Introduction

In 2016, at the peak of the so-called 'refugee crisis' in Europe, the International Organisation for Migration (IOM)'s Missing Migrants Project recorded that 5,143 migrants died attempting to cross the Mediterranean into Europe.[1] There have also been thousands of cases of migrants dying in refugee camps, prisons, immigration detention centres, or while crossing land borders into or between Council of Europe (CoE) member States.[2] Sometimes these incidences attract international media attention. For example, the 71 bodies discovered in the back of a food transport truck at the side of a road in Austria in August 2015;[3] the reported deaths of 40 migrants at, or close to, 'The Jungle' refugee camp in Calais, prior to it being cleared in October 2016;[4] the 2017 self-inflicted death of Arim Baker at Morton Hall Immigration Removal Centre in the United Kingdom;[5] the deaths of 39 migrants in the back of a freight lorry in Essex, the United Kingdom in 2019;[6] and the shooting dead of Muhammed Gulzar at the Turkish/Greek border in March 2020.[7] During the Covid-19 pandemic, the situation at Europe's southern borders appeared to once again deteriorate significantly. In May 2021, Fulvio Vassallo Paleologo, of the University of Palermo and Director of ADIF (Associazione Diritti e Frontiere) explained that:

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1 IOM Missing Migrants Project, 'Missing Migrants: Tracking deaths along migratory routes' <www.missingmigrants.iom.int/> accessed 1 March 2021.

2 United Against Refugee Deaths, 'List of 40,555 documented deaths of refugees and migrants' (*UNITED for Intercultural Action*, 1 June 2020) <http://unitedagainstrefugeedeaths.eu/wp-content/uploads/2014/06/ListofDeathsActual.pdf> accessed 1 March 2021. For example, while the UK Home Office does not produce deaths data, a Freedom of Information Request by the Guardian Newspaper revealed that there were 29 deaths during the first four months of 2020 in Home Office accommodation in the UK alone. See: Diane Taylor, 'Revealed: shocking death toll of asylum seekers in Home Office accommodation' (*The Guardian*, 15 December 2020) <www.theguardian.com/uk-news/2020/dec/15/revealed-shocking-death-toll-of-asylum-seekers-in-home-office-accommodation> accessed 8 September 2021. See also, Institute of Race Relations, 'UK BAME, refugee and migrant deaths in custody (2014–2020)' (*Institute of Race Relations*, 2020) <www.irr.org.uk/research/deaths/bame-refugee-and-migrant-deaths-in-custody-2014-2020/?utm_source=newsletter&utm_medium=email&utm_campaign=it_happens_here_too&utm_term=2020-06-18> accessed 20 March 2021.

3 Bethany Bell and Nick Thorpe, 'Austria's migrant disaster: Why did 71 die?' (*BBC*, 25 August 2016) <www.bbc.com/news/world-europe-37163217> accessed 1 March 2021.

4 United Against Refugee Deaths (n 2).

5 Institute of Race Relations (n 2).

6 BBC, 'Essex lorry deaths: Police name 39 victims' (*BBC*, 8 November 2019) <www.bbc.com/news/uk-england-essex-50350481> accessed 1 March 2021.

7 Forensic Architecture, 'The Killing of Muhammad Gulzar' (*Forensic Architecture*, 8 May 2020) <www.forensic-architecture.org/investigation/the-killing-of-muhammad-gulzar> accessed 9 March 2021.

> Recent reports suggest an increase of deaths of migrants attempting to reach Europe and, at the same time, an increase of the collaboration between EU countries with non-EU countries such as Libya, which has led to the failure of several rescue operations […] In this context, deaths at sea since the beginning of the pandemic are directly or indirectly linked to the EU approach aimed at closing all doors to Europe and the increasing externalisation of migration control to countries such as Libya.[8]

While the total number of unnatural deaths amongst unsettled migrants and refugees in Europe is impossible to calculate precisely, we do know that the numbers continue to be very high and that the deaths are occurring in deeply troubling circumstances. However, in spite of the numbers, and the occasional media attention, Heller and Pezzani point out that the conditions in which these deaths occur are rarely established with precision, and responsibility seldom determined.[9] This book aims to make a contribution that might help address these problems.

The book is concerned with the deaths of migrants and refugees both within and close to the borders of CoE member States. Specifically, it is concerned with investigative obligations that may be engaged in the aftermath of such deaths, whether they occur in refugee camps, prisons, immigration detention centres or while the deceased were en route between States by land or by sea. The book sets out and critically examines the—at times contradictory—jurisprudence on the nature and scope of investigative obligations that arise under five regional and international human rights instruments, and describes the potential significance of that jurisprudence for the deaths of unsettled migrants and refugees within and close to the borders of CoE member States.

The Location of the Analysis within the Literature

The literature of relevance to the project at hand falls into three main strands: border control and migration policy and law; the position of migrants in destination States; and works that address obligations to investigate deaths.

First, there is a wealth of academic literature on the socio-political and ethical context surrounding border control, migration and refugee movements.[10] There is also

8 Quoted by Lorenzo Tondo, 'Revealed: 2,000 refugee deaths linked to illegal EU pushbacks' (*The Guardian,* 5 May 2021) <www.theguardian.com/global-development/2021/may/05/revealed-2000-refugee-deaths-linked-to-eu-pushbacks> accessed 8 September 2021.

9 Charles Heller and Lorenzo Pezzani, 'Liquid Traces: Investigating the Deaths of Migrants at the EU's Maritime Frontier' in Nicholas De Genova (ed), *The Borders of "Europe": Autonomy of Migration, Tactics of Bordering* (Duke University Press 2017) 95.

10 For just a few examples discussing the ethical and moral, see Serena Parekh, *No Refuge: Ethics and the Global Refugee Crisis* (OUP 2020); Gillian Brock, *Migration and Political Theory* (Polity 2021); Phillip Cole, 'Global displacement and the topography of theory' (2016) 12 (3) Journal of Global Ethics 260; Sune Lægaard, 'Misplaced idealism and incoherent realism in the philosophy of the refugee crisis' (2016) 12 (3) Journal of Global Ethics 269; Aramide Odutayo, 'Human Security and the international refugee crisis' (2016) 12 (3) Journal of Global Ethics 365; Thomas Gammeltoft-Hansen and Jens

a large body of work that discusses migration control law, policy and practice in the European context and the interplay between this and the realities of migrant and refugee flows into and within Europe. Much, if not most, of this literature includes a degree of principled normative criticism of the perceived moral, ethical, legal (including rights-based), and/or practical failings of European immigration and border-control regimes. In particular, it includes research and argument that both implicitly and explicitly links European border control tactics to the vulnerability of migrants and refugees, the risks they are exposed to when attempting to reach Europe, and to fatalities.[11] The law, policy and practice of European border control have been the subject of expert and meticulous scrutiny and analysis, and the purpose of this book is not to restate or re-argue those debates.[12]

Vedsted-Hansen, *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Routledge 2017).

11 The Committee on the Rights of the Child has, for example, made such a connection: UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CmMW), 'Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child (CmRC) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (16 November 2017) UN Doc CMW/C/GC/4—CRC/C/GC/23, paras 4.1–4.2. For just a few examples of literature that makes this link between border control tactics and vulnerability and fatalities see Violeta Moreno-Lax, 'Carrier Sanctions and ILOs: Anticipated Enforcement of Visa Requirements through 'Imperfect Delegation'—Diverting Flows, Entrenching Unsafety' in Violeta Moreno-Lax (ed), *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (OUP 2017), ch 5; Paolo Cuttitta, 'Preface: The Increasing Focus on Border Deaths', in Paolo Cuttitta and Tamara Last (eds), *Border Deaths: Causes, Dynamics and Consequences of Migration-related Mortality*' (AUP 2020) 9–12; Paolo Cuttitta, Jana Häberlein, Polly Pallister-Wilkins and Tamara Last, 'Various Actors: The Border Death Regime' in ibid 39; Kristof Gombeer, 'Understanding the Causes of Border Deaths' in ibid 131–149; Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Global Frontier* (Palgrave Macmillan 2011), whose book seeks to 'piece together an account of deaths at the global frontier that goes beyond crude 'body counts' to reveal the detailed connections between border protection policies and the deadly risks faced by illegalized travellers.' (p. 9); Thomas Spijkerboer, 'The Human Costs of Border Control' (2007) 9 (1) European Journal of Migration and Law 127; Violeta Moreno-Lax, Jenny Allsopp, Evangelia Tsourdi, Philippe de Druycker, *The EU Approach on Migration in the Mediterranean* (European Parliament 2021) <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf> accessed 28 July 2022, e.g. 80, 95, 152; Mariagiulia Giuffre and Cathryn Costello, 'Tragedy and Responsibility in the Mediterranean' (*Open Democracy,* 27 April 2015) <www.opendemocracy.net/en/can-europe-make-it/crocodile-tears-tragedy-and-responsibility-i/> accessed 4 March 2022; Elspeth Guild, Cathryn Costello and Violeta Moreno-Lax, *The 2015 refugee crisis in the European Union* (European Parliament 2017) 2, 4; Marie-Laure Basilien-Gainche, 'Leave and Let Die: The EU Panopticon Approach to Migrants at Sea' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), *Boat Refugees' and Migrants at Sea: A Comprehensive Approach: integrating maritime security with human rights* (Brill Nijhoff 2016), e.g. 329.

12 See, for example, Bernard Ryan and Valsamis Mitsilegas, *Extraterritorial Immigration Control: Legal Challenges* (Brill Nijhoff 2010); Stefan Salomon, *Unreached Paradise Europe: Human Rights Obligations of EU Member States and Frontex in the Context of Ex-*

Secondly, away from State border scenarios, sociological studies of migrants within European State borders tend to focus on settled migrants.[13] This includes specialist literature that discusses migrants in European States and mental illness, which usually focusses on diagnosis and treatment rather than cause.[14] Otherwise, accounts that discuss the particular status and vulnerabilities of newly arrived migrants and refugees, and associated fatalities (as opposed to accounts that may reference relevant cases, but focus on institutional contexts such as police violence or prison regime failures)[15] tend to be confined to case-studies and come from practitioner or journalistic sources.[16] However, the 'embodied border paradigm' described by Moreno-Lax takes this literature further by providing a basis for linking these first two strands with a theoretical context when it comes to the particular and enduring vulnerabilities of migrants and refugees, including those who have reached Euro-

traterritorialisation of Border Controls (Akademiker Verlag 2011); Maïté Fernandez, 'The EU Borders Policy and Frontex-Coordinated Operations at Sea: Who is in Charge? Reflections on Responsibility for Wrongful Acts' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), (n 11); Derek Lutterbeck, 'Policing Migration in the Mediterranean' (2006) 11(1) Mediterranean Politics 59; Anja Klug, 'Harmonisation of Asylum in the European Union—Emergence of an EU Refugee System?' (2004) 47 German Yearbook of International Law 594; Anja Klug, 'Strengthening the protection of migrants and refugees in distress at sea through international cooperation and burden-sharing' (2014) 26(1) Int J of RefuG Law 48; Nicholas De Genova (n 9); Cathryn Costello, Michelle Foster, Jane McAdam, *The Oxford Handbook of International Refugee Law* (OUP 2021).

13 It should be emphasised that this is a tendency rather than a rule, and that a clear distinction between settled and unsettled migrants is often not possible. See, for example Clíodhna Murphy, 'The Enduring Vulnerability of Migrant Domestic Workers in Europe' (2013) 62(3) ICLQ 599. On the particular scandal in the UK surrounding the 'Windrush generation' see, for example, Amelia Gentleman, *The Windrush Betrayal: Exposing the Hostile Environment* (Guardian Faber 2019).

14 See, for example, Anna-Clara Hollander, Alexandra Pitman, Hugo Sjöqvist, Glyn Lewis, Cecilia Magnusson, James B Kirkbride and Christina Dalman, 'Suicide risk among refugees compared with non-refugee migrants and the Swedish-born majority population' (2020) 217(6) BJPsych 686; Marion Aichberger, Amanda Heredia Montesinos, Zohra Bromand, Rahsan Yesil-Jürgens, Selver Temur-Erman, Michael Rapp, Andreas Heinz and Meryam Schouler-Ocak, 'Suicide attempt rates and intervention effects in women of Turkish origin in Berlin' (2015) 30(4) Eur. Psychiatry 480; Dinesh Bhugra and Peter Jones, 'Migration and Mental Illness' (2001) 7(3) BJPsych Advances in Psychiatric Treatment 216.

15 See, for example Simon Pemberton, 'Demystifying Deaths in Police Custody: Challenging State Talk' (2008) 17(2) Soc. Leg. Stud 237, which discusses in detail the killing of Joy Gardiner by police and immigration officials in the wider context of State violence.

16 See for example, Amelia Gentleman, 'Alex, Filmon, Mulue and Osman thought they were safe in Britain. So why did the teenage friends take their own lives?' (*Guardian online*, 23 February 2022) <www.theguardian.com/world/2022/feb/23/alex-filmon-mulue-and-osman-thought-they-were-safe-in-britain-so-why-did-the-teenage-friends-take-their-own-lives?CMP=Share_AndroidApp_Other> accessed 4 March 2022; BBC 'Jimmy Mubenga death: Timeline of the case and G4S guards' trial' (*BBC*, 16 December 2014) <www.bbc.com/news/uk-england-london-28153863> accessed 4 March 2022; Nayanah Siva, 'Deaths at UK immigration detention centres are the result of avoidable systemic failures, report says' (2016) 354 BMJ <www.bmj.com/content/354/bmj.i4073.full> accessed 31 March 2022.

pean destinations 'safely'.[17] According to Moreno-Lax, the border can no longer be described as a purely territorial phenomenon, but is '"embodied" by the migrant herself, immanent, continuous, and ever-present.'[18] While Moreno-Lax discusses this phenomenon primarily in the context of European borders extending outwards to meet migrants through the securitisation and externalisation of controls—while also becoming 'status-related, sensitive to nationality, security, and other personal factors'—she also comments on its general pervasiveness, where:

> [Integrated Border Management] has rendered the border ubiquitous through a system of 'concentric circles' of control'. The border not only follows the migrant—whether voluntary or forced—but infiltrates her legal position as [a third country national], conditioning her possibilities of movement to and within the EU—and also her claim as a rights-holder under the fundamental rights *acquis*.

The 2016–17 self-inflicted deaths of four young Eritrean friends who arrived in the United Kingdom as asylum seekers suggest that there is an urgent need to properly understand the manifestation of this paradigm, with investigations into the circumstances surrounding such deaths potentially providing a valuable contribution to that end.[19]

Thirdly, turning to investigative obligations, the literature is more fragmented. There is a literature that discusses procedural obligations that are associated with substantive human rights obligations generally.[20] When it comes to investigations into deaths, there is a literature on the importance of investigations as truth discovery processes—typically in the context of transitional justice theory.[21] There is

17 Violeta Moreno-Lax, 'Chronology and Conceptualization of "Integrated Border Management" The "Embodied Border" Paradigm' in Violeta Moreno-Lax (ed) (n 11) ch 2.

18 Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (n 11) 150.

19 The inquest into one of the friend's deaths took place before Assistant Coroner Bernard Richmond QC in Inner West London Coroner's Court. The coroner held that Alexander Tekle's 'immigration status was a constant concern for him and that added to the stress he was experiencing.' INQUEST, 'Inquest finds failures in support before the death of young asylum seeker Alexander Tekle' (*INQUEST*, 10 January 2022) <www.inquest.org.uk/alexander-tekle-inquest-closing> accessed 6 March 2022.

20 Eva Brems, 'Procedural Protection: An Examination of Procedural Strategies' in Eva Brems and Janneke H Gerards (eds) *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2014) 137; and, for example, Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights* (Intersentia 2016) ch 2.1; Keir Starmer, 'Positive Obligations under the Convention' in Jeffrey Lowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart Publishing 2001); Dimitris Xenos, *The Positive Obligations of the State under the European Convention on Human Rights* (Routledge 2012); Alastair Mowbray, 'Duties of Investigation Under the European Convention on Human Rights' (2002) 51(2) ICLQ 437.

21 See, for example, Sévane Garibian, 'Ghosts Also Die: Resisting Disappearance through the 'Right to the Truth' and the Juicios por la Verdad in Argentina' (2014) 12(3) JICL 515; André du Toit, 'The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition' in Robert I. Rothberg and Dennis Thompson (eds),

also a substantial amount of literature on the right to life and, in particular, associated investigative and related procedural obligations.[22] Some of this is general in nature, but contributions often focus on specific areas of concern: for example, disappearances,[23] the Troubles in Northern Ireland,[24] Chechnya,[25] situations of

Truth v. Justice: The Morality of Truth Commissions (PUP 2000); Trudy Govier, 'What Is Acknowledgement and Why Is It Important?' in Carol A L Prager and Trudy Govier (eds) *Dilemmas of Reconciliation: Cases and Concepts* (WLU Press 2003); Frank Haldemann, 'Another Kind of Justice: Transitional Justice as Recognition' (2008) 41(3) ILJ 675; Sam McIntosh, *Open Justice and Investigations into Deaths at the Hands of the Police, or in Police or Prison Custody* (EThOS 2016); Sam McIntosh, 'Taken Lives Matter: Open justice and Recognition in Inquests into Deaths at the Hands of the State' (2016) 12(2) Int J Law Context 141; Margaret Popkin and Naomi Roht-Arriaza, 'Truth as Justice: Investigatory Commissions in Latin America' (1995) 20(1) LSI 79; Elizabeth Stanley, 'Truth Commissions and the Recognition of State Crime' (2005) 45(4) BJC 582.

22 See, for example, Fionnuala Ni Aolain, 'The Evolving Jurisprudence of the European Convention Concerning the Right to Life' (2001) 19(1) NQHR 21; Juliet Chevalier-Watts, 'Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State? (2010) 21(3) EJIL 701; Elizabeth Wicks, *The Right to Life and Conflicting Interests* (OUP 2010); Sam McIntosh, *Open Justice and Investigations* (n 21); Sam McIntosh, 'Taken Lives Matter: Open Justice and Recognition in Inquests into Deaths at the Hands of the State' (n 21); Sam McIntosh, 'Fulfilling Their Purpose: Inquests, Article 2 and Next of Kin', (2012) 3 Public Law 407; Alastair R. Mowbray, 'Chapter 2 Article 2: The Right to Life' in Alastair R. Mowbray (ed), *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004). The literature also includes works that are directed at practitioners or come in the form of case comments, such as Peter Ferguson, 'The Right to Life: Some Procedural Requirements' (2001) 151 New Law Journal 808; Matthew Happold, 'Letting States Get Away with Murder' (2001) 151 New Law Journal 1323; Patrick O'Connor and Henrietta Hill, 'Investigating the State' (2003) 153 New Law Journal 1792.

23 Juliet Chevalier-Watts, 'The Phenomena of Enforced Disappearances in Turkey and Chechnya: Strasbourg's Noble Cause?' (2010) 11(4) Human Rights Review 469; for an Inter-American perspective see Garibian (n 21).

24 Fionnuala Ni Aolain, 'Truth Telling, Accountability and the Right to Life in Northern Ireland' (2002) 5 EHRLR 572; Christine Bell and Johanna Keenan, 'Lost on the Way Home? The Right to Life in Northern Ireland' (2005) 32(1) J Law Soc 68; Harriet Moynihan, 'Regulating the Past: The European Court of Human Rights' Approach to the Investigation of Historical Deaths under Article 2 ECHR' (2017) 86 British Yearbook of International Law 68—This touches upon Northern Ireland and other historical deaths.

25 Freek van der Vet, 'Seeking Life, Finding Justice: Russian NGO Litigation and Chechen Disappearances before the European Court of Human Rights' (2012) 13(3) Human Rights Review 303; Kirill Koroteev, 'Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context' (2010) 1(2) IHLS 275; Jane Buchanan, '"Who Will Tell Me What Happened to My Son?": Russia's Implementation of European Court of Human Rights Judgments on Chechnya' (*Human Rights Watch*, 2009) <www.hrw.org/report/2009/09/27/who-will-tell-me-what-happened-my-son/russias-implementation-european-court-human> accessed 23 March 2022.

armed conflict generally,[26] extraordinary rendition,[27] custody deaths[28] and cross-border homicides.[29]

While human rights-based obligations to investigate deaths have generally received little attention in the context of deaths amongst unsettled migrants and refugees, there has been a significant amount of quantitative work by academics, intergovernmental organisations (IGOs) and non-governmental organisations (NGOs) that seeks to produce reliable figures on the numbers of migrant deaths occurring at and within Europe's borders. For example, since 1993, UNITED for Intercultural Action has been producing a database of 'refugees, asylum seekers and undocumented migrants who have died through their attempts to enter Europe.'[30] At the forefront of academic research in this area are Tamara Last and Thomas Spijkerboer, with their project 'The Human Cost of Border Control', in which Last created the *Deaths at the Borders Database for the Southern EU*. According to the project, this is 'the first collection of official, state-produced evidence on people who died while attempting to reach southern EU countries from the Balkans, the Middle East, and North & West Africa, and whose bodies were found in or brought to Europe.'[31] It draws from official sources from Spain, Gibraltar, Italy, Malta and Greece to document deaths in and around the Mediterranean between 1990 and 2013.[32] Both Last and Spijkerboer have also written extensively on the subject of the human cost of border control.[33] Finally, the Missing Migrants Project, under the auspices of

26 Noëlle Quenivet, 'The Obligation to Investigate After a Potential Breach of Article 2 ECHR in an Extra-territorial Context: Mission Impossible for the Armed Forces?' (2019) 37(2) NQHR 119; Elizabeth Stubbins Bates, '"Impossible or Disproportionate Burden": The UK's Approach to the Investigatory Obligation under Articles 2 and 3 ECHR' (2020) 5 EHRLR 499; Juliet Chevalier-Watts, 'Military Operations and the Right to Life: The Uneasy Bedfellows' (2011) 5 HR&ILD 207.

27 Suzanne Egan, 'Investigative Obligations: Is There a Right to the Truth?' in Suzanne Egan (ed), *Extraordinary Rendition and Human Rights: Examining State Accountability and Complicity* (Palgrave 2019).

28 Conor Talbot, 'The State's Positive Obligations Under the ECHR in the Context of Irish Prisons' (2015) Human Rights in Ireland <www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2664520> accessed 31 March 2022; Jo Easton, 'Requitement to Investigate Deaths in Custody' in Jo Easton (ed), *Death in Custody: Inquests, Family Participation and State Accountability* (Emerald Publishing 2020).

29 Stefan A G Talmon, 'The Procedural Obligation under Article 2 ECHR to Investigate and Cooperate with Investigations of Unlawful Killings in a Cross-Border Context' (2019) Diritti Umani e Diritto Internazionale 99.

30 United Against Refugee Deaths (n 2).

31 Tamara Last, 'Deaths at the Borders: Database for the Southern EU' (*DataverseNL, V1*, 12 May 2016) <www.doi.org/10.34894/57REIC> accessed 13 March 2022.

32 Ibid.

33 See, for example Last's contributions to Paolo Cuttitta and Tamara Last (n 11); Tamara Last, 'Who is the 'Boat Migrant'? Challenging the Anonymity of Death by Border-Sea' in Violeta Moreno-Lax and Efthymios Papastavridis (eds), (n 11); Tamara Last, 'Deaths at the Borders: Database for the Southern EU' (12 May 2015), <http://www.borderdeaths.org/?page_id=425> accessed 4 March 2022; Tamara Last and others 'Deaths at the borders database: evidence of deceased migrants' bodies found along the southern external borders of the European Union' (2017) 43(5) JEMS 693; Thomas Spijkerboer 'The Hu-

the International Organisation for Migration (IOM), has been documenting the deaths of migrants along mixed migration routes worldwide since October 2013, using their own methods and criteria.[34] UNITED's database will at times be relied upon in this book in order to give at least an idea of the numbers of fatalities that are the subject of this review. UNITED are preferred over other sources that record fatalities amongst migrants and refugees because, unlike other surveys, their database captures all of the main categories of deaths that are the concern of this study—including, for example, custody deaths and deaths upon forced return to countries of origin or transit. The different methodologies used by those organisations attempting to record the number of fatalities all have their own advantages and disadvantages. UNITED rely on a range of sources for their data, including other NGOs, media sources and the IOM. The source of the information on each individual death is recorded on their database.

In addition, there is an increasing amount of NGO and academic research into the circumstances of specific deaths or fatal incidences involving migrants at Europe's borders. Researchers at Forensic Oceanography, in particular, have been documenting the deaths of migrants at sea as well as undertaking their own detailed investigations and evidence gathering into fatal incidences in the Mediterranean.[35] Their sister organisation, Forensic Architecture, has also carried out similar investigations into the deaths of migrants at Europe's external and internal land borders.[36] Their work tends to be case-study focussed but it does also draw connections between incidences and discuss commonalities between fatal scenarios.[37] Again, while these investigations are relevant in highlighting what is possible even on the part of non-State actors when it comes to collecting evidence and investigating specific deaths, and can be held up to challenge State inaction in the aftermath of certain deaths, its focus is very much on the deaths themselves rather than State responses in their aftermath. Finally, the NGO Last Rights, which campaigns for the creation of 'a new framework of respect for the rights of missing and dead refugees, migrants

man Costs of Border Control' (n 11); Tamara Last and Thomas Spijkerboer, 'Tracking deaths in the Mediterranean' in Tara Brian and Frank Laczko (eds), *Fatal Journeys. Tracking Lives Lost During Migration* (International Organization for Migration 2014); Thomas Spijkerboer, 'Wasted Lives. Borders and the Right to Life of People Crossing Them' (2017) 86 Nord Int Law 1; Thomas Spijkerboer, 'Moving Migrants, States and Rights: Human Rights and Border Deaths' (2013) 7(2) LEHR 213; Thomas Spijkerboer, 'Are European States Accountable for Border Deaths?' in Satvinder S Juss (ed), *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate 2013).

34 IOM (n 1) accessed 13 March 2022.

35 See Forensic Oceanography in Forensic Architecture, 'Investigations' *(Forensic Architecture)* <www.forensic-architecture.org/category/forensic-oceanography> accessed 4 March 2022.

36 Forensic Architecture, 'Category—Borders' *(Forensic Architecture)* <www.forensic-architecture.org/category/borders> accessed 4 March 2022. Charles Heller and Lorenzo Pezzani describe Forensic Oceanography's ethos, philosophy and methodology in their book chapter, Charles Heller and Lorenzo Pezzani, (n 9) 95.
Forensic Architecture, 'Category 'Forensic Oceanography' *(Forensic Architecture)* <www.forensic-architecture.org/category/forensic-oceanography> accessed 13 March 2022.

37 Ibid.

and bereaved family members', has been contributing to debates on what should happen in the aftermath of deaths, including in relation to investigating deaths and identifying the deceased.[38]

There is surprisingly little written about the right to life and associated investigative obligations when it comes to the deaths of unsettled migrants and refugees. A notable exception to this is Thomas Spijkerboer's chapter 'Are European States Accountable for Border Deaths?'.[39] While restricted in length and scope, it does constitute an important contribution to the literature in this area, raising and exploring some of the issues that will be considered in more detail in this book. Spijkerboer's analysis should not be seen as the end of the debate, but rather as the start. In its identification of the importance of the issues and some potential pathways, it is clear that there is a need for further in-depth analysis of the caselaw on investigative obligations and its implications for scenarios in which large numbers of migrants and refugees are dying.

To that end, this study asks to what extent does the current law provide a basis on which it can be argued that European States have an obligation to investigate the unnatural deaths of unsettled migrants and refugees within or close to their borders?

Answering this question is important because investigations into deaths have the potential to have a significant positive practical impact on various facets of this ongoing human tragedy: a tragedy that is manifested both at Europe's external borders and also deep within Europe's territories, where Moreno-Lax's 'embodied border paradigm' finds tragic expression in, for example, deaths in the back of food transport trucks,[40] or at the hands of police,[41] security forces[42] or private G4S security guards,[43] or from self-inflicted deaths in detention.[44] There are at least five reasons why an answer to the question is important.

First of all, investigations into such deaths have the potential to identify any connections between State policies and practices and migrant fatalities, and give public and official expression to those connections where they exist. This can help ensure accountability in the area of domestic and supranational border control policy, as well as in the actions of institutions and actors that work in this area. Second, where practical systemic or operational failures contribute to a death, an investigation can

38 See, for example, Last Rights, 'Extended Legal Statement and Commentary: The Dead, the Missing and the Bereaved at the World's Borders' (*Last Rights,* 2019) <http://last-rights.net/LR_resources/html/LR_docs.html#documents> accessed 4 March 2022.

39 Thomas Spijkerboer, 'Are European States Accountable for Border Deaths' (n 33) 61–76.

40 BBC, 'Essex lorry deaths: 39 bodies found in refrigerated trailer' (*BBC*, 23 October 2019) <www.bbc.com/news/uk-england-50150070> accessed 6 March 2022.

41 BBC, 'Joy Gardner's family sues police' (*BBC*, 15 February 1999) <http://news.bbc.co.uk/1/hi/uk/279922.stm> accessed 6 March 2022.

42 Forensic Architecture, 'The Killing of Muhammad Gulzar' (n 7) last accessed 9 March 2021.

43 BBC, 'Jimmy Mubenga death: Timeline of the case and G4S guards' trial' (n 16).

44 Institute of Race Relations (n 2) accessed 20 March 2021.

provide an opportunity for lesson learning. Third, while justice is a multifaceted and subjective concept, a reliable, public, independent, official narrative about the circumstances surrounding a death, or deaths, can itself constitute an important element of justice for families and survivors even if they also seek other remedies.[45] Fourth, in contested death scenarios, an effective investigation is typically a prerequisite to the pursuit of those other remedies. Finally, providing families with answers about dead or missing loved ones is essential for the grieving process to take its course. Indeed, on a very basic level bodies are more likely to be identified and successful contact made with next of kin where there has been some investigation into a death and its circumstances. But as well as the immediate benefits investigations can offer in providing answers to families, raising public awareness, and, where appropriate, ensuring accountability for deaths, they can also create a solid, evidence-based foundation for impact-orientated policies that focus on reducing suffering and harm. The lessons learned and the accountability that can result from effective investigations can not only save lives but could contribute to a more generally humane system for managing the movement and settlement of migrants and refugees.

Methodology

This study employs a traditional doctrinal approach focussing on primary sources and, in particular, caselaw. Specifically, it uses direct analysis and interpretation of cases to identify the manner and extent to which the Judgments, Decisions, Views, Observations and General Comments of the Courts and Committees that monitor compliance with the instruments discussed, provide the basis for investigative obligations, or contribute to interpretations that may provide the basis for such obligations where the law remains unclear. While the scholarly literature is often touched upon, the deployment of this methodology means that cases—as the original sources—are prioritised. There are two particular advantages of using this method. First, it is the cases as primary sources—rather than the scholarly literature—that can provide the basis for any obligations that may exist. Secondly, the focus on caselaw that this method affords allows a depth of attention that is necessary in order to precisely identify both the scope and content of legal obligations that are relatively well established, as well as those strands of caselaw that have the potential to contribute to legal arguments about the extent to which such obligations should be expanded and consolidated where the current state of *lex lata* is undefined, ambiguous or otherwise unclear.

The caselaw considered falls into two main categories. The first has direct and clear relevance to circumstances in which unsettled migrants and refugees are dying: such as those that address use-of-force deaths at the hands of the State and deaths in detention. The second category of cases consists of those which are more indirectly relevant to circumstances in which significant numbers of unsettled migrants

45 Sam McIntosh, *Open Justice and Investigations* (n 21) 172–173; Sam McIntosh, 'Taken Lives Matter: Open Justice and Recognition in Inquests into Deaths at the Hands of the State' (n 21).

and refugees are dying. These include, for example, healthcare-related deaths or deaths that result from industrial accidents. While these may not appear to hold direct relevance to significant numbers of migrant or refugee deaths, some of the arguments and lines of reasoning that inform judgments may, by analogy, provide clues on how unclear, untested or ambiguous areas of caselaw may be decided in future, and relevant principles can also often be derived from them. Some caselaw will fit into both these categories. For example, cases addressing self-inflicted deaths in custody are directly relevant to the significant number of self-inflicted deaths in immigration detention centres, but they could also hold significance for the deaths of migrants in the Mediterranean as they demonstrate that the voluntary actions of an individual that contribute to their own death will not necessarily erase a State's legal responsibility.

Across both categories of the caselaw the focus is on obligations owed by European States, and specifically on human rights instruments that bind some or all member States of the CoE. The analysis is limited to what are arguably the five most important international and regional legal instruments in this area: the European Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights/ECHR), the Charter of Fundamental Rights of the European Union (CFREU), the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT), and the United Nations Convention on the Rights of the Child (CRC).

On the ECHR, the analysis will include judgments, admissibility decisions and European Commission on Human Rights (the Commission ECmHR) reports. While other sources will be drawn upon, particular reference will at times be made to the Guides on the Convention articles that are published by the European Court of Human Rights (ECtHR). The purpose of these Guides is 'to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court.'[46] While they are produced by the Court, they do not hold any formal or binding status when it comes to the law surrounding the ECHR. Nevertheless, in keeping with their purposes, they will often naturally be the first port of call for practitioners and other stakeholders when seeking up-to-date information and understanding of the topics they discuss. For this reason, they merit and will be given some critical attention.

In relation to the CFREU, use will be made of the Praesidium of the European Convention's *Explanations relating to the Charter of Fundamental Rights*, as well as CJEU and domestic caselaw. With the ICCPR, the Human Rights Committee's (HRC's) Views, Concluding Observations on country reports, and General Comments will be drawn upon. The status of these will be briefly discussed in the introduction to Chapter B of Part II. When it comes to the CAT, there will be a similar focus on the Committee Against Torture's (CmAT's) Decisions on individual

46 ECtHR, *Guide on Article 2 of the European Convention on Human Rights: Right to Life* (CoE, updated 31 December 2021) 5.

complaints, Conclusions and Recommendations on country reports, and General Comments. The discussion on the Convention on the Rights of the Child will draw on some Concluding Observations on country reports by the Committee on the Rights of the Child (CmRC), but the lack of relevant caselaw means that particular reliance is placed on the Committee's General Comments.

With regard to terminology, the term 'unsettled migrants and refugees' is mainly used to capture non-nationals who are present in a given territory without a settled legal status: i.e. they either do not hold a locally-defined legal status or they hold only a time-limited or transitory locally-defined legal status. However, this is not intended as a rigid category and the intention is for the term to capture the vulnerability of mostly non-EU migrants and refugees in Europe in terms of their legal and social position in the geographical regions they find themselves.

Structure

The book is divided into two parts. Part I is dedicated in its entirety to an analysis of the relevant investigative obligations arising under the ECHR, while the book's shorter Part II takes in investigative obligations under the CFREU, the ICCPR, the CAT and the CRC. Given the history of Article 2 ECHR—including the large amount of caselaw on the Article and the relatively advanced human rights regime that surrounds it—Part I of the book is substantially larger than Part II, despite the latter addressing four different regimes.

Part I is comprised of three chapters. Chapter A examines the scope of Article 2 ECHR's substantive obligations. This is necessary because while the main investigative obligation under Article 2 is a free-standing one, its origins and development—including in relation to its scope and application—are closely tied to a requirement to give practical effect to those substantive obligations. A large part of this chapter explores how the Court addresses issues of causation and remoteness, particularly when it comes to alleged breaches of the positive substantive obligation to adequately safeguard life under Article 2. Caselaw will be considered that, for example, clearly demonstrates that obligations under Article 2 can be engaged in the context of activities carried out by the State which are generally permitted by public international law, including human rights law. This is important because not only has the Court specifically confirmed the public international law principle that States have a right to control their borders, but also because this will generally be its starting point when addressing cases that touch upon border control.[47] Chapter B then addresses the investigative obligations that arise under the Article. Both chapters take a detailed look at different categories of cases that are directly or indirectly relevant to those circumstances in which many migrants and refugees are dying within or close to the borders of CoE member States. While the focus is on the Right to Life under Article 2, Article 3 ECHR (prohibition of torture) at times

47 See, for example, *Gül v. Switzerland* App no 23218/94 (ECtHR, 19 February 1996) para 38 and *Abdulaziz, Balkkandali and Cabales v. the United Kingdom* App nos 9214/80, 9473/81 and 9474/81 (ECtHR, 24 April 1985) para 67.

forms part of the discussion. Not only do similar, if not identical, investigative obligations arise under both Articles—with caselaw on one influencing the caselaw on the other—but the circumstance of a death may be preceded by treatment that will itself give rise to an investigative obligation under Article 3.

Having established the basic elements of the investigative obligations that arise under Article 2, Chapter C then discusses the potential jurisdictional reach of the Convention and the investigative obligations that arise under Article 2 in particular. While jurisdiction is a threshold criterion when it comes to the admissibility of a case before the European Court of Human Rights and would therefore normally be the first issue to be considered before the Court in a given case, it is considered separately from the discussion of the elements of the investigative obligations because it is not always a contested or contentious issue in scenarios involving the death of unsettled migrants and refugees. It will also be seen in Chapter 3 that the ECHR jurisprudence on jurisdiction is some of its most controversial, and is more effectively considered removed from the discussion on the detailed technical aspects of Article 2's substantive and procedural obligations. Finally, the chapter ends with a brief discussion on the implications of the EU potentially acceding to the ECHR. There is a certain amount of artificiality in separating out the analysis of the caselaw along these lines. However, it has proven to be the most effective way of extrapolating and discussing the dominant features of the caselaw and identifying gaps, ambiguities and potential issues for ascertaining whether there may be an investigative obligation in a given scenario.

Chapter A of part II discusses the CFREU and investigative obligations. This is followed by Chapters B–D of part II which discuss investigative obligations that exist or might be derived from the ICCPR, the CAT and the CRC respectively. Each of these chapters follows the same format of considering the relevant substantive obligations that arise under the respective instruments, followed by a consideration of any investigative obligations that might be engaged in the aftermath of certain types of migrant and refugee deaths, and end with a consideration of how the respective instruments address questions of jurisdiction.

The Argument

There are three main limbs to the argument that permeates the book. The first is that relatively well-defined investigative obligations will arise under some of the instruments discussed in this book in the aftermath of a number of categories of fatal scenarios which affect significant numbers of unsettled migrants and refugees. One can generally point to two types of investigative obligation that may arise in these cases depending on their circumstances. The first will be identified as the 'full investigative obligation'. This is a free-standing, *ex officio* obligation on States to initiate an investigation into certain types of deaths, which has clear minimum requirements in terms of how the investigation must be carried out. In particular, it must generally be initiated by the State, independent, effective, open to the public, and allow for the involvement of the deceased's next of kin. It will be argued that there are a number of types of cases that clearly engage this full investigative obligation,

such as use-of-force deaths at the hands of State actors and unnatural deaths in custody. The second obligation is to have a system in place that in normal circumstances will provide an opportunity for some investigation into contentious deaths. In terms of its investigative elements this is a weaker obligation, as those elements and any minimum requirements are contingent—for example, upon the behaviour of any potential applicant/complainant. As such, this lesser obligation typically does not include all of the same minimum standards as the 'full investigative obligation'. When it comes to the ECHR, it is relatively clear that some categories of cases will engage this second obligation and *not* the full investigative obligation. However, there are some internal inconsistencies in some ECtHR judgments, as well as some significant outlying caselaw that means that dividing categories of cases between the two types of obligations according to the circumstances of a death is not always straightforward.

The second limb of the book's argument turns to how this lack of clarity is to be addressed. Here, it will be argued that ambiguity in areas of the caselaw on the weaker obligation, coupled with what might be described as some outlying cases, may leave some room open for the future expansion of the scope of investigations when it comes to some of the cases under consideration.

The third main limb of argument concerns the fact that there are some fatal scenarios involving migrants and refugees which, by their nature, give rise to two significant hurdles that may limit the extent to which the investigative obligations discussed can be viewed expansively. These hurdles concern the questions of remoteness and jurisdiction when it comes to the deaths of migrants and refugees that occur beyond the territory of a particular State which arguably bears some practical responsibility for the death. The nature of these hurdles will vary depending on the circumstances surrounding a death and, it will be argued, the human rights instrument that is being discussed. There may in some cases be a relatively strong argument both that the threshold criterion of jurisdiction can be met, and that the circumstances of a death are such as to fit the other criteria necessary for an investigative obligation to be engaged. In other cases, the situation will either simply be unclear, or the caselaw may weigh more against an obligation being engaged. In relation to all of these cases, the book explores the strongest case for investigative obligations being engaged if one accepts that there is at least an arguable case that there is a link between State practice in the area of border control and the vulnerability of migrants and refugees to harm and death while on route to Europe.[48] Therefore, as well as describing the current state of the law in relation to these more problematic scenarios, this limb will be concerned with pulling together those strands of the respective monitoring bodies' (Courts' and Committees') reasoning and arguments that can be found in their existing caselaw that might be employed to argue for an expansive investigative obligation in these difficult cases. While these arguments will draw from analogous features of existing caselaw, it will also be clear to the reader that they are being ad-

48 Again, it is beyond the scope of the book to re-argue well-trodden debates on this matter see (n 12). The intention is merely to state that the connection is, at the very least, an arguable one to make and explore what this might mean for investigative obligations in this area.

vanced as *arguments,* rather than as an exegetical discovery of what inherently lies within that caselaw. Counter-arguments and points of contestation are acknowledged, but the arguments advanced in this book are often framed so that they identify the strongest case for claims that States have investigative obligations. In doing so, the work seeks to set out legal positions that practitioners might plausibly adopt. This will conversely identify both arguments that States may need to counter if resisting the proposition that investigative obligations exist, and arguments on which courts may need to adjudicate in future. In practice, the potential success or otherwise of such arguments is likely to be highly fact specific.

A brief introduction to human rights obligations to investigate deaths

In 1995, the European Court of Human Rights (ECtHR) reached a controversial judgment that was to have far-reaching implications for the protections existing under Article 2 (the right to life) of the European Convention on Human Rights. *McCann v. the United Kingdom* concerned the shooting dead of three members of the Irish Republican Army (IRA) in Gibraltar by British soldiers.[49] As part of its judgment, the Court ruled that where someone dies as a result of the use of force by a State actor, the State must initiate an independent and effective investigation into the circumstances of the death. While there is no such obligation on a plain reading of Article 2, the Court reasoned that it was necessary to imply it into the Article because a prohibition on States arbitrarily killing people 'would be ineffective in practice, if there existed no procedure for reviewing the lawfulness of the use of force by State authorities.'[50] The Court additionally held that in determining whether a State has breached the prohibition on arbitrary killings, it was important to consider all the relevant surrounding circumstances of the case, rather than just the immediate physical cause of death.[51]

The nature and scope of the investigative obligation that was established in *McCann* have been significantly expanded over the years. First, the ECtHR has held that the obligation is not confined to use-of-force deaths at the hands of State actors or institutions but is also engaged where a State may have failed to take 'appropriate steps to safeguard life'.[52] Second, acts performed or producing effects outside of the territorial jurisdiction of a State can, in some circumstances, give rise to an investigative obligation even where the death itself occurs outside of a State's national territory.[53] Subsequent judgments to *McCann* have also set minimum requirements for investigations in terms of their effectiveness, scope, independence, openness to the public, and the extent to which they involve the deceased's family.[54]

49 *McCann and Others v. UK* App no 18984/91 (ECtHR, 27 September 1995) para 31.
50 Ibid para 161.
51 Ibid para 201.
52 See, for example, *Keenan v. UK* App no 27229/95 (ECtHR, 3 April 2001) para 89.
53 See, for example, *Al-Skeini v. UK* App no 55721/07 (ECtHR, 7 July 2011) paras 149–150.
54 See, for example, *Jordan v. UK* App no 24746/94 (ECtHR, 4 May 2001) paras 105–109.

The investigative obligation under Article 2 ECHR that was created by the Court in *McCann* is just one of a number of investigative obligations that exist under regional and international human rights law. A similar investigative obligation exists under Article 3 ECHR (the prohibition against torture). The CFREU also contains a right to life (Article 2) and a prohibition against torture and inhuman or degrading treatment or punishment (Article 4).[55] Article 52(3) CFREU requires that Charter rights that correspond to ECHR rights are, as a minimum, given same meaning and scope as given to the latter by the ECtHR.[56] The Praesidium of the Convention has specifically confirmed this in relation to Article 2, stating that:

> The provisions of Article 2 of the Charter correspond to those of the […] Articles of the ECHR and its Protocol. They have the same meaning and the same scope, in accordance with Article 52(3) of the Charter.[57]

Therefore, EU Institutions and EU member States—when the latter are acting within EU competences—are in theory bound by equivalent investigative obligations under Articles 2 and 4 of the Charter to those existing under Articles 2 and 3 ECHR.[58]

Other international human rights instruments have also seen the development of investigative obligations. It will be seen that the HRC has held there to be investigative obligations under Articles 6 (the right to life) and 7 (the prohibition of torture) of the ICCPR.[59] Articles 12 and 16 of the CAT, explicitly require States to investigate whenever there are reasonable grounds to believe someone has suffered

55 Charter of Fundamental Rights of the European Union (CFREU) [2000] 43 OJ C 364/01.

56 Ibid art 52(3).

57 Praesidium of the European Convention 'Explanations relating to the Charter of Fundamental Rights' [2007] 40 OJ C 303/02.

58 So far there has as yet been no caselaw before the CJEU on this topic. It will be seen that just because there is an already existing obligation under the ECHR (of which all EU members are also parties), this is not just a purely redundant obligation. It potentially has significant implications given the different way in which the question of jurisdiction is dealt with under EU law.

59 '28. Investigations into allegations of violation of article 6 must always be independent', UNCHR 'General Comment No. 36: Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, Add.28. See also UNCHR 'Concluding Observations of the Human Rights Committee: Cameroon' (4 August 2010) UN Doc CCPR/C/CMR/CO/4, Add.15; 'impartial': see, e.g., UNCHR 'Concluding Observations: Bolivia' (6 December 2013) UN Doc CCPR/C/BOL/CO/3, Add.15; 'prompt': See, for example., UNCHR 'Communication No. 1556/2007, Novaković *v.* Serbia' (21 October 2010) UN Doc CCPR/C/100/D/1556/2007, paras 5.4 and 7.3; 'thorough': UNCHR 'Concluding Observations: Mauritania' (21 November 2013) UN Doc CCPR/C/MRT/CO/1, para 13; 'effective': UNCHR 'Concluding Observations; United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc CCPR/C/GBR/CO/7, para 9; 'credible': UNCHR 'Concluding Observations: Israel' (3 September 2010) UN Doc CCPR/C/ISR/CO/3, para 9 and 'transparent': UNCHR 'Concluding Observations: United Kingdom of Great Britain and Northern Ireland' (17 August 2015) UN Doc CCPR/C/GBR/CO/7, para 8. See also UNCHR 'General Comment No. 3: Article 2 (Implementation at the national level)' (29 July 1981) HRI/GEN/1/Rev.9; UNCHR 'Concluding Observations: Guatemala' (3 April 1996) UN Doc CCPR/C/79, Add. 63.

torture or cruel, inhuman or degrading treatment or punishment, where it is at the instigation of, or with the consent or acquiescence of, a State actor. An investigative obligation exists under Article 6 (right to life) of the CRC.[60] Article 24 of the International Convention for the Protection of all Persons from Enforced Disappearance includes an obligation to investigate disappearances.[61] Finally, Articles 32 and 33 of Protocol 1 to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, set out the rights of victims' families to know the fate of their relatives and discusses the associated need for States to gather and transmit evidence and information.[62]

While this book is concerned with the international and regional legal frameworks that govern the behaviour of CoE member States, it is important to note that other regional regimes also support positive investigative obligations, even when they do not exist on a plain reading of their respective legal instruments. The Inter-American Court of Human Rights (IACtHR) has held an investigative obligation to exist both in relation to deaths at the hands of the State[63] and disappearances.[64] And the African Commission on Human and Peoples' Rights (ACHPR), has held there to be an investigative obligation under the right to life contained in the African Charter on Human and Peoples' Rights. The Commission's General Comment No. 3 on the Right to Life states:

> The failure of the State transparently to take all necessary measures to investigate suspicious deaths and all killings by State agents and to identify and hold accountable individuals or groups responsible for violations of the right to life constitutes in itself a violation by the State of that right… All investigations must be prompt, impartial and transparent.[65]

There are also non-legally binding international agreements, principles and guidelines that are relevant to the subject. Objective 8 of the 2018 Global Compact for Migration, for example, is to 'Save lives and establish coordinated efforts on missing migrants',[66] under which States have committed themselves to 'cooperate inter-

60 UNICEF 'Implementation Handbook for the Convention on the Rights of the Child' (*UNICEF*, September 2007) 92 <www.unicef.org/lac/media/22071/file/Implementation%-20Handbook%20for%20the%20CRC.pdf> accessed 24 March 2022; UN Committee on the Rights of the Child 'Concluding observations: United Kingdom of Great Britain and Northern Ireland' (9 October 2002) UN Doc CRC/C/15/Add.188, para 40.

61 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

62 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 4.

63 *Montero Aranguren et al (Detention Center of Catia) v. Venezuela, Martínez Liébano and 36 Others v. Venezuela,* Preliminary object, merits, reparations and costs, Inter-American Court of Human Rights Series C No 150, para 66 (5 July 2006).

64 *Velásquez Rodríguez v. Honduras*, Merits, Judgment, Inter-American Court of Human Rights Series C No 4, paras 176–180 (29 July 1988).

65 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)' (ACHPR Banjul 2015), para 15.

66 UNGA Res 73/195 (2019) UN Doc A/RES/73/195, para 16.

nationally 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', and to 'identify those who have died or gone missing, and to facilitate communication with affected families'.[67] The actions listed to achieve these objectives logically require investigative elements when it comes to migrant deaths and/or the integration of investigative elements into the relevant systems, given that they include the need to:

1. Develop procedures and agreements on search and rescue of migrants, with the primary objective to protect migrants' right to life that uphold the prohibition of collective expulsion, guarantee due process and individual assessments, enhance reception and assistance capacities, and ensure that the provision of assistance of an exclusively humanitarian nature for migrants is not considered unlawful.
2. Review the impacts of migration-related policies and laws to ensure that these do not raise or create the risk of migrants going missing, including by identifying dangerous transit routes used by migrants, by working with other States as well as relevant stakeholders and international organizations to identify contextual risks and establishing mechanisms for preventing and responding to such situations, with particular attention to migrant children, especially those unaccompanied or separated.[68]

The Compact also refers to limited investigative and information management elements, specifically regarding the identification of the deceased, the recovery of remains and the traceability of burials.[69]

Further, the (revised) 2016 Minnesota Protocol on the Investigation of Potentially Unlawful Death, published under the Auspices of the Office of the United Nations High Commissioner for Human Rights, is effectively a non-legally binding manual of good practice and international guidelines for the investigation of contentious deaths.[70] The first paragraph refers to its aims as being 'to protect the right to life and advance justice, accountability and the right to a remedy, by promoting the effective investigation of potentially unlawful death or suspected enforced disappearance.'[71]

It will already be clear that the obligations to investigate migrant deaths, such as they are, are established by a complex series of legal instruments as well as being governed by diverse, and sometimes possibly contradictory, sets of legal decisions. The aim here is to introduce some more coherent understanding of the obligations owed by European States, taken as a whole, and to offer some insights as to the manner in which those obligations might further develop.

67 Ibid para 24.
68 Ibid paras 24(a)-(b).
69 Ibid paras 24(e)-(f).
70 OHCHR, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation on Extra-legal, Arbitrary and Summary Executions' (*United Nations*, 2017) <www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf> accessed 24 March 2022.
71 Ibid para 1.

I. The European Convention on Human Rights

A. Understanding the scope of Article 2's substantive obligations

A very brief introduction to the case of *McCann v. the United Kingdom*

While this chapter focusses on Article 2's *substantive* obligations, this introduction will begin with a very brief overview of the origins of the Article's *investigative* obligation. This is to contextualise what follows and to understand *why* a review of Article 2's substantive obligations is necessary for a full understanding of the scope of the investigative obligation. A detailed analysis of the investigative obligation will then be returned to as the topic of Chapter B. Part I will then conclude with Chapter C's examination of the potential jurisdictional reach of Article 2 as well as a discussion of the potential significance of the future accession of the EU to the ECHR.

As mentioned in the introduction, the investigative obligation under Article 2 ECHR was effectively created by the ECtHR in the case of *McCann v. The United Kingdom*.[72] This 1995 case concerned the shooting dead of three unarmed IRA members by British soldiers in Gibraltar in 1988. As part of its judgment, the Court held that wherever someone dies as a result of the use of force by State actors there must be an effective official investigation into the death. The aim of the investigation in such cases is to establish if the use of force was justified: that is 'absolutely necessary' to achieve one of the permissible aims listed in Article 2(2). The Court's interpretation of the scope of the substantive obligation in the judgment will be returned to shortly, but in terms of the investigative obligation, the Court famously held that:

> [A] general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.[73]

In creating the investigative obligation, the Court therefore gives the obligation's purpose as: to help ensure the real-life protection of Article 2's substantive obligations, as required by Article 1 ECHR. The Court did not set out what form an investigation should take, but it did find that, on the facts before it, the obligation had been met by an inquest into the three deaths. This inquest, it held, had amounted to a 'detailed review of the events', and it noted favourably that it had been held in

72 *McCann and Others v. UK* (n 49).
73 Ibid para 161.

public and that the families of the deceased had been able to cross-examine witnesses and make submissions to the Coroner.[74] Openness to the public and openness to the participation of next of kin would be identified in subsequent caselaw as explicit requirements of the investigative obligation.[75] Other requirements identified in subsequent caselaw include that the State must initiate the investigation (i.e. without waiting for a complaint) and that the investigation must meet minimum standards in terms of its independence and effectiveness.[76] Crucially, subsequent caselaw has also held that the obligation not only arises where an individual has died as a result of the use of force by the State, but also where a death may have resulted from a failure by the State to adequately safeguard life.[77]

The investigative obligation under Article 2 does not, of course, require the State to undertake a detailed investigation into all deaths no matter how they may have occurred. So, what is the scope of the obligation in terms of both the types of deaths which will engage the obligation and the depth of investigation required? And what does this mean in relation to the circumstances in which many unsettled migrants and refugees are dying? Given that the obligation was read into Article 2 by the ECtHR, it is not surprising that the text of Article 2 is of little assistance in answering these questions. One must therefore look elsewhere. The most obvious indicator will be the factual backgrounds of cases in which the ECtHR has already ruled that the obligation is engaged. If there are no jurisdictional issues and the factual circumstances surrounding an unsettled migrant's death closely match a precedent, the investigative obligation will be engaged. It is clear, for example, that if a migrant or refugee is shot dead by police within the territory of a CoE member State, the investigative obligation will be engaged as per *McCann* and many subsequent cases.

Given that the ECtHR takes a purposive approach when interpreting the Convention, another important indicator of when the investigative obligation will be engaged lies in the normative purpose(s) which have been ascribed to the obligation by the Court. It has just been observed that the original purpose given for the obligation in *McCann* was to help ensure the practical protection of Article 2's substantive obligations. While the investigative obligation is a free-standing one—in that a failure to carry out an investigation can amount to a breach of Article 2 even if the Court is satisfied that there was no breach of the Article's substantive obligations—[78] the obligation nevertheless grew out of, and remains closely tied to, the practical protection of those substantive provisions. The fact that the ECtHR adopts a purposive approach means that where the factual circumstances of a migrant's death do not obviously match an existing precedent, an investigative obligation may be implied where it would, in the circumstances, contribute to furthering Article 2's normative purposes. The argument for creating a new precedent, which

74 Ibid para 162.
75 Ibid paras 162–164.
76 *Jordan v. UK* (n 54) paras 106–107.
77 *Keenan v. UK* (n 52) para 89.
78 See, for example, *Ramsahai and Others v. the Netherlands* App no 52391/99 (ECtHR, 15 May 2007).

is applicable to a new category of cases, will be stronger the closer any analogy can be drawn between the facts of the case and an already existing precedent. It will also be stronger if the envisaged new precedent does not contradict any limits which may have previously been articulated by the Court regarding the investigative obligation's scope. However, it is important to note that prior limits placed on the scope of the obligation by the Court are not necessarily decisive given the Convention's status as a 'living instrument', capable of evolving beyond previously set parameters.

Given that the *raison d'etre* of the investigative obligation began, and to a large extent remains, bound to the need to ensure the practical protection of Article 2's substantive obligations, its scope will naturally be closely linked to the scope of said substantive obligations. In *McCann* itself, the Court underlined that:

> The Court's approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions must be interpreted and applied *so as to make its safeguards practical and effective.*[79]

It therefore follows that a review of the scope of Article 2's substantive obligations is necessary before entering into the in-depth analysis of the investigative obligation itself. A degree of caution is needed here, however, because while the link between the investigative obligation and Article 2's substantive obligations to a large extent defines the former's character, there are other influences which have contributed to its evolution. Indeed, certain features of the investigative obligation have evolved whose relevance to ensuring the practical protection of Article 2's substantive requirements can appear rather tenuous. In this regard, the obligation has evolved into more than just a technical means to an end and has been attributed with its own inherent normative value—both by domestic courts and the ECtHR. Chapter B will, therefore, also touch upon those cases which have instilled in the investigative obligation some outlying, but nevertheless important purposes, which appear to be independent from the task of ensuring the practical protection of the substantive right to life.

While the ECtHR *Guide on Article 2* suggests that the investigative obligation is also inherent to the positive substantive requirement to protect the right to life by law,[80] it will be seen that the reality is arguably much more complex. Nevertheless, on a basic level, subsequent caselaw to *McCann* has indicated that an investigative obligation can also extend to non-use-of-force scenarios and situations where it is alleged that a State has failed to adequately safeguard life. It therefore also seems that some form of investigative obligation will be engaged whenever, as a matter of law, a death is *of a type* that can engage a State's responsibility under Article 2's substantive obligations. While this cannot necessarily always be taken for granted, given

79 *McCann and Others v. UK* (n 49) para 146.
80 ECtHR, 'Guide on Article 2 ECHR' (n 46) para 142.

the at times contradictory caselaw—especially if talking about the 'full investigative obligation'—[81] it remains a logical starting point.

1. The basic content of Article 2 ECHR

A simple reading of the text of Article 2 reveals the existence of two substantive obligations: one positive[82] and one negative. The first sentence of the Article requires States to ensure that everyone's right to life is 'protected by law'. The second prohibits the intentional deprivation of life. The Article immediately provides an exception to this prohibition where someone has been convicted of a capital offence. However, with the signing and coming into force of the Convention's Protocols 6 and 13, this caveat currently only applies to Russia and, during times of armed conflict, Armenia and Azerbaijan.[83] The second paragraph of the Article then lists a further four use-of-force scenarios that will not amount to a breach of the general prohibition where those scenarios result in a death. These are deaths which result from the use of no more than absolutely necessary force to: defend someone from unlawful violence; lawfully arrest someone; prevent an escape from lawful detention; or quell a riot or insurrection.

Two obvious questions present themselves on a basic reading of the Article. First, in terms of the obligation contained in the first sentence ('Everyone's right to life shall be protected by law'), what is meant by the term 'right to life' here? A State can only ensure a right is properly protected by its laws if it is clear what that right entails. A strictly positivist interpretation of the Article might be that the 'right to life', as referred to in the first sentence of the Article, is defined by the prohibition on intentionally taking life, articulated in the rest of the Article: i.e. it consists of the right not to be intentionally killed, other than in the exceptional scenarios described in Article 2(2). A more natural law interpretation, on the other hand, might allow for a much broader reading that sees the 'right to life' as consisting of an individual's inherent right to live or exist, and that this right should be protected by laws. The second question that arises on a basic reading of the text relates to the ambiguity caused by the qualification 'intentionally' in the second sentence of the Article: 'No one shall be deprived of his life *intentionally*…'. A literal reading would reduce the scope of the prohibition on taking life to exclude negligently or recklessly caused deaths, and potentially even a death which was the natural consequence of an action that was nevertheless motivated by some other objective. As it will be seen, thankfully neither of the restrictive approaches described here has

81 This caveat will be explored in much more detail below.

82 While the positive obligation might at first sight appear to be purely procedural in nature, it will be seen that is has been interpreted as a primarily substantive obligation to adequately safeguard life with procedural elements.

83 Russia is the only CoE member State not to have ratified Protocol 6 ECHR. Russia and Azerbaijan have neither signed nor ratified Protocol 13. Armenia has signed but not ratified Protocol 13. CoE Treaty Office, 'Complete list of the Council of Europe's treaties' *(Council of Europe Portal)* <www.coe.int/en/web/conventions/full-list> accessed 29 January 2020. While Russia has not ratified either protocol, there has been a domestic moratorium on the death penalty since 1996.

been adopted by the ECtHR. In what follows, the negative and positive substantive obligations will be addressed in turn, beginning with the negative obligation 'No one shall be deprived of his life intentionally'.

2. The prohibition on arbitrarily taking life

Despite its wording ('No one shall be deprived of his life intentionally…') both the ECmHR and the ECtHR wasted little time in expanding the scope of this prohibition beyond one that only prohibits States from *intentionally* killing people, to include a much wider category of use-of-force deaths.[84] In *McCann*, the Court points out that 'the exceptions delineated in paragraph 2 indicate that this provision extends to, *but is not concerned exclusively with*, intentional killing', a phrase that has been repeated time and again when the Court addresses Article 2.[85] This makes obvious sense given Article 2(2)'s content and wording, which implicitly envisages breaches of the Article where death was not necessarily the intended outcome: for example, where the *intention* was to prevent someone from escaping lawful detention, but the degree of force used is found to be more than absolutely necessary.

In terms of the investigative obligation, the Court has consistently held that it will be engaged in all cases involving the lethal use of force by State agents. This will be the case whatever the immigration status of the victim. It is uncontroversial, then, that where an unsettled migrant or refugee dies within the territory of a CoE member State as a direct result of the use of lethal force by State agents, there must be an Article 2 compliant investigation into the death. One of many examples occurred in Ceuta on 6 February 2014 when at least 15 migrants were killed during a push-back operation which included the use of batons, tear gas and rubber bullets by the Spanish Guardia Civil on El Tarajal beach. Six years later, the closure of an investigation by a Spanish judge was still under appeal, the case having already been twice closed and twice ordered reopened.[86]

It was seen in *McCann* that the Court characterised the negative obligation under Article 2 as a prohibition on the State from arbitrarily killing people. This prohibition is relatively clear and straightforward. It was also seen that paragraph 2 of the Article sets out exceptions where use-of-force deaths by agents of the State will not amount to breaches of this negative obligation. But an important aspect of the substantive obligation, as developed by the Court in *McCann*, is the fact that in answering the question of whether a State has breached the negative obligation, the Court will consider all the surrounding circumstances of a death and not just the moment in which lethal force was used:

> In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly

84 A.3.a) below will examine some of the limits in this regard.

85 *McCann and Others v. UK* (n 49) para 148 (emphasis added).

86 ECCHR, 'Case Report: Justice for Survivors of Violent Push-backs from Ceuta' (*ECCHR*, 2020) <www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Ceuta_2020Jan.pdf> accessed 19 November 2021.

where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.[87]

This meant that in *McCann,* the Court found that while the soldiers who fired the fatal shots had not necessarily personally breached Article 2, there had nevertheless been *a* breach because opportunities had been missed to detain the suspects prior to lethal force being 'rendered inevitable'.[88] This was a crucial development, and one which also has significant implications for the investigative obligation, in that the scope of investigations will also have to take in the surrounding circumstances of a death and not just the moment in which lethal force was applied.

Finally, before moving on to consider deaths whose potential characterisation as 'use-of-force deaths at the hands of the State' is complicated by intervening factors, there is one particular feature of the caselaw on deaths in custody that needs to be raised at this stage, before deaths in custody generally are addressed in more detail below. The direct relevance of caselaw on deaths in custody to the deaths of unsettled migrants and refugees within the borders of CoE member States has already been alluded to. UNITED record almost 300 deaths in custody on their database.[89] *Salman v. Turkey* concerned a death in police custody where the deceased had allegedly been beaten and tortured. In its judgment, the Court made a number of findings that appeared to hinge upon the pervasive coerciveness of State custody and inherent vulnerability of prisoners and, as such, have broader application than just to those deaths in custody that might be the direct result of violence by State actors.[90] The case is therefore important when considering other scenarios where the coercive use of force by the State may have been just one of the circumstances relevant to an individual's death. *Salman* is an important case that will be returned to in different contexts in this book. In its judgment, the Court brought into Article 2-related custody cases a principle already being applied in Article 3-related cases: where someone has been injured in custody, the onus falls on the State to explain those injuries:

> Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for treatment of an individual in custody is particularly stringent where that individual dies.
>
> […] Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the

87 *McCann and Others v. UK* (n 49) para 150.

88 Ibid para 201.

89 United Against Refugee Deaths, 'List of documented deaths of refugees and migrants due to the restrictive policies of „Fortress Europe" (*UNITED for Intercultural Action*, 1 June 2021) <http://unitedagainstrefugeedeaths.eu/wp-content/uploads/2014/06/ListofDeaths-Actual.pdf> accessed 18 July 2019, searched using terms 'detention', 'prison', 'custody' and 'detained'.

90 *Salman v. Turkey* App no 21986/93 (ECtHR, 27 June 2000).

burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.[91]

Here there is effectively a reversal of the burden of proof where an applicant alleges a breach of Article 2 (and 3)'s substantive negative obligation in custody, with the onus falling on the State to prove that injuries or deaths were not unlawfully caused by agents of the State. Normally, the Court will not find a breach of the prohibition on killing unless an applicant can prove 'beyond reasonable doubt' that a death was unlawfully caused.[92] The practical effect of this is that a State's failure to independently and adequately investigate a death in custody might not only amount to a breach Article 2's procedural obligation, but it may also lead the Court to find a breach of the substantive negative obligation.[93] Self-inflicted deaths in custody will be considered in more detail below—when considering the substantive *positive* obligation under Article 2. But it is significant that *Salman* is routinely referenced by the Court in *all* death-in-custody cases, including undisputed self-inflicted deaths.[94]

There are several other scenarios to consider when discussing Article 2's negative substantive obligation, where the caselaw is often far from clear on the basic principles to be followed. Chief amongst these are scenarios which involve State institutions or actors but where other independent, cumulative or intervening factors may also have contributed to an individual's death. It also includes non-use-of-force deaths at the hands of the State or State actors. The first category would include cases where normally non-lethal force exacerbates a pre-existing injury with fatal consequences, or cases which involve a surrounding context of coercive State force but where there is an intervening act which is arguably more directly causative of the death itself: e.g. self-inflicted harm or an accident in State detention.[95] The second category would include those scenarios when, for example, State authorities

91 Ibid paras 99–100.

92 *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania* App no 47848/08 (ECtHR, 17 July 2014) para 131.

93 See, for example, *Anguelova v. Bulgaria* App no 3861/97 (ECtHR, 13 June 2002) para 177; *Kismir v. Turkey* App no 27306/95 (ECtHR, 31 May 2005) para 167; *Aktaş v. Turkey* App no 24351/94 (ECtHR, 24 April 2003) paras 299–307; *Mojsiejew v. Poland* App no 11818/02 (ECtHR, 24 March 2009) para 71; *Khayrullina v. Russia* App no 29729/09 (ECtHR, 19 December 2017) para 118.

94 It will be seen that the relevance of *Salman v. Turkey* (n 90) is not entirely clear when it comes to self-inflicted deaths and alleged breaches of the substantive positive obligation under Article 2.

95 In fact, the only cases that have been unambiguously considered by the ECtHR as breaches of the negative substantive obligation are those involving the direct use of lethal force by State agents. Self-inflicted deaths in custody will be the first category of cases examined under the positive substantive obligation below, despite there being obvious arguments that the background of coercive force will often be a causative or contributing factor to such deaths. Healthcare-related deaths will also be looked at under the positive substantive obligation, as this is invariably where the Strasbourg Court prefers to lump such cases—at least where it admits such cases engage art 2 at all. It will be seen that the Court has persisted in an argument that healthcare-related deaths involving individual negligence should not generally engage art 2. This leaves for consideration in this section cases where normally non-lethal use of force may have directly caused or contributed to a death, and

provide services which are unsafe or where a death results from individual acts of negligence on the part of State actors, such as, but by no means restricted to, certain healthcare-related deaths.

The difficulty with these two categories of cases is in determining whether the negative substantive obligation under Article 2 is engaged at all. In some of these cases, the Court has determined that the deaths fall to be considered under Article 2's *positive* substantive obligation—to adequately safeguard life. As far as the investigative obligation is concerned, the significance of distinguishing between cases engaging the negative substantive obligation and cases engaging the positive substantive obligation will be discussed in Chapter B. It will be seen that there is no precise correlation between cases engaging the negative or positive obligations and those respectively involving acts or omissions on the part of State actors. Indeed, in some cases, despite the fact that the acts or omissions of a State actor were clearly responsible for an unlawful death, the ECtHR has held that neither of the substantive obligations under Article 2 is engaged.[96]

3. Cases that straddle the negative and positive obligations under Article 2 ECHR

Beyond those cases where the use of lethal force by agents of the State has directly caused someone's death, three important categories of cases remain to be considered regarding the substantive prohibition on States depriving people of their lives. These can sit in a grey area between the negative obligation owed by States not to arbitrarily kill people, and the positive obligation to 'safeguard life'. The first two of these categories which will be described below have special implications for the scope of Article 2's investigative obligation. They are also particularly relevant when considering the deaths of unsettled migrants and refugees. These are self-inflicted deaths in State custody, and unnatural deaths that occur in third countries after an individual has been forcibly removed from the territory of a CoE member State. The third category consists of 'direct' use-of-force cases[97] which appear to engage

non-healthcare scenarios where State systems or the actions of State agents are directly causative of non-use-of-force deaths.

The distinction between force directly contributive to a death—(where the meaning intended is force exerted on the body which directly causes physical harm that is contributive to the cause of death) and force that is *indirectly* contributive to a death (where force did not itself contribute to the *physical* cause of death, but may nevertheless have been psychologically causative (or contributive) to a self-inflicted death (such as was found in the inquest into the death of 14-year-old Adam Rickwood, who took his own life shortly after being struck in the face and restrained by staff at Hassockfield Secure Training Centre) is admittedly unsatisfactory. BBC, 'Unlawful force contributed to death of boy, 14, in cell' (*BBC*, 27 January 2011) <www.bbc.com/news/uk-england-12297125> accessed 24 March 2022.

96 A.4.e) on healthcare cases below.

97 Again, two types of use-of-force scenarios are distinguished in a way which is not altogether unsatisfactory but nevertheless necessary in order to be able to address the cases separately, as they have been by the ECtHR: by 'direct use-of-force' cases, it is meant those cases where state actors have deliberately inflicted direct physical force on a specific

Article 2's negative obligation, because force by State agents seems to have played a direct physical causative role in a death, but where there may also have been other causative factors. Before moving on to consider this third category in more detail here, the following explains why the first two categories are more appropriately addressed under a consideration of Article 2's positive obligation (at A.4. below) and the ECHR's jurisdictional scope (Chapter C) respectively.

Self-inflicted deaths: The status of self-inflicted deaths in custody is not immediately clear in terms of whether they fall to be considered under Article 2's prohibition on taking life or the positive substantive obligation to protect life.[98] There will often be an argument in cases involving self-inflicted deaths in custody that but for the trauma of imprisonment, and the pervasive coercion that imprisonment involves, the deceased may not have taken their own life.[99] The frequency of self-inflicted deaths in State custody far outstrips suicide rates in the general population. In 2017, in England and Wales, for example, there was around a five to six times excess of suicides amongst male prisoners when compared to the general population, and in female prisons the number of suicides was a staggering twenty times higher than in the general population.[100] It is important not to over-simplify the various and complex factors that contribute to these jarring statistics, but at least some of the contributing factors are likely to be related to prison conditions and the prison environment.[101] The scenarios in which these deaths occur are defined by the deliberate use of force by the State and a lack of personal autonomy for at-risk individuals: features which themselves create, or at least contribute to, the risk of self-harm. The unnatural deaths of unsettled migrants and refugees in prisons or detention centres are similarly far from uncommon. And where they occur within the jurisdiction of a CoE member State, ECtHR caselaw weighs heavily in favour of an investigative obligation always being engaged. But there is a question as to whether the scope and applicable minimum standards of an investigation into an apparent self-inflicted death must match those required for violent deaths at the hands of third parties. The scope of the investigation, will be related to the test applied in such cases when it comes to a State's potential responsibility under one of Article 2's substantive limbs.

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individual or limited group of individuals. This is distinguish from the physical coercion that is involved in incarceration more generally. Both categories involve the use of force and are, of course, violent in their own way.

98 Why this could be significant will be examined further at B.8. below.

99 Interestingly, in this respect, the law in Germany recognises the existential need of humans to be free, to the extent that there is no distinct criminal offence for escaping, or attempting to escape, from prison: see, for example, Deutscher Bundestag, Wissenschaftliche Dienste, *Ausarbeitung: Zur Strafbarkeit der Gefangenenselbstbefreiung,* (2019 Deutscher Bundestag) para 4.2.1.

100 Seena Fazel, Taanvi Ramesh and Keith Hawton, 'Suicide in prisons: an international study of prevalence and contributory factors' (2017) 4(12) The Lancet Psychiatry 946, 946.

101 See, for example, Seena Fazel and others, 'Suicide in prisoners: a systematic review of risk factors' (2008) 69 Journal of Clinical Psychiatry 1721.

In this regard, a question arises as to whether the agency exercised in self-harm cases erases the part played by the broader context of State violence that characterises State detention. In the case of *Salman,* where the applicant alleged that the harm was caused by State actors, the Court nevertheless appeared to take the general underlying coercive context of custody very seriously. However, it will be seen that while the ECtHR invariably quotes the relevant paragraphs in *Salman* in cases involving self-inflicted deaths in custody, there is a question as to whether the fact of incarceration alone has any bearing on a State's responsibilities. While it may have a bearing on who carries the evidential burden in such cases, it is not clear from the caselaw whether it has any generally applicable and practical bearing on the standard of care expected from the State when it comes to taking steps to protect life.[102] The key passages in *Salman* read as if the case is of general application to all custody deaths, with the onus lying equally on the State to provide an explanation for self-inflicted deaths in prison as it does for deaths that are alleged to be the result of 'direct' violence inflicted by State actors. And Strasbourg caselaw on self-inflicted deaths in custody (as well as the caselaw in England and Wales) certainly points to an investigative obligation being engaged in these cases with all the main formal requirements that exist for (other) use-of-force deaths at the hands of State agents—*ex officio /ex propio motu*, public, independent, involving the next of kin.[103] But there remains a question as to how the requirement for a 'satisfactory and convincing' explanation should be applied to self-inflicted deaths? If the investigative obligation is only attached to the negative obligation, will an explanation be satisfactory as long as it convincingly rules out homicide? As indicated, the Court routinely quotes *Salman* in cases involving self-inflicted deaths in custody, but it prefers to rely on a very different case—*Osman v. the United Kingdom*—for the legal test of when a State's responsibility for a *substantive* breach under Article 2 arises in self-inflicted cases.[104] *Osman* will be considered in more detail at 4.a) below, but it did not involve coercive force on the part of the State or its agents—or indeed a context of State custody—and is instead a landmark case with regard to Article 2's *positive* substantive obligation. It is for this reason that self-inflicted deaths in custody will be considered in the next Section that addresses the positive substantive obligation under Article 2.

Expulsion cases: This brings us to the second category of cases referred to above, which are those concerning a State's potential responsibility under Article 2 for sending people to their deaths in third States. This is also a particularly important area of interest given the focus of this book. The question is whether Council of Europe States are responsible under Article 2 when they forcibly remove (deport/extradite/expel) at-risk individuals to third States, when those individuals are subsequently killed in those third States? Despite these cases potentially engaging a State's responsibility under Articles 2 and/or 3 ECHR, they do so in a way that the ECtHR has (albeit slightly inconsistently) insisted holds no extraterritorial impli-

102 See B.3.e) below.
103 See, for example, *Keenan v. UK* (n 52). See also B.5. below.
104 *Osman v. UK* App no 23452/94 (ECtHR, 28 October 1998).

cations for the Convention regime. It will be seen at Sub-Chapter C.2 that this is because the Court has determined that any potential responsibility under Article 2 deriving from an *at-risk* individual's potential (or actual) removal to a third State, accrues somewhere between the decision to remove and the act of removal—rather than if and when they actually suffer harm post-removal. Nevertheless, these cases will be addressed at the beginning of a broader examination of the jurisdictional scope of Article 2 and the Convention in Chapter C below. Not only do these cases have obvious extraterritorial dimensions—even if the ECtHR insists they do not engage extraterritorial *jurisdiction*—but the way in which the Court addresses them has at times informed its approach to other scenarios that raise questions about the jurisdictional scope of the Convention.

The last point to mention here regarding these two categories of cases, before they are left to be considered further below, is that as well as their obvious specific relevance to the current project, they also illustrate more broadly how the Court has struggled to convincingly define the scope of Articles 2 and 3 in a way that is both principled, from a human rights perspective, and does not impose what the Court obviously fears might be an unreasonable burden on member States. As will be observed, it is difficult to escape the impression that in trying to find the right balance, ECtHR judges have often engaged in what Dembour has described as the 'Strasbourg Reversal'.[105] Dembour describes this as the Court's practice of anchoring its point of departure not to fundamental principles of human rights but to what some would argue are conservative interpretations of public international law principles. Thus, human rights are treated as automatically subordinate to such principles in a reversal of the priorities that might be expected from a human rights treaty regime's monitoring body.

a) Use-of-force deaths with intervening elements

The final category of use-of-force deaths that will be considered before moving on to Article 2's positive substantive obligation are cases where there were, or may have been, intervening circumstances, additional to the use of force by State agents, which may have contributed to an individual's death. Again, these cases often fall within a grey area between the negative and positive obligations under Article 2, at least in terms of how the Court has struggled to address them.

The case of *Scavuzzo-Hager and Others v. Switzerland*, concerned the death of a heavy drug user three days after he collapsed during his arrest by police.[106] The deceased was significantly intoxicated at the time of the arrest and suffered from underlying health problems, all of which, according to the Court, likely contributed to his death. While examining liability under Article 2's substantive obligations, the Court asked two questions. First, was there a causal relationship between the force used by police officers and the victim's death? Second, subsequent to the arrest, did

105 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 303.

106 *Scavuzzo-Hager and Others v. Switzerland* App no 41773/98 (ECtHR, 7 February 2006).

the officers do enough to fulfil the positive obligation under Article 2 to protect the victim's life?[107] In answering these questions, the Court gave very limited consideration to the question of whether the degree of force used by the police was 'absolutely necessary', as required by Article 2(2). On this issue, the judgment merely indicates that the Court was happy that 'usuelles' (common/normal) arrest techniques had been used, and that the victim's vulnerability was such that the slightest external impact on the body could have fatal complications.[108] While neither of these observations on their own answer the question of whether the force used was 'absolutely necessary', they could be interpreted as implying so much given that the Court accepted that it was reasonable of the police to detain the victim in the first place.[109]

While the Court concluded that it could not exclude the possibility that the use of force contributed to the death, it nevertheless found that there was no violation of the negative obligation under Article 2 because the officers could not have known the extent of the deceased's vulnerability. This boiling down of responsibility under Article 2's negative obligation to what is essentially a question of foreseeability is problematic for a number of reasons. Already noted is the fact that it seems to have displaced the normal requirement under Article 2(2) that the force used be 'absolutely necessary'. It is also true that significant (if normally non-fatal) force *was* used on the victim, which must always carry some risk of causing serious injury or even death. However, there is no discussion by the Court of what test is to be applied regarding such risks, and it fails to address a number of related questions: How likely does a possible outcome have to be for it to be considered 'foreseeable'? For example, is a remote but nevertheless real possibility 'foreseeable'? Or does it have to be more likely than not? Should the test be completely objective, based on the ordinary reasonable person, or the ordinary reasonably experienced or trained police/prison/immigration officer? To what extent should one take into account the fact that there is always a risk that an apparently healthy individual has underlying health problems that might be exacerbated by the use of significant force (let alone someone who shows signs of heavy drug use)? And is foreseeability an all-or-nothing test in terms of State responsibility, or should it be considered together with other circumstances? On this last point, the judgment in *Scavuzzo-Hager* suggests that a lack of foreseeability is a make-or-break consideration when it comes to deciding whether Article 2 has been breached. However, should foreseeability be balanced against the arbitrariness of the violence inflicted? Would it have made a difference if, for example, significant but normally non-fatal force was inflicted

107 Ibid para 55.

108 Ibid para 62.

109 Ibid paras 10–14 and 54. The Court relied on police and passer-by evidence that the victim was acting strangely (climbing on building scaffolding, and appeared to have behavioural problems ('presentait des troubles du comportment')); that he was known to have committed robberies in two Cantons; and that after initially voluntarily accompanying the police to their vehicle, he became agitated, shouting '«Je veux mourir—je ne veux pas mourir» ("I want to die—I don't want to die") and tried to escape by climbing out the car window.