issues/Migration/36_42/TheLastRightsProject.pdf (accessed 10th November 2020).

³² The Last Rights Project, *supra* note 31, at p. 2. For example, article 33 of Additional Protocol I deals with the collection of information on individuals gone missing once the active hostilities have ceased.

³³ C. Jarvis and S. Bolton, ‘GCM Indicators: Objective 8: Save Lives and Establish Coordinated International Efforts on Missing Migrants’, at: <https://rli.blogs.sas.ac.uk/2019/06/17/gcm-indicators-objective-8-save-lives-and-establish-coordinated-international-efforts-on-missing-migrants/> (accessed 24th October 2020). See also S. Grant, ‘Dead and Missing Migrants: The Obligations of European States under International Human Rights Law’, *IHRL Briefing* 2016. He upholds that human rights instruments do not mention any specific duty in relation to the dead and the management of bodies and one may even question whether the notion of human dignity continues after death.

³⁴ The Last Rights Project, *supra* note 31, at p. 2. Some interesting examples are drawn from ancient literature. For example, Homer condemns Achilles’ disrespect for the bodies of those he just killed. Similarly, Sophocles also mentions the importance of an adequate burial and how this principle cannot be overridden by the government.

³⁵ The right to life is contained in every human rights’ instrument. For instance, article 6 of the 1966, International Covenant for Civil and Political Rights (ICCPR) but also the 1948, Universal Declaration of Human Rights (UDHR) mentions the right to life. Regional instruments also contain provisions in relation to the right to life and the respect of human dignity as it can be seen from article 2 of the 1950, European Convention on Human Rights (ECHR).

³⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9 at para 14. The restatement of the right to life as a *jus cogens* norm (at least in its core aspects) is mentioned by C. Heyns and T. Probert, ‘Securing the Right to Life: A Cornerstone of the Human Rights System’, at:

Moreover, precisely in the name of human dignity and the right to life, the jurisprudence of international tribunals and courts provides some detailed principles and standards.³⁷ Crucial on this matter has been the ECtHR and its interpretation of Article 2 of the European Convention on Human Rights (ECHR). The Court established that when an individual goes missing in life-threatening situations, a procedural obligation to provide an adequate and timely investigation exists³⁸. The UN General Assembly maintains that ‘failure to investigate is in and of itself a violation of the right to life’.³⁹ Importantly, an effective investigation entails ‘a requirement of promptness and reasonable expedition’.⁴⁰ Similar interpretations were also put forward by the Inter-American Court of Human Rights (IACtHR) in the case of *La Cantuta v. Peru* of 2006.⁴¹ The precise type of investigation will depend on the specific circumstances of the case at hand, but the state cannot wait for the family of the victim to lodge a complaint.⁴² States shall also be responsible for securing the appropriate evidence, being it forensic data, testimonies and whenever possible an autopsy to establish the cause of death.⁴³

Similarly, the families of the victim must always be involved in the investigation and should have information about the ‘circumstances of death and location of the remains of their family members’.⁴⁴ From the jurisprudence of the ECtHR mostly, The Last Rights Project in 2017 proposed a set of twelve obligations for states when dealing with missing or dead individuals in the context of migration. This project – managed by the UK-based charity Methoria – promotes the rights of all missing and deceased migrants, while calling on states to abide by IHRL norms.⁴⁵ The twelve obligations contained in the report are all derived from the right to life⁴⁶ and range from determining the cause of death and preserving any personal effects of the victim, to notify family members, to search for all missing individuals. Moreover, they shall be complemented by national legislation. In fact, most legal systems have some national provisions dealing with the treatment of bodies, as for example the prohibition of mutilation.⁴⁷ In addition, the African Commission on

<https://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/> (accessed 15th april 2021).

³⁷ The Last Rights Project, *supra* note 31.

³⁸ *Varnava and Others v. Turkey*, Decision of 18 September 2009, [2009] ECHR, at 136 and *Osmanoglu v. Turkey*, Decision of 24 January 2008, [2008] ECHR, at 87.

³⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9 para. 18.

⁴⁰ *Case of Rantsev v. Cyprus and Russia*, Decision of 7 January 2010, [2010] ECHR, at 232. This has been restated in the case of *McCann and Others v. The United Kingdom*, Decision of 27 september 1995, [1995] ECHR, at 161 and the case of *Montero-Aranguren et Al (Detention Centre of Catia) v. Venezuela*, Decision of 5 july 2006, [2006] ECHR, at 66. See also *Cyprus v. Turkey*, Decision of 12 may 2014, [2014] ECHR at 220 and *Mahmut v. Turkey*, Decision of 28 march 2000, [2000] ECHR, at 120.

⁴¹ *La Cantuta v. Peru*, Decision of 29 November 2006, [2006] IACHR, at 101(c).

⁴² *Case of Kelly and Others v. The United Kingdom*, Decision of 4 May 2001, [2001] ECHR. States shall initiate a proper investigation, *ex officio* – as soon as the matter has been brought to the authorities’ attention.

⁴³ *Idem*, at para. 96.

⁴⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9.

⁴⁵ Methoria, Last Rights, at: <http://lastrights.net> (accessed 12th april 2021).

⁴⁶ The Last Rights Project, *supra* note 31. Check the document to see precisely all the twelve international legal obligations listed.

⁴⁷ *Ibid*.

Human and Peoples' Rights⁴⁸ and the Human Rights Committee⁴⁹ also restated the relevance of carrying out impartial and transparent investigations and granting some reparation to the victim's family.

Furthermore, the right to life entails an obligation for states to protect life through appropriate and reasonable precautionary measures.⁵⁰ States fail to uphold such an obligation if they knew of an immediate risk or threat to life and failed to intervene.⁵¹ Certainly, these criteria can apply in the context of irregular migration. States, most of the time are aware of the risks migrants face during their journeys and they nonetheless fail to take action to mitigate these risks, sometimes even accentuating them by imposing stringent migration control policies.⁵²

Thus, tribunals, courts but also human rights bodies have widely interpreted the right to life as to include among others, an obligation to investigate, to provide a dignified treatment to the bodies and to search for missing persons. Crucially though, none of these cases has been dealing with dead or missing persons in the context of irregular migration. Likewise, the ECtHR jurisprudence deals with situations in which the state or its authorities are directly responsible for the death. There is a lack of case law dealing specifically with border deaths and migration. Thus, principles, international standards and interpretations of the right to life must be applied by analogy from cases dealing with comparable circumstances.⁵³ As a consequence, 'while these cases establish a number of important principles, more work is needed to establish their application in situations of migrant deaths',⁵⁴ where the state is only indirectly responsible as a result of its enforcement policies and border controls.⁵⁵

Fundamentally, Objective 8 must be welcomed as an important achievement in this direction. The commitment explicitly references the right to life and the importance of human dignity, demonstrating how international human rights law is the appropriate framework within which to interpret the objective. The GCM and in this specific case, Objective 8 play an important role in the systematisation and clarification of states' obligations under human rights law applicable in the context of migration.⁵⁶ Objective 8 represents an important 'bridge' explicitly calling for the application of the right to life as interpreted under human rights law to the context of migration.

⁴⁸ African Commission on Human and Peoples' Rights, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), 2015. This is mentioned in para. 7.

⁴⁹ Human Rights Committee, General Comment No. 31 [80], 6 May 2004. Para. 18 is interesting.

⁵⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9. Measures shall be implemented to protect life and prevent excessive violence by the state, its agents but also private non-state actors.

⁵¹ *Case of Osman v. The United Kingdom*, Decision of 28 October 1998, [1998] ECHR at 116.

⁵² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9. This is specifically addressed in para 10.

⁵³ Grant, *supra* note 33.

⁵⁴ *Idem*, at p. 13. This is mentioned by Robins *supra* note 10 and in fact it is of paramount importance to establish what legal framework, especially in relation to human rights law, applies in the context of migration.

⁵⁵ Grant *supra* note 33. The death of migrants during their journey is a foreseeable consequence of the tighter border controls implemented by states.

⁵⁶ Guild, Basaran and Allinson, *supra* note 22.

Obviously, it represents only a first step and additional efforts of clarification and systematisation can only be welcomed.

IV. The Importance of Objective 8

As the role of Objective 8 in bridging international human rights' interpretations of the right to life and the particular context of irregular migration has been established, this section stresses the importance of this commitment. The cruciality of Objective 8 has to be understood in relation to the policies states have been adopting nationally, 'based on deterrence, militarisation and extraterritoriality, which implicitly or explicitly may tolerate the risk of migrants deaths as part of an effective control of entry'.⁵⁷ Oftentimes, these measures involve a form of externalisation, by which border control does no longer take place at the physical borders of countries⁵⁸ putting the lives of migrants even at greater risk.⁵⁹

Therefore, in light of the current scenario, Objective 8, by restating the importance of the *jus cogens* norm of the right to life and in action (b) explicitly calling for the review of migration-related policies to ensure that the risk of migrants going missing is addressed and their human rights respected,⁶⁰ represents an important advancement.⁶¹ As a matter of fact, this Objective seeks to address the 'impossibility to protect the right to life while simultaneously attempting to deter entry by endangering life'.⁶² Objective 8 correctly brings this contradiction to the forefront and recognises the need to avoid policies endangering migrants' lives in the name of migration control and national security. Equally, it is crucial that the Objective explicitly mentions the lawfulness of humanitarian assistance. In fact, as states continue to adopt problematic policies at the national level, the provision of assistance by non-governmental organizations (NGOs) and faith-based groups remains a fundamental element to protect the right to life of migrants.⁶³

Critically, the Objective puts attention on victims' families. The impacts of having a missing relative are numerous. First and foremost, 'the close relatives of a missing person live in constant

⁵⁷ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9 at p. 6.

⁵⁸ *Ibid.* The most glaring example mentioned in the report is the pushback on the high seas and on land, which notably endangers even further the lives of migrants. Similarly, deterring people to leave their country in order to avoid the risks and possible death during the journey cannot be understood as 'saving lives' but simply as permitting a more secret death somewhere else.

⁵⁹ *Ibid.*

⁶⁰ C. Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?', *International Journal of Refugee Law* 2018-30, pp. 643 649.

⁶¹ UN General Assembly, *supra* note 7.

⁶² Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9. Para. 45 of the New York Declaration already called states to review their migration policies and their impact on the lives of migrants.

⁶³ K. J. Appleby, 'Implementation of the Global Compact on Safe, Orderly, and Regular Migration: A Whole-of-Society Approach', *Journal on Migration and Human Security* 2020-8, pp. 214 229. Similarly, Chetail upholds that in this regard Objective 8 is crucial as many states have attempted to criminalise humanitarian assistance in their domestic system.

anxiety'.⁶⁴ Importantly, the relatives of a missing person may not be entitled to the support that widows and orphans oftentimes benefit from.⁶⁵ Thus, the uncertainty revolving around the status of a missing person may negatively affect the property rights but also 'guardianship of children, inheritance and the possibility of remarriage'.⁶⁶ Importantly, missing someone in the family can largely impact gender and family roles. Indeed, when interviewed 'women also reported becoming a target of harassment when a husband is missing, as well as seeing their identity challenged since their status as wives or widows is ambiguous'.⁶⁷ Hence, the actions provided in Objective 8, by stressing the importance of collecting data, informing families and establishing adequate procedures for search and rescue operations have an important role to play in relation to the victims' families and their future. Furthermore, as many times families may be reluctant to go and ask for help to their leaders or may lack information and knowledge on how to proceed to look for a missing relative,⁶⁸ they are not correctly represented in the process of burial or identification of the body.⁶⁹ Bringing families and relatives into the picture and making them visible represents a fundamental development brought about by Objective 8 since as a result states may adopt and clarify procedures at the national level, facilitating families' access to information and participation. Despite this progress marked by Objective 8 in acknowledging the importance of families, a more nuanced and gender sensitive approach would have been desirable.

In addition, Objective 8 restates many important principles of international law and confirms their applicability and interpretation in the context of migration. Firstly, the objective clearly upholds the duty to protect family unity and the right to family life.⁷⁰ Secondly, it reaffirms the prohibition of collective expulsion in the context of search and rescue operations. According to Chetail, this principle is contained and endorsed in many international instruments and its restatement in the GCM represents 'a clear-cut confirmation of its customary law nature'.⁷¹ Lastly, soft law as the GCM can play a role in the process of formation or consolidation of customary norms.⁷²

⁶⁴ICRC, 'The Missing ICRC Progress Report', at <https://www.icrc.org/en/doc/resources/documents/publication/p0897.htm> (accessed 16th October 2020) at p. 17. In fact, on the one hand when faced with a missing relative, there is always hope that he or she may not be dead. On the other hand, the confirmation of death, irrespective of how emotionally destabilising puts an end to the uncertainty. As claimed in the Missing Migrants report *supra* note 8 the primary need for families is to have closure, they need to know what happened to their loved ones.

⁶⁵ICRC, *supra* note 64.

⁶⁶*Ibid* at p. 17.

⁶⁷ Robins, *supra* note 10, at p. 16. He argues how families are considered as invisible in the identification process and burial of victims and how this may have many impacts. The situation because of the shift and challenge of traditional gender roles is specifically acute for women.

⁶⁸ ICRC, *supra* note 64.

⁶⁹ IOM, 'Missing Migrants in the Mediterranean: Addressing the Humanitarian Crisis Summary Report', at: <https://www.iom.int/news/missing-migrants-mediterranean-addressing-humanitarian-crisis> (accessed 25th november 2020). In light of this underrepresentation of migrants' families, the impacts on relatives is rarely accounted for.

⁷⁰ V. Chetail, 'The Global Compact for Safe, Orderly and Regular Migration: A Kaleidoscope of International Law', *International Journal of Law in Context* (2020 forthcoming).

⁷¹ *Ibid* at p. 10.

⁷² A. Bufalini, 'The Global Compact for Safe, Orderly and Regular Migration', *QIL Zoom-In* 2019-59, pp. 5 24. Soft law can have – in his words – a catalytic effect, prompting the development of customary international law.

Notwithstanding few delegations as Denmark or the UK – clearly stating that the GCM and the commitments therein do not accrue to the formation of new custom, there is room to argue that both the GCM and in this case Objective 8 may contribute to the consolidation of existing *opinio juris* in the context of migration.⁷³ This idea and role for the GCM was endorsed – even if in very broad terms – by Turkey.⁷⁴

V. The Limits of Objective 8

Despite the fundamental developments discussed in the previous section, Objective 8 and its related commitments were the result of a careful drafting process by states. However, precisely because states meticulously negotiated Objective 8 but more in general the GCM with an eye on upholding their interests and sovereignty, this section discusses some of its major limitations. Whilst, limitations regarding the wording *per se* were already considered, certain important elements are missing or are in need of clarification.

Firstly, the Objective does not mention the international maritime conventions. A reference to international maritime law would have been beneficial,⁷⁵ given that states under this body of law – as discussed in the next session – must uphold certain community interests, *i.e.* the protection of human rights. As it is shown in the next session, these instruments also have a role to play when it comes to search and rescue operations at sea. Thus, the absence of any mention to these international treaties ‘is perhaps a missed opportunity [to] reaffirm all existing legal duties’.⁷⁶ As a matter of fact, Objective 8 could have been a great forum to comprehensively restate and identify rules dealing with search and rescue in a cogent manner.⁷⁷

Furthermore, the six actions listed to fulfil Objective 8 do not prescribe any precise conduct and leave broad discretion to states in the achievement of the Objective.⁷⁸ This lack of precision constitutes a major limitation in the Compact’s implementation phase. On a provocative tone, some scholars went as far as claiming that ‘considerations about legal effects aside, the

⁷³ Bufalini, *supra* note 72. In fact, despite being a non-binding instrument, the GCM has been endorsed by more than one hundred and fifty states and a UN General Assembly resolution. This – in the author’s opinion could certainly contribute to consolidation of customary international law. In fact, despite delegations have acknowledged that the GCM does not contribute to the formation of new customary international law, all delegations – with the exception of the US – were silent on the idea that the GCM may consolidate already existing *opinio juris* in the context of migration.

⁷⁴ *Idem* at 18.

⁷⁵ Chetail, *supra* note 70. The failure to mention the maritime conventions and the related and well-established customary duty to save individuals at distress at sea is an important drawback of how Objective 8 has been drafted.

⁷⁶ Bolton and Jarvis, *supra* note 2. For example, a reference to article 98 could have been a good way to bring systematisation and interaction between maritime law and human rights’ obligations for states in the context of irregular migration.

⁷⁷ Chetail, *supra* note 70. This identification and systematisation of the rules states must follow when dealing with search and rescue operations has rarely been done as an exercise. Thus Objective 8 would have been a great opportunity to fill this void.

⁷⁸ Bufalini, *supra* note 72.

commitments contained in the Compact seem too imprecise to create expectations of compliance'.⁷⁹ For instance, a provision calling for the facilitation of movement by the victim's family members to identify and participate in legal proceedings as well as in the burial process is missing.⁸⁰ Similarly, some articulation detailing how families could benefit from legal aid and assistance during the identification procedures and the investigative process would have been desirable.⁸¹ Additionally, there is no provision dealing with the allocation of budgets for welfare and funding of the victims' family members. This would have been extremely important in order to show commitment to the 'welfare, psychological and advocacy support for bereaved families'.⁸² On this matter, a special provision dealing with children would have also represented an important commitment.⁸³

Another limit has to do with the collection of data. In fact, action (e) of the Objective calls for the collection and sharing of data without providing any clear standard or criteria defining border-deaths. Indeed, while some databases to trace migrants' deaths exist, there is a lack of consensus on what is meant by 'border-related' deaths.⁸⁴ Given the widespread acceptance and endorsement of the GCM, some standards – even if not binding – could have been of useful guidance. This is especially the case considering that irregular migration by nature involves challenges in data collection as the objective is to avoid detection by authorities.⁸⁵ Moreover, when proposing some recommendations regarding the treatment of the deceased and the collection of data, the Special Rapporteur Agnes Callamard called for a gender-sensitive standpoint to be adopted.⁸⁶ Unfortunately, this reference to gender was nowhere implemented in Objective 8 and more specifically, in action (e) dealing with this matter.

However, despite the lack of precision and the related discretion left to states when it comes to the implementation phase, the GCM represents a powerful roadmap for states. This non-binding document in fact, creates fundamental connections between human rights law, the right to life and international migration law, providing important guidance and a minimum set of standards to a field characterised by the predominance of individualised national interests and policies.

⁷⁹ M. Gatti, 'EU States' Exit from the Global Compact on Migration: A Breach of Loyalty', at: <https://eumigrationlawblog.eu/eu-states-exit-from-the-global-compact-on-migration-a-breach-of-loyalty/> (accessed 27th november 2020).

⁸⁰ Bolton and Jarvis, *supra* note 2.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ T. Brian and F. Laczko, *Fatal Journeys Tracking Lives Lost during Migration*, IOM's Global Migration Data Analysis Centre 2014. Some organizations include in the definition of border-related deaths only those occurring at the external borders of states, while others consider deaths occurring within the destination or transit countries as well, if these can be somehow attributed to the border control regime.

⁸⁵ *Ibid.* The attempt to avoid detection by states' authorities poses extreme challenges in the collection of data on migrants' deaths. The geography of the migration routes also does not help. Some international guidance would have been beneficial. For similar reasons, survivors may not be willing to share their irregular journey with authorities to report the death of some of their companions.

⁸⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9.

Above all though, the principle of non-refoulement is not cited in Objective 8.⁸⁷ This principle is mentioned in the objective devoted to the return of migrants, but according to Chetail, reference to this fundamental tenet of migration and human rights' law was advisable also in Objective 8, especially in relation to search and rescue at sea.⁸⁸ In light of this absence, in his view, 'the principle of non-refoulement is thus acknowledged merely as an obstacle to removal and not as a ground of protection on its own'.⁸⁹ Moreover, in this respect, the Special Rapporteur Callamard explicitly advised states to abide with this principle both at land and sea.⁹⁰ In addition, this principle was embedded in action (a) of Objective 8 in the Second Draft, but then arguably removed during the negotiation process.⁹¹ Similarly, another reference to refugees, asylum seekers and individuals in need of international protection was removed, during the negotiation process, from the text of Objective 12, as these persons are protected and governed by other international legal frameworks.⁹² In Spagnolo's view, 'this might be justified [...] for the sake of notional purity, to keep refugee law outside the scope of the GCM, but nonetheless the silence of the GCM on this principle is loud'.⁹³

VI. Objective 8 and the Specific Case of Distress at Sea

Up to this point, the discussion highlighted the strengths and limitations of Objective 8. This section explores the specific case of distress at sea, as a whole array of international obligations arise for states under maritime law. In fact, when dealing with people missing or dying at sea, the duty to render assistance, to search and rescue is enclosed in the maritime conventions.⁹⁴

⁸⁷ Chetail, *supra* note 70.

⁸⁸ Chetail, *supra* note 70. See also Bufalini *supra* note 72 on this matter. The relevance of the principle of non-refoulement is especially visible when under the SAR Convention individuals must be disembarked to a place of safety. Even A. Spagnolo acknowledges the importance of this principle for search and rescue operations and the notions of 'place of safety' in this piece, 'We Are Tidying up: The Global Compact on Migration and Its Interaction with International Human Rights Law', at: <https://www.ejiltalk.org/we-are-tidying-up-the-global-compact-on-migration-and-its-interaction-with-international-human-rights-law/> (accessed 10th december 2020).

⁸⁹ Chetail, *supra* note 70, at p. 12.

⁹⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9.

⁹¹ 2018, Global Compact for Safe, Orderly and Regular Migration Draft Rev 2. Bufalini *supra* note 72 comments on this matter. The removal of such reference to non-refoulement was pushed by certain states among China. The statement made by Ambassador Li Li (2018) at the Marrakesh Conference offers a great example of how states considered that such principle could only be applied to refugees and that the two frameworks – for refugees and migrants – should not overlap.

⁹² B. Nagy, 'GCM Commentary: Objective 12: Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral', at: <https://rli.blogs.sas.ac.uk/2018/11/29/gcm-commentary-objective-12/> (accessed 13th april 2021).

⁹³ Spagnolo, *supra* note 88. Here the author is implicitly referencing to the Chinese Ambassador's statement in Marrakesh mentioned above. For the Ambassador the principle of non-refoulement should not apply to migrants but only to refugees.

⁹⁴ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9.

Moreover, this duty is considered part of customary international law.⁹⁵ For instance, Article 98 of the UN Convention on the Law of the Sea (UNCLOS) reads 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 [...];
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers [...].
2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose’.⁹⁶

This obligation to render assistance is also postulated in the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Salvage (SALVAGE) and the International Convention on Maritime Search and Rescue (SAR).⁹⁷ Notably, ‘these conventions impose upon the master of a ship, whether civilian or military, the positive duty to provide assistance to any persons in distress at sea, independent of their status, nationality or circumstances’.⁹⁸ Notwithstanding some issues and confusion that may arise in relation to the notions of ‘distress’⁹⁹ or ‘place of safety’,¹⁰⁰ these instruments establish states’ duties to rescue individuals in distress in the high seas,¹⁰¹ ‘as human rights obligations are typically bounded by territorial limits or [states’] jurisdiction or control over an area or person’.¹⁰²

⁹⁵ T. Aalberts and T. Gammeltoft-Hansen, ‘Sovereignty at Sea: The Law and Politics of Saving Lives at the Mare Liberum’, *Journal of International Relations and Development* 2014.

⁹⁶ 1982, United Nations Convention on the Law of the Sea.

⁹⁷ T. Basaran, ‘The Saved and the Drowned: Governing Indifference in the Name of Security’, *Security Dialogue* 2015-46, pp. 205-220. The relevant provisions are: Chapter V regulation 33(1) of the SOLAS Convention, Chapters 2.1.10 & 1.3.2 of the SAR Convention and article 10 of the SALVAGE Convention.

⁹⁸ *Ibid.*

⁹⁹ P. Sutherland, *Report of the Special Representative of the Secretary-General on Migration*, A/71/728 (2017). All maritime conventions lack a solid and precise definition of what constitutes distress. For instance, Malta applies a narrower definition compared to other countries, distinguishing between being in need of rescue and ‘unseaworthiness’.

¹⁰⁰ E. D. Papastavridis, ‘Is There a Right to Be Rescued at Sea? A Skeptical View’, *QIL Zoom-In* 2014-4, pp. 17-32. He mentions how the terms ‘place of safety’ have never been defined more precisely and these have not been drafted in a way to guarantee the legal basis for an individual right. Controversies arising in relation to these terms also underscore all the debates on third safe countries that have been shaping the discourse of disembarkation in the Mediterranean Sea.

¹⁰¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9. In fact, when the persons are found in the territorial waters of the state, the duty to render assistance is straightforward. On the high seas, where states enjoy a lesser degree of jurisdiction, these conventions were very relevant to ensure that assistance is provided unconditionally.

¹⁰² *Idem*, at para. 61.

Problematically, these conventions make no explicit reference ‘to the missing and are not usually applied to missing people as a group’.¹⁰³ Whether these treaties can play a major role in the context of irregular migration can be questioned. Additionally, the trend among states – for instance European coastal states – has been to outsource obligations arising under the maritime conventions, many times with the consequence of endangering the life of many.¹⁰⁴ Moreover, these instruments impose obligations on states, but do not mention any individual right to be rescued *per se*.¹⁰⁵ Notably though, ‘the law of the sea [...] pursues community interests, among which the protection of human rights’.¹⁰⁶ From this, ‘the duty to render assistance can be considered as the operational obligation deriving from the application of the human right to life at sea’.¹⁰⁷ Thus, the individual right to be rescued has to be found and interpreted within the normative framework of the right to life.¹⁰⁸

Despite human rights’ courts have not yet addressed specifically the duty to protect life in the context of dangerous sea journeys, all the principles and obligations analysed in the previous section, as the duty to investigate, inform families, to search and treat the body of the dead with respect are applicable.¹⁰⁹ Hence, with reference to the aforementioned ECtHR jurisprudence, the failure to properly and effectively investigate deaths at sea in the context of irregular migration would amount to a violation of article 2 of the ECHR.¹¹⁰ Therefore, the obligations arising from states under IHRL and in relation to the right to life are applicable also in situations of people in distress at sea. Importantly, this allows for the establishment of an individual right to be rescued, as an appendix of the right to life and human dignity. The application of human rights complements the state-centred regime of international maritime law.

Importantly, neither the jurisprudence of international human rights’ courts or monitoring bodies, nor the GCM distinguishes between assistance at sea or land, entailing that states shall respect the same fundamental obligations and guarantees. Crucially, the Zero Draft mentioned pushbacks and

¹⁰³ J. Sarkin, 'Respecting and Protecting the Lives of Migrants and Refugees: The Need for a Human Rights Approach to Save Lives and Find Missing Persons', *The International Journal of Human Rights* 2018-22, at p. 214.

¹⁰⁴ *Ibid.*

¹⁰⁵ Papastavridis, *supra* note 100. In the author’s view, these conventions merely allocate competences among states. The individual right to be rescued at sea cannot be inferred from these conventions, nor by any subsequent practice or interpretation. The right to be rescued at sea is a corollary of the fundamental right to life as applied under IHRL. Furthermore, he correctly points out that the obligation to rescue people in distress at sea, is an obligation of means and not of result.

¹⁰⁶ S. Trevisanut, 'Is There a Right to Be Rescued at Sea? A Constructive View', *Questions of International Law* 2014-4 at p. 8.

¹⁰⁷ *Idem*, at p. 24. The author, however, contends that such an interpretation will cause issues because human rights apply only where the individual is subject to the jurisdiction of the state. This may thus cause some issues in the high seas where the jurisdiction of states is limited.

¹⁰⁸ *Idem*, at p. 19. States have to protect human rights at sea, not because this is provided for in the maritime conventions but because of their separate obligations arising under IHRL.

¹⁰⁹ Grant, *supra* note 33.

¹¹⁰ The Last Rights Project, *supra* note 31. Moreover, the failure to investigate the death, search and rescue for missing people at sea can also be seen as a violation of article 3 of the ECHR in relation to the surviving families.

the right to life at land and sea in action (a)¹¹¹ but this wording was dropped from the Second Draft in May 2018, and now the protection of migrants' right to life is absolute and universal, irrespective of the geographical setting.¹¹² By speaking of assistance in general, Objective 8 coherently calls for the respect of the right to life and human dignity as it has been extensively interpreted by human rights law, being this in the context of dangerous travel journeys at sea or land, acting as a useful complement to the maritime conventions. An extensive interpretation of states' obligations to protect lives in the high seas may be fostered by Objective 8 and this must be appraised.¹¹³

VII. Best Practices in Relation to Objective 8 and its Actions

As only two years have passed since the adoption of the GCM, it may still be early to evaluate its implementation. However, some initiatives in place before the GCM's adoption already pointed towards the right direction and are thus worth of analysis in this section. Therefore, as states negotiated and agreed on the GCM, more actions and efforts along this path should be expected in the future.

For instance, previous to the GCM's adoption, the International Organization for Migration (IOM) started a process of data collection – the IOM Missing Migrant Project, to count the dead and missing worldwide.¹¹⁴ This database is already a major achievement in itself but better levels of identification for the dead and the missing who are eventually found should be developed.¹¹⁵ Similar databases are also used regionally, as it is the case with the Border Safety Initiative Tracking System (BSITS) that manages data on migrants' deaths along the US-Mexico border.¹¹⁶

Always in the context of the US, the Colibri Center for Human Rights has been fundamental in keeping track and identifying missing persons. It was founded in 2006 and by 2016, it created a database of more than 3000 missing individuals and 150 positive identifications were undertaken, allowing families to pay respect and recollect the remains of their relatives.¹¹⁷ Another positive example of data collection was conducted in Italy by the Commission for Missing Persons in order to recover forensic data to allow systematic investigations of the Lampedusa shipwrecks of 2013.¹¹⁸

¹¹¹ Global Compact for Safe, Orderly and Regular Migration Zero Draft, *supra* note 16. Throughout the negotiations, until May 2018 when the Second Draft was put forward, action (a) of the Objective referred to pushbacks at land and sea and how the right to life had to be respected in these circumstances.

¹¹² Global Compact for Safe, Orderly and Regular Migration Draft Rev 2, *supra* note 91.

¹¹³ Bufalini, *supra* note 72.

¹¹⁴ Jarvis and Bolton, *supra* note 33.

¹¹⁵ *Ibid.* As reported by F. Lackzo, A. Singleton and J. Black, 'Fatal Journeys: Improving Data on Missing Migrants', IOM's Global Migration Data Analysis Centre 2017, this database is not an official source and shall be considered as a minimum estimate on migrant deaths and missing individuals.

¹¹⁶ US Customs and Border Protection, 'Search and Rescue Efforts for FY 2015', at: <https://www.dhs.gov/sites/default/files/publications/Customs%20and%20Border%20Protection%20-%20Search%20and%20Rescue%20Efforts%20for%20FY%202015.pdf> (accessed 17th December 2020). The data is mostly used to identify dangerous paths, categorise deaths and identifying trends. The data is used as a guideline to allocate national budget to border safety projects.

¹¹⁷ Appleby, *supra* note 63.

¹¹⁸ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9.

This Commission's work is remarkable as it recognised the legitimate expectation of families to know the fate of their relatives.¹¹⁹ Along this line, in Thailand the missing people not identified were tagged with a microchip to favour future identification after the 2004 Tsunami.¹²⁰

Regarding search and rescue operations, the Mare Nostrum initiative launched by Italy was exemplary as it saved thousands of lives in the Mediterranean.¹²¹ This operation had the double objective of safeguarding life at sea and bringing human traffickers and smugglers to justice¹²² and represents a great example of preventative action by the state.¹²³

All these efforts and initiatives show that the commitments proposed in Objective 8 are achievable and realistic. States have all the tools to improve data collection, identification and tracking of missing or dead migrants. Fundamental for any future initiative that may arise as part of the GCM's implementation and precisely of Objective 8 are the Guiding Principles on the Missing by the International Committee of the Red Cross (ICRC). These guidelines relating to families, identification and data collection 'should be present in any international framework for the identification of migrant deaths and for the families of missing migrants'.¹²⁴ Moreover, all the successful initiatives discussed are based on a multi-stakeholder approach.¹²⁵ Importantly, the Compact calls for a whole-of-society approach, welcoming the involvement of actors such as civil organizations, NGOs, and faith-based groups.¹²⁶ For sure then, as the GCM and specifically Objective 8 demand the development of more cooperation and efforts along the line of those described in this section, whether this will be the case or not is simply a matter of political will.

VIII. International Provisions and Guidelines Complementing Objective 8 and the GCM

Besides the great achievement marked by the adoption of the GCM and in this specific case of Objective 8, one of the aforementioned limitations was the lack of clarity and precision in the commitment's actions. What steps shall states undertake to correctly implement this Objective? It is no surprise that states were left with a certain degree of discretion. In fact, international migration

¹¹⁹ Grant, *supra* note 33.

¹²⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9.

¹²¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9. This operation was much better than similar initiatives launched in the Mediterranean such as Operation Sophia or Triton. However, this operation was abandoned by the Italian government for lack of support.

¹²² Ministero della Difesa Mare Nostrum Operation, Marina Militare, at: <https://www.marina.difesa.it/EN/operations/Pagine/MareNostrum.aspx> (accessed 12th december 2020)

¹²³ Grant, *supra* note 33.

¹²⁴ *Idem*, at 6.

¹²⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, *supra* note 9. Multi-stakeholder leadership, cooperation and mutual respect are all necessary elements for the implementation of successful initiatives also in light of the GCM. Civil society shall be included more in the search and rescue operations as they can provide some invaluable contribution.

¹²⁶ Appleby, *supra* note 63. Societal actors should be conceived by states as partners and not as enemies. Different actors from civil society can bring different but important contribution in the implementation of the GCM and in this case of Objective 8.

law has always been at the crossroads between states' sovereignty and international human rights. Be it as it may, however, some other international documents and guidelines provide similar measures, might complement Objective 8 and deserve some analysis.

For instance, a document worth mentioning is the 2018 Principles and Guidelines by the Office of the High Commissioner for Human Rights (OHCHR).¹²⁷ These guidelines focus on data collection and data protection guarantees to be implemented between and within states.¹²⁸ Furthermore, as precise guidelines for states to identify, collect and trace the missing or dead are lacking in the GCM, The Last Rights Project adopted the Mytilini Declaration¹²⁹ in 2018 seeking to redress the gap.¹³⁰ Indeed, the Declaration comprises detailed provisions on families' involvement and their rights *vis-à-vis* the identification and collection of missing persons.¹³¹ Moreover, a set of policies for states to treat migrant bodies are provided to uphold the right to truth for victims' families.¹³² Importantly, this Declaration was signed by numerous civil society groups while there has been little or better no reaction from the ultimate addressees – states.¹³³

In 2017 the UN Working Group on Enforced or Involuntary Disappearances (WGEID) also recognised the right to truth for family members in the context of missing or deceased migrants.¹³⁴ Paragraphs 67 and 68 of the report produced by this working group mention the right to identification, recollection of remains, the right of family – all actions subsequently inserted in Objective 8. Along this line, scholars and practitioners from Georgetown drafted in 2013 the International Migrant Bill of Rights (IMBR) where the right to life and human dignity were considered in article 5 and 3 respectively.¹³⁵

Similar commitments to those listed in Objective 8 are also contained in the Minnesota Protocol on the Investigation of Potentially Unlawful Death of 2016.¹³⁶ Despite not referring explicitly to migration, the Protocol reads in paragraph 2(a) that potentially unlawful death includes situations in which 'death may have been caused by acts or omissions of the State, its organs or agents, or may otherwise be attributable to the State, in violation of its duty to respect the right to life'.¹³⁷ Hence, the applicability to situations of borders' externalisation and migration control seems apparent. Importantly, the Protocol contains detailed standards on investigative procedures as well

¹²⁷ OHCHR, 'Principles and Guidelines Supported by Practical Guidance on the Human Rights Protection of Migrants in Vulnerable Situations', at: <https://www.ohchr.org/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf> (accessed 11th december 2020).

¹²⁸ Grant, *supra* note 33.

¹²⁹ 2018, The Mytilini Declaration – Declaration for the Dignified Treatment of All Missing and Deceased Persons and Their Families as a Consequence of Migrant Journeys.

¹³⁰ Jarvis and Bolton, *supra* note 33.

¹³¹ The Mytilini Declaration, *supra* note 129.

¹³² *Ibid.* See also Robins *supra* note 10.

¹³³ Robins, *supra* note 10.

¹³⁴ *Ibid.*

¹³⁵ 'International Migrant Bill of Rights', *Georgetown Immigration Law Journal* 2013-28.

¹³⁶ 2016, The Minnesota Protocol on the Investigation of Potentially Unlawful Death.

¹³⁷ *Idem*, at p. 1.

as the rights of victims' relatives.¹³⁸ Moreover, the Special Rapporteur Callamard explicitly mentioned the ICRC Field Manual for the Management of Dead Bodies after Disasters¹³⁹ as a useful document encompassing standards and best practices for the treatment of the dead – regardless of the fact that this document was not drafted for the context of irregular migration.¹⁴⁰

Overall, many international documents and declarations, despite being soft-law instruments, specify actions and standards that states may follow when dealing with missing or deceased migrants. Importantly, these instruments may complement Objective 8 and the GCM's implementation. However, it is crucial to acknowledge the incredible value-added of the GCM and related Objective 8 – among all the cited international documents it is the only one drafted and agreed by states themselves.

IX. Conclusions

The present work investigated Objective 8 of the GCM. As a start, the drafting history of this Objective was examined. In fact, during the negotiations, states were very careful in nuancing the wording of the commitment in relation to the criminalisation of humanitarian assistance, as well as providing an *à la carte* approach when listing the six actions of the Objective. On a positive tone instead, action (f) and references to collective expulsion and individual assessment were added with respect to the Zero Draft, importantly aligning the Objective to international case-law. The work then outlined how Objective 8 is a restatement of the right to life and hence it shall be interpreted and applied within the framework of IHRL. In light of these considerations, case-law mostly by the ECtHR in relation to the right to life was explored.

Proceeding the work discussed other limitations of the Objective, as for instance the absence of any reference to the principle of non-refoulement as well as a lack of detailed actions relating to the rights of family members. These limits clearly demonstrate how states were very cautious and considerations about sovereignty always played a predominant role during the drafting process. Objective 8 was carefully formulated at the intersection between human rights and states' sovereignty.

A specific paragraph was devoted to search and rescue operations at sea, as in this scenario three different legal regimes – migration, maritime and human rights law – overlap. The analysis concluded that Objective 8 has a fundamental role to play as it explicitly calls for the application of the extensive interpretation of both substantive and procedural obligations for states in relation to the right to life in the context of irregular migration. Best practices in place before the GCM's adoption and other international documents that, if complemented to the GCM could provide states with useful guidance and standards for the treatment of missing and deceased migrants were reviewed.

¹³⁸ 2016, The Minnesota Protocol on the Investigation of Potentially Unlawful Death.

¹³⁹ ICRC, 'Management of Dead Bodies after Disasters: A Field Manual for First Responders', at: <https://www.icrc.org/en/publication/0880-management-dead-bodies-after-disasters-field-manual-first-responders> (accessed 11th november 2020).

¹⁴⁰ This is also mentioned by Robins *supra* note 10.

Lastly, despite no new legal obligations *per se* arise from the GCM, the relevance of the agreement reached by states and its adoption marks an important achievement. The GCM represents a political commitment,¹⁴¹ recognising that migration requires a higher degree of international attention.¹⁴² Despite the many controversies that its soft-law nature raised in relation to the impact on international law, the GCM shall be considered as ‘an instrument of both consolidation and expansion of international law’¹⁴³ in the context of migration. Moreover, the GCM explicitly acknowledges the importance of a whole-of-society approach¹⁴⁴ to migration as no state alone can effectively provide solutions to this phenomenon since they all are both countries of origin and destination. As states have, up until now, dealt with migration in an individualised manner,¹⁴⁵ the GCM should be considered as a major achievement pushing for cooperation at the international level, both among states and non-states actors. In this regard, it is important that information is disseminated to local actors from civil society. Sharing effective information with local stakeholders on the GCM and its implementation should be a priority, as only like this the document can be brought to life.¹⁴⁶

Regardless of the margin of *manoeuvre* that states were extremely careful in securing, ‘the renewed commitment towards binding rules of international law represents an important acknowledgment, [...] if not the main achievement of the Compact’.¹⁴⁷ In fact, as mentioned throughout the work, the commitments of the GCM and in this case Objective 8 have been criticised for being drafted in a vague and unprecise manner, leaving huge discretion in the hands of states. However, when taking a closer look, the imprecision of the Compact may not be a flaw. ‘This document represents a point of departure for global cooperation in the field of migration, and it would be surprising if it were very detailed or straightforward’.¹⁴⁸ Accordingly, the Compact ‘must not be seen as a final product but as a roadmap to frame the international agenda’.¹⁴⁹ On this matter, the fact that Objective 8 acts as a powerful bridge to apply the extensive interpretations of the right to life in the context of migration perfectly exemplifies this role of the GCM as a roadmap. Thus, at the end of the day, considering the hostility states have demonstrated in the last years towards migrants, the negotiation of such a comprehensive document represents a fundamental milestone!¹⁵⁰

¹⁴¹ Guild, Basaran and Allinson, *supra* note 22. See also K. Allinson, J. N. Stefanelli and K. T. Weatherhead, ‘Partnerships for Practice: Making the Global Compact for Migration Work’, at: https://www.biiicl.org/documents/2027_gcm_workshop_report_final.pdf (accessed 10th november 2020).

¹⁴² Costello, *supra* note 60.

¹⁴³ Chetail, *supra* note 70 at p. 17.

¹⁴⁴ Appleby, *supra* note 63. Moreover, as mentioned by Sarkin (2018) a more coordinated approach would also be cost-effective.

¹⁴⁵ Sarkin, *supra* note 103.

¹⁴⁶ Guild, Basaran and Allinson, *supra* note 22.

¹⁴⁷ Chetail, *supra* note 70 at p. 2.

¹⁴⁸ Gatti, *supra* note 79.

¹⁴⁹ Chetail, *supra* note 70 at p. 1.

¹⁵⁰ Allinson, Stefanelli and Weatherhead, *supra* note 141.