

Migration, Death, and Human Rights

Christine Straehle, University of Hamburg and University of Ottawa

Christine.straehle@uni-hamburg.de

Draft – comments welcome.

Introduction

Migration is dangerous. A recent ICRC report states that about 20, 000 migrants are believed to have gone missing between 2014 and 2019 in Europe alone (ICRC 2022). Many of those missing are expected to have died – either when crossing the Mediterranean (IOM 2017; Kovras and Robins 2016; Last et al 2014), or in transit in the back of a smuggler’s truck, or through untreated illness. Similarly, many migrants die in the desert along the Mexican-US border in their attempt to reach the opportunities of the US and Canada (De Leon 2015; Hinkes 2008).

The objective of this paper is to investigate how obligations towards the dead can be justified, normatively. Put differently, I want to examine if a conceptual account of the grounds of human rights can explain obligations towards those whose lives are over. The notion of right I subscribe to here is the most familiar one, i.e. I accept human rights as *claim* rights, not negating the fact that rights can also function as liberties, powers or immunities.¹

A note on methodology may be warranted at this point. A critic could argue that my project is circular: Why assume that we need to find an account of human rights that can justify obligations towards the dead – what we should rather do is investigate whether or not there *are* obligations towards the dead. However, consider this: in Sophocles’ play *Antigone*, the heroine defies the order of King Orestes not to bury her brother Polynices according to the ancient rites, even though Orestes threatens death to anybody who shows Polynices this last respect. When confronted with her deed, Antigone makes reference to her responsibility before the gods, whose laws she observed:

. . . I have done no wrong,
I have not sinned before the gods. Or if I have,
I shall know the truth in death. But if the guilt

Lies upon Creon who judged me, then, I pray,
May his punishment equal my own.

Put otherwise, obligations towards the dead have a long history; yet it is not quite clear how to justify them *independently* of the obligations towards survivors, i.e. surviving family members and friends, or beyond references to our own welfare, or without reference to the gods in today's pluralist world. To restate my original aim: my aim is to give our moral intuitions and historical moral traditions about obligations towards the dead a philosophical form. One way to do so is to investigate if we can ground obligations towards the dead in human rights. I believe that if we can find an account of human rights that can help explain obligations towards the dead for *their own sake*, we will then be able to develop an account of what justice demands for the dead, which actors have justice obligations towards them, and what form the fulfillment of these obligations can take.ⁱⁱ I suggest to do so in two steps: first, by investigating what grounds of human rights can apply to the dead; and second by investigating if human rights extend in time – more specifically, beyond a person's lifetime. I will argue that a dignity-based account of human rights can be applied to the dead; and that to protect someone's dignity demands honouring their life projects beyond their lifetime. I won't be able to develop a full-fledged account of justice for the dead here – I will only sketch some measures that may be appropriate to honour the life projects of dead migrants in particular in the last part of the paper.

A second methodological note concerns the dispute among human rights theorists about the relationship between moral and legal human rights. According to some, like Gopal Sreenivasan, legal and moral human rights are two different things that should be kept separate. How to justify legal human rights thus requires different arguments than the justification for moral human rights.ⁱⁱⁱ In contrast, Alan Buchanan argues that the justification for legal moral rights is arrived at by *mirroring* the concerns of moral human rights within the political sphere – legal ones are then the expression of moral human rights.^{iv} If this is the case, however, then the catalogue of legal human rights is much shorter than often assumed, since justifications for moral human rights have a much higher threshold than those for legal human rights – such as universal interests (Raz) or universal basic needs (Miller 2012), or universal ideas about human dignity, as I will sketch in a little while. Finally, some authors agree that legal human rights give expression to universally held moral human rights but not as mirroring but as *grounding*, which is to say that

moral human rights are at the basis of legal human rights.^v For the purposes of this paper, I will adopt the grounding view: I accept that moral reasons justify moral human rights, and that moral human rights justify legal ones. I agree here with those who argue that without at least partial moral grounding, human rights would lose their normative force.^{vi} This is to say that if we can find moral reasons to treat dead migrants in a specific way, and if these reasons could justify moral human rights, then we can infer that there can be legal human rights that can be claimed on behalf of dead migrants. Since rights holders are dead, others can claim them in their stead.

I examine three different accounts of the grounds of human rights, based on dignity, basic needs and to protect human interests and argue that to make human rights transcend human time, the most plausible account is one that considers human rights to protect human dignity. I will spend some space exploring how dignity is conceptualized to motivate human rights for the dead in section two before moving on to investigate which actors could have obligations towards dead migrants. I end with some thoughts on what form these obligations could take in part four. In the next two sections, when writing about human rights I will mean moral human rights, unless otherwise stipulated. In section three and four, when thinking about duty holders and the form of human rights obligations towards the dead, I will also talk about legal rights.

I: By what right?

Antigone's respect for her brother and divine law is the kind of respect that Massimo Renzi and other European leaders have invoked in what is often termed the 'refugee crisis' in Europe: In the words of the then Italian Prime Minister, he ordered the recoveries of migrant bodies from the Mediterranean in order to *honour* them (Renzi 2015). Indeed, Italy is the only country documented to have undertaken recovery efforts of sunken ships used by migrants to cross the Mediterranean, the last one in October 2015. Similarly, the European Union has stipulated that member states have obligations to honour the dead on their territory (Grant 2016) - but it is not clear what this stipulation actually entails or, indeed, on what normative grounds it can be justified. The most puzzling question is *how* those who have died can be rights holders, how we can justify that the dead still have rights claims.

One way of getting to a possible answer is to look at the moral justification of human rights that have been discussed in the literature. Philosophers writing about theories of human rights have proposed different grounds on which they can be defined and defended. Some argue that human rights are grounded in our dignity (Rosen 2018; Waldron 2015), moral equality (Sangiovanni 2017), others that they are meant to cover basic human needs (Miller 2012a and b) or protect interests (Tasioulas 2015); yet others that they provide individuals with the bases of flourishing lives (Nussbaum 1997); or that they are meant to enable autonomous living (Griffin 2008). I believe it to be uncontroversial that the last two grounds of human rights can be safely neglected when thinking about motivating human rights of the dead. Neither the concerns for autonomy nor those for flourishing lives have much slack for those whose lives are over.

Similarly, possibly, for the interest account of human rights, although here the scenario is a bit less clear. In Joseph Raz' original definition, a moral right exists if an individual's interest in the objective of the right is strong enough that we can derive a duty on others to protect the interest at stake (Raz, *The Morality of Freedom*, 1988; chapter 7). The distinction for *human* rights is that they protect what can be labeled as universal interests that generate duties on the part of others (Tasioulas 2015: 50). I will neglect here the different strategies of justifying human rights in the interest-based account – suffice to say instead that to motivate a universal interest that can motivate human rights for the dead, much hinges on how one defines the possible interest at stake. Think here for instance about the interest to be free from torture: while self-flagellation could be something that individuals might chose for spiritual reasons, to argue that individuals want to be free from torture seems uncontroversial. But a similar *universal* interest how to be treated when dead is more difficult to pin down: while it may true that some have an interest in being buried close to where family members can visit and remember them, others choose to be burnt and have their ashes scattered across favorite places.

To be sure, a universal interest could be that our bodies are treated well. One way to think about rights for the dead is to think about the harm that death inflicts. Then human rights could be proposed to buffer that harm. So for instance, if one of the harms that death inflicts derives from the fact that one can no longer protect one's interests, then we could convince ourselves that the function of human rights is to protect against abuses of our bodily interests – not to be severed or

left unburied, in the sea or on land, exposed to the effects of erosion and time. Indeed, most people don't want to imagine that their bodies are neglected or harvested for organs, or chopped up for scientific reasons – unless they have provided their consent. Witness the ongoing controversies how organ donations are administered in different countries – the tacit consent or opt-out model in countries like Spain stands in contrast with national legislations in which organ harvesting requires active consent, or opting in. At least since ideas concerning habeas corpus came about, legislation over individual bodies is meant to remain with individuals themselves so any use of body parts is meant to require the possibility of a say in that same use. This suggests that the actual interest at stake would be to have our *autonomy* interests respected (see Rabe Smolensky 2009; in line with Raz 1988). Beyond the idea that we can formulate a universal interest in having one's wishes respected in death, and that those who survive are morally obligated to respect these in death, the interest account of human rights doesn't seem to help justify obligations towards the dead. This is particularly so if we don't know the wishes of the dead which may often be the case for migrants who set out on their migratory project with hopes for a better future. The interest-based account, in other words, doesn't help us figure out what it would mean to “honour the dead”.

David Miller has proposed a needs-based theory of human rights, which aims to avoid some of the culturally charged pitfalls of ascribing universal interests to people in different cultural and geographical places. According to Miller, human rights ‘specify a global minimum people everywhere are entitled to as a matter of justice’ (Miller 2012a: 166). This formulation makes reference to what is owed to individuals everywhere – yet again, it seems that this formulation doesn't help ground human rights for the dead: if the reference point is that we should design human rights to realize what is owed to individuals as a matter of justice, then the discussion is simply shifted to think about what *justice* requires for the dead.

This raises the question what justice *can demand* for the dead. Recall that one of the puzzles with a justification of rights for the dead is that dead people, i.e. those who are *no longer alive* or those who are *not yet alive*, are not customarily taken to have rights bearing status. While rights demands for the unborn could be rebutted by pointing to their non-identity, most would be hard-pressed to accept that the dead also have no identity. Indeed, protecting and remembering their

identity may be one of the obligations we have towards them. That may be what Massimo Renzi and others mean when they speak of ‘honouring the dead’. Nevertheless, the dead don’t have rights we commonly assume to be necessary to have a decent life,^{vii} neither do they easily qualify for the rights that make up the catalogue of human rights.^{viii} Unless we want to make reference to ‘divine law’ or ‘the spirit of the gods’, as Antigone suggests, we are left puzzled by what is owed to the dead.

II: Dignity, Moral Equality, and Human Rights

A more helpful way of thinking what we owe to dead migrants may be to turn to a definition of human rights based on human dignity. Indeed, dignity and death are most often linked in legislations allowing assisted suicide – the idea being that to be able to decide when to die, and how, allows individuals to choose the final path of their lives.

Dignity is ubiquitous in much of human rights law and theory. Witness the ICCPR preamble that states that “rights derive from the inherent dignity of the human person.” Or recall Article 1.1 and 1.2 of the German Grundgesetz, which state:

“1 Human dignity shall be inviolable. To respect and protect it shall be the responsibility of all state authority, and
2 The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.”

Philosophically, dignity is prominently articulated in Kant’s ‘Formula of humanity’ which postulates a clear universalist ethical stance that ties human dignity to universal standing and concern for all human beings. There are at least two main modern (Kantian) interpretations of dignity: the first, and most common, is the idea of dignity as a particular kind of value or *worth* that humans have qua humans which is typically grounded in our rational capacities (Rosen 2018). Others conceive dignity as a kind of *status* or *rank* understood as a particular package of rights, powers, duties, privileges, immunities that we have as humans. (Waldron 2015). I will first discuss Waldron’s account of dignity as rank to explore what we can draw from it when thinking about grounding human rights for the dead before turning to Sangiovanni’s critique of dignity as the basis of human rights.

Waldron on Dignity

In his Tanner lectures, Jeremy Waldron discusses the Kantian idea of human dignity by giving it a very particular political turn. Analyzing the uses of dignity, Waldron observes that it is often employed to ground rights, as I am suggesting here, and other times as providing the content of rights: “It is perfectly plausible that human dignity could be the overall telos of rights in general, but also that certain particular rights could be oriented specifically to the explicit pursuit of that objective or to protecting it against some standard threats to dignity.” (Waldron 2015: 17)

Nevertheless, Waldron argues against the idea of dignity as the overall telos, instead proposing that “dignity is a *normative status* and that many human rights may be understood as incidents of that status.....we can distinguish between dignity as a general status and the particular rules that protect and support it.” (Waldron 2015:18, *emphasis mine*) Especially this last bit is interesting for my purposes here: if we accept Waldron’s claim that dignity is a general status, but with different instantiations, the idea that those whose lives are over still have dignity *claims* becomes plausible: in other words, there may be ‘particular rules that protect and support’ the dignity of the dead.

Sangiovanni argues against the idea that we need the idea of human *dignity* in order motivate and justify human rights, instead arguing for the grounding of human rights in the promise of equal moral status. Accordingly, human rights are meant to protect and promote all those who are vulnerable to state action that endangers and challenges this equal moral status, treating individuals unequally and provoking inequality. Both Waldron and Sangiovanni refer to George Vlastos’ influential paper ‘Justice and Equality’ in which Vlastos argued that one of the achievements of modern egalitarian societies was not that these societies had abolished earlier differentiations of nobility or rank, but instead, that the promise of equality meant that all were considered of just one rank, and ‘a pretty high rank at that’ as Waldron points out.^{ix}

While much in Sangiovanni’s account is helpful to understanding the grounding of legal human rights, and indeed seem very close to Waldron’s account based on human dignity, the moral equality approach to justifying human rights has one disadvantage when thinking about grounding human rights for the dead, in my view: it is that equality is necessarily relative. This is to say that individuals are equal in respect to a comparison, rather than as an absolute. But this

raises the question of the equalans in death. What are we equalising? If we wanted to use this approach to assess the situation of one dead person over another, we would have to answer the question – equal to what. So for instance, one argument could run that all dead people are properly buried according to their wishes – but dead migrants are not. Obligations could thus be defined based on what it takes to realize their wishes, or to compensate for the fact that their wishes haven't been respected. However, unless explicitly stated before the travel, it is all nigh impossible to realize these wishes. Implementing Sangiovanni's account of moral human rights would thus bring us back to an interest-based account of human rights for the dead. Waldron's account of human dignity as a general status seems more promising when thinking about possible human rights for the dead.

So far I have argued that the human dignity approach to grounding human rights is the most promising when thinking about justifying obligations towards the dead. While Waldron's account doesn't directly prescribe the obligations of states towards human rights holders, Sangiovanni adopts a particularly political turn in his argument for human rights, which Waldron can easily adopt, and which is shared by Rawls and Raz; the political theory of human rights accepts them as rights that protect individuals against state action.^x If my account is correct that the dignity approach to human rights can justify human rights for the dead, then I posit that human rights extend over time, into death. Waldron's account then gives us an idea what shape these rights can take. Dignity then calls upon commensurate consideration by the state of individuals in society. One way states have adopted to considering individuals has been to provide access to the means to realize life projects. Think here of liberal states enabling individuals to choose different life plans and providing the necessary background for them: public schooling and education allow for children to adopt the tools to navigate life, welfare and health care provisions provide for a safety net to life plans that may be more daring than others. Some states have adopted policies of reproductive technologies, others have adopted legislation to facilitate identity adaptation and non-heterosexual partnerships, and most liberal democratic states have adopted legislation to allow for freedom of occupational choice. In other words, the general normative status that Waldron underlines supports the pluralistic life plans of individuals, and states have pledged to enable and honour these life plans accordingly.

Similarly, in death: states honour those who have dedicated their lives to the state and society in a particular way – we have state funerals for dignitaries and fallen soldiers whose contributions to societies have gone beyond those of others. But we also honour the life plans of those who have simply led lives without specific public calling. We allot land for cemeteries, and holidays for the dead, and name schools for authors and actors. What is noteworthy about these practices is that we honour the dead even though those honoured are no longer able to enjoy the honour. But we do so regardless – in commemoration of their life plans. The same should apply to dead migrants.

III Whose obligations?

In recent years, researchers of different disciplines have begun to consider the death of migrants at the border or in transit. We can distinguish three different bodies of literature generally: some theorists, in anthropology, sociology and cultural studies broadly defined, have focused on the effects of migrant deaths on survivors of diaspora communities (Alonso 2018); others have investigated the cultural artefacts resulting from death (Laceur 2015; see also the publications in the context of *Thanatic Ethics*: <https://www.thanaticethics.com>). This line of investigation is based on anti-colonial and critical theory that suggests that the death of migrants needs to be conceptualized in the context of global power imbalance and ‘necropolitics’ (Mbembe 2003). A second line of analysis has been proposed by cultural and political geographers, political sociologists and political scientists who situate the death in transit in the context of the border state and the increasing securization of state borders (see the project on *The Human Cost of Border Controls* <https://www.borderdeaths.org/>). A third body of literature investigates the human rights obligations of host states from a legal perspective (see for instance the EU funded project on *Migration and Transnational Social Protection in (Post)Crisis Europe*: <https://cordis.europa.eu/project/id/680014>). In this line of investigation, national law is examined as to the implementation of human rights law (Grant 2016).

Increasing attention has also been paid by philosophers to the phenomenon of international migration and the problems in ethics and political philosophy that it raises. While some argue that borders should remain open unless there are exceptionally urgent reasons for restricting movement (Carens 2013; Cole 2000; Bertram 2018; Hidalgo 2019), others suggest that legitimate states have a general justification for controlling inward migration (Pevnick 2011; Miller 2016a; Song 2019; Blake 2020); for exchanges on this issue, see Wellman and Cole 2011; Fine and Ypi 2016.) Within this

broad debate, a number of more specific questions have been raised: Does the human right to freedom of movement include a right to enter and reside in the state of one's choice (Huemer 2010; Oberman 2016; Miller 2016b)? If a state decides to practice a selective immigration policy, which grounds for selection are permissible and which are impermissible (Blake 2002; Fine 2016; Hosein 2019, ch. 4)?

Many philosophers, including legal philosophers, have discussed the responsibilities of host states in the administration of national borders. Indeed, many philosophers have argued for the concept of 'open borders' (Carens 1987), especially in light of the fundamental differences in access to opportunities across the world. Other scholars have discussed the link between border regimes and the occurrence of migrant death, arguing that restrictive border regimes *risk* migrants' death; states implementing such regimes should therefore accept a duty of border rescue (Oberman 2019) lest being found responsible for migrants' death.

What interests me here is the particular challenge of duties and obligations towards the dead. We could analyse these responsibilities as flowing from border regimes – thus defined in a *contextual* way– or we could investigate them as responsibilities towards the dead *independent* from policies pertaining to migration. For the purposes of this project, I accept that states have the right to regulate migration onto their territory, within the confines of the universal duty of 'do no harm' – what I call state partiality (Miller 2005). This avoids having to prove responsibility for the death as a consequence of migration policy; instead, it prescribes obligations that set in *after* death. Put otherwise, even if we assume states not to be *causally* responsible for individual deaths, not having caused individual deaths through specific policies, host states can still be held responsible for human rights obligations towards the dead, or so I claim. If my account of human dignity expanding into death is convincing, and if the account of human rights based on dignity concerns is accepted, then host states have obligations to honour the life projects of dead migrants on their territory, regardless of whether they can be held responsible for the deaths. Note that I don't assume that human rights obligations towards dead migrants *only come* to host states, but that both state of origin and host state have obligations to honour their lifeplans. Yet the form the obligations take are different for host and state of origin, as my suggestions about possible measures below illustrates.

IV What obligations?

My starting assumption is that respect for human dignity of dead migrants will require state action on the part of host states. Second, I suggest that host states should acknowledge their responsibilities in the form of assistance to the state of origin and surviving families. However, in the non-ideal scenario in which migrant death arises, which is informed by a realistic, empirically grounded view of how states have suggested to address the loss of life in migration, I suggest that there are at least three possible policy measures to realize and protect human rights of the dead.

First, *recovery* measures in line with the Italian policy to recover lost bodies mentioned earlier. This would allow for the dead to be identified and recognized. If we want to honour a life project, we need to know whose life project it is. The analogy to be drawn here may be that of fallen soldiers and the military code that demands that they are brought home.

Second, *repatriation* measures for the bodies to be buried in their country of origin. This would allow for them to be mourned by surviving family members and remembered in their home thus enabling for the families to honour their life project.

Third, public *commemoration* measures such as we find for the victims of sunken slave ships or fallen soldiers. Many organizations and NGOs have embarked on efforts to recover the bodies of dead migrants – on sea and on land – to commemorate those who have engaged with migration project.^{xi} Witness the annual ‘migration trail’ that many volunteers along the Mexican-US border follow to remember the many who have perished in the desert. Or witness the graveyards that communities on Italian and Greek Islands have established for dead migrants, many buried without having been properly named, but tended in their project by the locals.

Commemoration – public commemoration – would recognize the journeys they embarked upon, the hardship they endured, and the premature ends they have found. It would honour the life projects as worthwhile ones, even if not successful; it would respect the courage and perseverance, and the vision of those who died in their search for a life elsewhere.^{xii}

These solutions will impose costs of different kinds on the states that have obligations: recovery requires funds to lift sunken ships, uncover bodies in the desert, their transport and preparation for repatriation. It also requires funds for forensic pathologists to *identify* those who has been recovered. Repatriation requires personnel and planes or ships to bring the bodies to their burial sites after having done the difficult work of tracing their origins. Commemoration will demand resources but also a public discourse acknowledging that migrants die trying to enter host states. To honour their life projects, the hardship and pain that migrants shoulder and suffer should be acknowledged. While this may seem as a small symbolic gesture towards those who have lost their lives, this may be what protecting the human rights of the dead may mean: to acknowledge the toll the pursuit of a life project has taken, and to assure that it is honoured in its own right.

ⁱ This is of course the traditional Hohfeldian conceptualization; (Hohfeld, W. N. 1913. Some fundamental legal conceptions as applied to judicial reasoning. *Yale Law Journal*, 23, 16–59)

ⁱⁱ I will use obligations in the first instance broadly, before arguing later on that these obligations actually take the form of negative duties.

ⁱⁱⁱ G. Sreenivasan, 'Legal human rights, as distinct from moral ones' in J. Tomalty and K. Woods (eds), *The Routledge Handbook of Human Rights*, Routledge: New York (forthcoming0).

^{iv} A. Buchanan XXX

^v For a discussion of the distinction and terminology see A. Sangiovanni 2017, *Humanity without Dignity*, esp. chapter 5.

^{vi} D. Miller (2012) 'Grounding Human Rights' *Critical Review of Social and Political Philosophy*. 15 (4): 407-427. See Sangiovanni 2017(at 213):

“at the heart of any plausible justification of a legal human right (or set of such rights) will be a universal-concern-meriting moral rights, by which I mean a moral right that merits (*pro tanto*) protection in international law. The object of this moral right need not ‘correspond’ directly with the object of the particular legal human right (or rights) that it justifies, but the moral right must provide a necessary part of the overall justification.”

^{vii} However, note that French law allows for posthumous marriage if it serves to legitimize children born after death of one parents occurs. (See Rabe Smelensky 2009, fn 2).

^{viii} The UN OHCHR stipulates similarly that the wishes of the dead should be protected, however, for reasons tied to survivors: first, to honour the dead ‘makes us human’ but it also allows for surviving family members to have their moral due (see <https://www.ohchr.org/en/stories/2024/07/protecting-and-respecting-dead-makes-us-human>, accessed July 21, 2024). While I agree with these statements, I am interested to examine here is to what extent we can justify human rights for the dead *independently* of the interests of survivors.

^{ix} G, Vlastos (1962) 'Justice in Equality' in R. Brandt (ed.) *Social Justice*, Prentice Hall. See Waldron 2015.

^x See J. Raz (2010) 'Human Rights without Foundations' in Bessone and Tasioulas (eds) *The Philosophy of International Law*. Oxford. Oxford University Press, 321-338: “Following Rawls, I will take human rights as rights that set limits to the sovereignty of states”. at 328.

^{xi} See also Last Rites at <http://www.lastrights.net/#EvenAfterDeath-Section>, accessed June 15, 2024; <https://refocusmedialabs.org/even-after-death-film> on the importance of reclaiming dead migrants; The work of Dr Cristina Cattaneo at Labanof, who has assisted many families of dead migrants to identify their dead <https://www.labanof.unimi.it/forense.html#> accessed June 10, 2024; see also A. Okeowo (2023) 'The Crisis of Dead Migrants' *The New Yorker*, Jan 16, 2023 <https://www.newyorker.com/magazine/2023/01/16/the-crisis-of-missing-migrants> .

^{xii} Note the memorials put up for emigrants for example in Ireland, remembering those who left due to the famines. These memorials are not put up because the emigrants died, but in part to commemorate the hardship they endured, and the loss the community left behind suffered.