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International Humanitarian Law : the legal framework for humanitarian forensic action

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Highlights

- International Humanitarian Law contains rules on the management of dead bodies.
- Key rules include the duties to collect, identify and bury human remains.
- Institutional frameworks must be established to implement rules on the dead.
- Respect for the dignity of the dead is a key guiding principle.
- Families have a right to know the fate of their relatives.

"No, I know he's dead, but..."[1]

Abstract

In armed conflicts, death is not an exceptional occurrence, but becomes the rule and occurs on a daily basis. Dead bodies are sometimes despoiled, mutilated, abandoned without any funeral rite and without a decent burial. Unidentified remains may be counted by hundreds or thousands. As a result, families look for years for missing relatives, ignorant of the fate of their loved ones. International humanitarian

[1] This is a quote from the main character (John May) in a movie entitled *Still Life* (2013) by Uberto Pasolini.

law, also called the laws of war or the law of armed conflict, is an international law branch, which has been developed to regulate and, as far as possible, to humanize armed conflicts. It contains a number of clear and concrete obligations incumbent to belligerent parties on the management of dead bodies, which provide the legal framework for humanitarian forensic action. The purpose of this article is to present, in a simple and concise manner, these rules with a view to extrapolate some key legal principles, such as the obligation to respect the dignity of the dead or the right to know the fate of relatives, which shall guide anyone dealing with human remains.

Keywords: Humanitarian law – dead – missing – dignity – family – human rights.

I) Introduction

In armed conflicts or other situations of violence, as well as in natural disasters or in the context of migration, death is everywhere. On the battlefield, in hospitals, in detention settings, in refugee camps, in mass graves… Especially in wars, violent deaths are not anymore an exceptional occurrence, but become the rule and occur on a daily basis. Dead bodies are sometimes despoiled, mutilated, abandoned without any funeral rite and without a decent burial. Unidentified remains may be counted by hundreds or thousands. Families look for years for missing relatives, ignorant of the fate of their loved ones.

In such contexts, forensic expertise is desperately needed, and not only for the purpose of criminal investigations, but also to ensure respect for basic humanitarian considerations. Human remains must be handled respectfully and with dignity. Families have the right to know the fate of their relatives. These are not only moral requirements but also proper international legal obligations.

International humanitarian law, also called the laws of war or the law of armed conflict, provides for clear and concrete obligations incumbent to belligerent parties towards the dead and their relatives in the context of armed conflicts. Notably, dead bodies must be searched for, collected, identified and returned to their families.[2]

Humanitarian organizations, such as the International Committee of the Red Cross (ICRC), can offer their forensic expertise to belligerent parties in order to support them in fulfilling their humanitarian obligations with regard to the management of dead bodies. The ICRC, for instance, describes its activities in this field as "provid(ing) advice, support and training to local authorities and forensic practitioners in searching for, recovering, analysing, identifying, and managing large numbers of unidentified remains in varying states of preservation"[3]. In brief, as defined by the ICRC, humanitarian forensic action consists in the application of forensic science to humanitarian activities.

[2] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law,* Vol. I : Rules, ICRC/ Cambridge University Press, 2005, Rules 112-116. Available at :https://www.icrc.org/customary-ihl/eng/docs/v1.

[3] ICRC, In-brief : *Forensic science and humanitarian action*, In-brief, Geneva, ICRC, December 2013. Available at : https://www.icrc.org/fr/publication/4156-forensic-science-and-humanitarian-action

The objective of this article is to present, in a simple and concise manner, the most important and relevant international humanitarian law rules regarding the management of dead bodies, which constitute the legal framework for humanitarian forensic action in armed conflict situations. Knowing the existence and content of these rules enables persons managing dead bodies, including forensic experts, to support, strengthen and promote their action in armed conflicts by understanding what are belligerents' duties in such contexts. Understanding the principles underlying these rules gives also food for thought regarding potential limits to humanitarian forensic action or, at least, possible challenges in practice.

In terms of structure, this article will first present the relevant international legal frameworks, with a focus on international humanitarian law. Then it will discuss the key international humanitarian law provisions regarding the management of dead bodies and related institutional framework. Throughout the paper, the main legal principles underlying humanitarian forensic action will be recalled and summarized in the conclusion.

II) International humanitarian law and other relevant international legal frameworks

International Humanitarian Law (IHL) is one of the oldest branches of public international law, i.e. the law that regulates relations between States and other subjects of international law. IHL can be defined as "a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare"[4].

In essence, IHL aims at limiting the savagery of wars: it establishes minimum non-derogable rules, which strike a balance between humanitarian considerations (principle of humanity) and the military necessity goal to prevail over the enemy. For instance, only military targets, never the civilian population or civilians can be attacked. IHL also provides that the wounded, sick and shipwrecked must be respected and protected. It affords protections to persons detained in relation to an armed conflict such as prisoners of wars or civilian internees. IHL does not regulate however, whether a State has the right to go to war, or to use force, against another State. This is governed by a distinct body of international law, called *jus ad bellum* and mainly governed by the United Nations Charter.

International Humanitarian Law rules can be found primarily in the Four Geneva Conventions of 1949 and in their Additional Protocols of 1977. These treaties are binding upon all States having ratified them. The Geneva Conventions are often depicted as embodying universally agreed-upon norms because they are among the most widely ratified treaties in the world.[5]

In order to trigger the applicability of International Humanitarian Law, there must be an armed conflict. There are mainly two types of armed conflicts. First, international armed conflicts, which oppose two or more belligerent States or a belligerent State

[4] ICRC, Fact-sheet : *What is International Humanitarian Law?*, Geneva, ICRC, 2004, p.1. Available at: https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf
[5] Ibid.

and an international organization (such as NATO). The Gulf War opposing Iraq to a coalition of States led by the United States of America is a good example of an international armed conflict. Second, non-international armed conflicts opposing a State to an organized non-State armed group or opposing two or more organized non-State armed groups. The armed conflict in Colombia which opposed the Government to the Revolutionary Armed Forces of Colombia (FARC) can be given as an example of a non-international armed conflict. But non-international armed conflicts do not necessarily take place on the territory of a single State. For instance, the conflict opposing the United States of America or France to the Islamic State (ISIS), an organized non-state armed group, in Syria, is also a non-international armed conflict even if it has a cross-border dimension.

The reason why lawyers give such importance to the classification of armed conflicts – i.e. as to whether armed violence reaches the threshold of an armed conflict or whether a conflict is international or not – is because the legal framework, the number and types of rules that will apply will substantially differ. While IHL for international armed conflicts has developed over centuries, the treaty rules that apply to non-international armed conflicts are newer, much less numerous and elaborate. This is so because States have traditionally been reluctant to regulate at the international level matters which they used to consider private or internal. As a result, while international armed conflicts are governed notably by the four Geneva Conventions and Additional Protocol I, non-international armed conflicts are only regulated by Article 3 common to the Geneva Conventions and Additional Protocol II, if its limitative conditions of application are fulfilled.

Most contemporary armed conflicts are non-international ones and in many of them, only one provision applies. This is the so-called Common Article 3, which merely encompasses the most fundamental humanitarian guarantees, such as the prohibition of murder, of torture and the right to a fair trial. This is nothing compared to the hundreds other provisions of the Geneva Conventions, which are dedicated to international armed conflicts exclusively. With respect to rules pertaining to the management of dead bodies, this difference between international and non-international armed conflicts is also crucial since most relevant rules have been developed for international armed conflicts alone.

This being said, IHL is not only made of treaty rules. Customary law is another important source of international law.[6] It is unwritten law that is made of State practice considered by the States as legally binding. Identifying customary law is always a challenging task involving researching and analysing States' actual practice, their military manuals, domestic laws, declarations in international fora etc. After a ten-year study, the International Committee of the Red Cross has identified 161 rules that belong to customary international humanitarian law and which – for the great majority – apply equally to international and non-international armed conflicts.[7] As we shall see, a number of rules pertaining to the management of dead bodies

[6] Art. 38 of the *Statute of the International Court of Justice* annexed to the *Charter of the United Nations*, 1945.

[7] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law,* Vol. I : Rules, Vol. II : Practice, Cambridge, ICRC/ Cambridge University Press, 2005. Available at :https://www.icrc.org/customary-ihl/eng/docs/v1. Hereafter : *ICRC Customary IHL Study*.

belong to customary international humanitarian law and apply to all types of armed conflicts and to all belligerent parties.

Not only IHL, but also other branches of international law provide significant legal obligations regarding the management of dead bodies. International human rights law, which applies at all times, is particularly important in contexts such as natural disasters or internal disturbances where IHL does not apply. But human rights law also offers protection in armed conflicts by complementing, reinforcing and influencing IHL.[8]

The main treaties forming part of human rights law are the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic Social and Cultural Rights (1966). There are also regional human rights treaties, such as the European Convention on Human Rights, the American Convention on Human Rights or the African Charter on Human and Peoples' Rights. The strength of human rights law is that compliance by States is monitored by numerous mechanisms, at both the universal and regional level, including by Courts (as, for instance, the European Court of Human Rights) which can decide cases and afford reparations to individuals. A number of human rights are relevant to the management of dead bodies. These include the right to life and the related obligation to investigate violent deaths, the prohibition of enforced disappearances, the prohibition of inhumane and degrading treatment and the right to respect for family life or freedom of religion. Concrete examples will be provided in the following sections.

Serious violations of IHL or human rights law can amount to war crimes, crimes against humanity or acts of genocide. As such they not only entail the international responsibility of the State (if committed by a State agent) but also the international criminal responsibility of the individuals who have committed, ordered or otherwise assisted in the commission or these crimes. International criminal law defines these crimes and the conditions under which an alleged perpetrator can be prosecuted and sanctioned at the international level by courts and tribunals, such as the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda or the International Criminal Court. As we shall see, serious violations of rules with respect to the handling of dead bodies in a respectful and dignified manner can amount in some cases to international crimes.

III) The duties of belligerents regarding the management of dead bodies in armed conflicts

Under international humanitarian law, belligerents, including States and organized non-State armed groups in the context of non-international armed conflicts, must respect several concrete legal obligations with respect to the management of dead bodies. These various legal obligations can be summarized through the following six key rules[9]:

[8] On the mutual influence between IHL and human rights law, see Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie,* Paris, Pedone, 2013.

[9] The titles of the rules are named after the rules considered as belonging to customary international humanitarian law by the *ICRC Customary IHL Study*, Rules 112-117.

1. Obligation to search for and collect the dead.

The duty to search for and collect the dead is a longstanding rule of IHL[10] and a "highly important humanitarian deed"[11]. It is included in modern IHL treaties pertaining to both international and non-international armed conflicts[12] and it is considered as belonging to customary international humanitarian law for all types of armed conflicts[13].

While international humanitarian law recognizes that belligerent parties will not always be in a position to collect the dead, in particular in the middle of armed clashes, for obvious security reasons, it nevertheless requires that, "whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction".[14] This obligation is an obligation of means that must be performed with *due diligence* rather than an obligation of result.[15] What matters is that belligerents do their utmost to search and collect the dead as soon as possible when this is materially feasible. Time is of essence in wartime situations. The more time elapses, the smaller are the chances that corpses will be recovered and properly identified. Belligerent parties must also endeavor to agree on mutual arrangements for teams to search and collect the dead from the battlefield areas.[16]

Even when armed forces or armed groups cannot, for various reasons, collect the dead themselves, they may authorize the civilian population or humanitarian organizations to search for and collect the dead.[17] The ICRC has often engaged in such operations at the request of, or with the express authorization of, the concerned belligerent party. It has done so, for instance, in the contexts of the armed conflicts in Bosnia and Herzegovina[18] and in Colombia, where ICRC forensic experts were requested by families and authorized by the Colombian Rebel Armed Forces (FARCs) to look for and recover 11 dead politicians in the middle of the jungle during a 4-day ceasefire in the non-international armed conflict.[19] While IHL does not give a right to the ICRC or other humanitarian organizations to search for and collect the dead in areas controlled by a Party to the conflict, permission to conduct such

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[10] Article 3 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field* (1929).

[11] Israel, High Court of Justice, *Barake case* (so-called *Jenin (Mortal Remains)* case), Ruling, 14 April 2002, §7.

[12] Article 15§1 of *Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field* (1949), hereafter GCI. Art. 18§1 of *Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea* (1949), hereafter GCII. Art. 16§2 of *Geneva Convention (IV) on Civilians*, hereafter GCIV ; article 8 of *Additional Protocol II to the Geneva Conventions* (1977), hereafter APII.

[13] *ICRC Customary IHL Study*, Rule 112.

[14] Ibid.

[15] Ibid.

[16] Art. 33§4 of *Additional Protocol I to the Geneva Conventions* (1977), hereafter API.

[17] See, e.g. art. 17§2 API : "The Parties to the conflict may appeal to the civilian population and the aid societies (…) to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for so long as they are needed."

[18] See UN Secretary-General, *Report pursuant to Security Council Resolution 752 (1992)*, UN Doc. S/24000, 26 May 1992, §9.

[19] "Keep Looking for the Dead : Don't kill the Hope", *Haaretz Weekly Magazine,* 13 November 2015 : Interview with Morris Tidball-Binz. Available at: http://blogs.icrc.org/ilot/2015/11/24/keep-looking-for-the-dead-don-t-kill-the-hope/

humanitarian activities must not be denied arbitrarily.[20] Médecins Sans Frontières (MSF) has also conducted humanitarian activities related to the collection and management of dead bodies in and outside armed conflict situations. For instance, in the context of the Mediterranean Migration Crisis, MSF is training local fishermen in search and rescue operations in Tunisia and it is also training teams from the Tunisian and Libyan Red Crescents in dead body management.[21]

The implication of humanitarian organizations in the recovery of corpses is particularly useful when there are allegations of disrespect for dead bodies by one of the belligerent parties. For instance, after a military operation conducted by Israel in the West Bank, in the Jenin refugee camp ("Operation Defensive Wall"), Palestinian petitioners requested the Israeli High Court of Justice that the Israeli armed forces be ordered to stop removing bodies of Palestinians that had been killed during the armed clashes and that Israel be ordered not to bury those ascertained to be terrorists and rather transfer them to the Palestinian authorities for burial.[22] There were allegations and fears among Palestinians that their dead would not be handled respectfully by Israel and that they would be buried in mass graves or in secret places to conceal evidence of a massacre.[23] The Israeli High Court importantly held that respondents (i.e. Israeli authorities) were actually "responsible for the location, identification, evacuation, and burial of the bodies" and that this was "their obligation under international law".[24] An agreement between the parties was ultimately reached on the basis that Israeli authorities would collect the dead but that the Red Cross, and possibly the Red Crescent, would participate in these activities.[25]

The search and collection of the dead must moreover be performed "without distinction".[26] Belligerents must therefore not only search and collect the dead belonging to their own armed forces or civilian population, but also those belonging to the enemy. The obligation applies independently of the dead's characteristics (nationality, allegiance, ethnicity, gender, religion etc.) and of his/her past behaviors. This has also been recognized by the Israeli High Court of Justice in the aforementioned Jenin mortal remains case when it insisted on the requirement that no differentiation be made at all between the dead, and notably between "the bodies of civilians and the bodies of armed terrorists."[27]

2. Humane treatment of the dead

[20] *ICRC Customary IHL Study*, Rule 112 and Rule 55.
[21] See MSF Website on Mediterranean Migration. Available at: http://www.msf.org/en/topics/mediterranean-migration.
[22] Israel, High Court of Justice, *Barake case* (so-called Jenin (Mortal Remains) case), Ruling, 14 April 2002.
[23] CNN, *Israeli Court : Palestinians can bury Jenin dead,* 14 April 2002. Available at : http://edition.cnn.com/2002/WORLD/meast/04/14/jenin.court/index.html. BBC, *Israeli Army can clear Jenin dead,* 14 April 2002. Available at : http://news.bbc.co.uk/2/hi/middle_east/1928651.stm
[24] Israel, High Court of Justice, *Barake case* (so-called Jenin (Mortal Remains) case), Ruling, 14 April 2002, §7.
[25] Ibid, §9.
[26] This is implicit in art. 16 of GCIV, which applies to the entire populations of the belligerent parties and in article 8 of APII, which does not specify any distinction.
[27] Israel, High Court of Justice, *Barake case* (so-called Jenin (Mortal Remains) case), Ruling, 14 April 2002, §9.

The dead must be treated with due respect. This principle has been explicitly incorporated in IHL through article 34, paragraph 1, of Additional Protocol I to the Geneva Conventions.[28] It has also been argued that this principle is inherent in Article 3 Common to the Four Geneva Conventions, which protects persons *hors de combat*.[29] Two concrete prohibitions, which are to be found in many domestic legislations and military manuals[30] as well as in treaty and customary IHL for both international and non-international armed conflicts, derive from this.[31] First, the prohibition of mutilating dead bodies[32] and, second, the obligation to "take all possible measures to prevent the dead from being despoiled"[33].

Mutilating dead bodies is a horrendous act that is performed out of contempt for the dead and the living, and often to terrorize the enemy through the display of lugubrious "war trophies". This crime is unfortunately all too common in contemporary armed conflicts. The numerous beheadings – including post-mortem – committed by armed groups such as the Islamic State in Iraq and the Levant (ISIL) in Libya notably are a case in point.[34] With respect to the 2016 conflict in Azerbaijan, it has been reported that servicemen of the Nagorno Karabakh Republic were mutilated and beheaded post-mortem.[35] Mutilations of dead persons have also been alleged in the context of the conflict between Turkey and the Kurdistan Workers' Party (PKK).[36]

Mutilations of dead bodies constitute an "outrage upon the personal dignity" of the deceased, and as such a serious violation of IHL, as evidenced by the Elements of Crimes of the Statute of the International Criminal Court (ICC).[37] Several persons have been prosecuted and convicted after the Second World War for mutilation of dead bodies and cannibalism.[38] For instance, in the *Schmid case* in 1947, the US General Military Court at Dachau found a German medical officer guilty of maltreatment in violation of Article 3 of the 1929 Geneva Convention because he

[28] Ibid.
[29] Colombia, Council of State, *Case No. 9276*, Statement of the Prosecutor, Concepto del Procurador Primero Delegado, 19 August 1994. This has been reported in the collection of State practice made by the ICRC in relation to Rule 113 of the ICRC Customary IHL Study. See : https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule113.
[30] See commentary to Rule 113 of the *ICRC Customary IHL Study* and related practice.
[31] Rule 113 of the ICRC Customary IHL Study: "Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited."
[32] Art. 4§2 a) APII ; Rule 113 of the *ICRC Customary IHL Study*.
[33] Art. 15§1 GCI ; Art. 18§1 GCII ; art. 16§2 GCIV ; Art. 34§1 API ; Art. 8 APII ; Rule 113 of the *ICRC Customary IHL Study*.
[34] See, e.g., *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings*, UN Doc. A/HRC/31/CRP.3, 23 February 2016, §86.
[35] Interim Public Report of the Human Rights Defender (Ombudsman) of NKR, "Atrocities Committed by Azerbaijani Military Forces Against the Civilian population of the Nagorno-Karabakh Republic and servicemen of the Nagorno-Karabakh Defense Army on 2-5 April 2016", Shushi, April 2016, §§63-69.
[36] Martin Dolzer, *Human Rights Delegation Report from Brussels, Berlin, North Rhine Westphalia, Hamburg to Diyarbakir, Siirt, Hakkari, Semdinli, Yüksekova, Dersim, Hamburg*, 30 August 2010. Available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201010/20101025_3-5hrdr_en.pdf
[37] Elements of crimes of the International Criminal Court, 2011, art. 8§2 b) xxi, footnote 49 and 8§2 c) ii), footnote 57. Available at: https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf
[38] See commentary to Rule 113 of the *ICRC Customary IHL Study* and related practice.

had, among others, decapitated the deceased and baked the head.[39] In the *Tisato case,* an Australian Military Court convicted a Japanese soldier for "cannibalism" because he had eaten the flesh of killed prisoners.[40]

Mutilations can moreover be analyzed as human rights violation. For instance, a case was brought before the European Court of Human Rights by the father of an alleged member of the PKK who had in all likelihood been killed by Turkish soldiers and whose ears had been severed post-mortem.[41] Interestingly, the Court considered that the anguish caused to the father of the victim as a result of the mutilation of the body of his son amounted to a degrading treatment for him in violation of Article 3 of European Convention on Human Rights.[42]

Prohibiting and criminalizing the mutilation of dead bodies therefore serves to protect the dignity of both the dead person and of their relatives. It also serves to preserve information/evidence that are crucial for the identification of the body as well as for elucidating the cause of death.

The same purpose underlies the prohibition of "despoiling", "pillaging[43]" or robbing the dead by stealing items that are on the body. These items belonged to the dead and must be returned to his/her family.[44] They are also crucial elements for the identification of bodies. For instance, in cases where the body is deteriorated and absent the possibility of a DNA assessment, a watch or keys can help in the identification of a body. Robbing the dead is also considered a war crime, as evidenced, for instance, by the prosecutions of SS personnel who were actively involved in the administration of the Nazi concentration camps, where the pillage of the property of dead Jews and other members of minorities was meticulously planned and carried out on a large scale.[45]

3. Return of human remains and personal effects of the dead

a) Return of human remains

In the context of international armed conflicts, the 1949 Geneva Conventions do not provide for a clear-cut obligation to return the remains of the dead.[46] They simply

[39] US, General Military Court at Dachau, *Schmid case*, Judgment, 19 May 1947. This case has been reported in the collection of State practice made by the ICRC in relation to Rule 113 of the ICRC Customary IHL Study. See : https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule113.
[40] Australia, Military Court at Rabaul, *Tisato Case,* Judgment, 2 April 1946. This case has been reported in the collection of State practice made by the ICRC in relation to Rule 113 of the ICRC Customary IHL Study. See : https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule113.
[41] European Court of Human Rights (hereafter: ECtHR), *Akkum v. Turkey*, 24 March 2005.
[42] Ibid, §259.
[43] The prohibition of despoiling dead bodies is an application of the ancient and well-recognized prohibition of pillage. See Commentary to Rule 113 and 52 of the *ICRC Customary IHL Study*.
[44] See below.
[45] US MIlitary Tribunal at Nuremberg, *Pohl case*, Judgment, 3 November 1947. The relevant excerpt reads as follows: "Robbing the dead, even without the added offence of killing, is and always has been a crime. And when it is organized and planned and carried out on a hundred-million-mark scale, it becomes an aggravated crime, and anyone who takes part in it is a criminal."
[46] Marco Sassòli and Marie-Louise Tougas, "The ICRC and the missing," *International Review of the Red Cross*, Vol. 84, No. 848, 2002, p. 731.

evoke the "possible transportation to the home country" of the bodies.[47] Additional Protocol I goes further as it stipulates that agreements "shall be concluded" between States to "facilitate the return of the remains of the deceased to the home country upon its request or (…) upon the request of the next of kin".[48] Additional Protocol I also defines a procedure to be followed in the absence of an agreement. If the home country is not willing to cover the costs for the maintenance of gravesites, the State in whose territory the gravesites are located may offer to facilitate the return of the remains. If, after five years the remains have not been returned, the State where the body is located can dispose of the grave in accordance with its own laws on the subject-matter. It is also worth noting that Additional Protocol I foresees the possibility for the next of kin to ask directly the return of the remains and personal effects of the deceased unless the home country objects to this.

Although such agreements are rarely concluded,[49] there are a number of practical examples in recent history concerning the return or exchanges of mortal remains. For instance, in 1991, Indonesia handed over to Japan the ashes of 3,500 Japanese soldiers killed during the Second World War.[50] Exchanges of mortal remains were also conducted in the aftermath of the 1973 war between Egypt and Israel[51] or of the 1980-1988 Iran-Iraq War[52].

Based on the aforementioned elements of State practice, the ICRC has concluded that, in international armed conflicts, there is a customary obligation for Parties to armed conflicts to "endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin".[53] This duty is an obligation of means rather than an obligation of result as the verbs "endeavor to facilitate" indicate. It might be considered as too soft, but it has the merit of being realistic and of requiring States to adopt a proactive and positive stance with respect to the return or human remains and of outlawing measures constituting unnecessary impediments to such returns.

Regarding non-international armed conflicts, international humanitarian law provisions remain silent with respect to the return of the remains from one belligerent party to another in such contexts. This is not surprising if one considers that what States had in mind when adopting Article 3 Common to the Geneva Conventions and

[47] Arts 17§3 GCI; 120§6 GCIII; 130§2 GCIV.
[48] Art. 34§§2-3 API.
[49] The following examples mostly concern conflicts which predate API or which were otherwise not covered by this treaty. See, e.g., Panmunjom Armistice Agreement concerning a military armistice in Korea, Panmunjom, 27 July 1953, Article II(13)(f) ; Agreement on Ending the War and Restoring Peace in Viet-Nam between the United States of America, the Republic of Viet-Nam, and the Democratic Republic of Viet-Nam, and the Provisional Revolutionary Government of South-Vietnam, Paris, 27 January 1973, Article 8(b) ; Agreement on Cooperation in Perpetuating the Memory of Finnish Servicemen in Russian and Russian (Soviet) Servicemen in Finland who fell during the Second World War, Helsinki, 11 July 1992 ; Agreement on Cooperation in Acknowledging the Memory of the War Victims who fell during the Second World War, concluded between Estonia and Finland, Parnu, 16 August 1997.
[50] *Asian Yearbook of International Law*, Vol. 1, 1991, p. 354.
[51] ICRC, *Annual Report 1975*, Geneva, 1976, p. 21. ICRC, *Annual Report 1976*, Geneva, 1977, p. 13.
[52] ICRC, *Operational update: Iraq: people living in rural areas remain among the most affected*, 14 December 2011, available at : https://www.icrc.org/eng/resources/documents/update/2011/iraq-update-2011-12-14.htm
[53] See Rule 114 of *ICRC Customary IHL Study*.

Additional Protocol II were traditional non-international armed conflicts, such as civil wars opposing a Government to insurgents. How could have States recognized a duty to return dead bodies to rebels – or members of their families – on its own territory? This would have been a very difficult take at least from a political and diplomatic perspective.

This being said, practice is sometimes more progressive than black-letter law.[54] For instance, an administrative court in Colombia held that families have a legitimate right to claim the bodies of their relatives.[55] Also worth of mention is, for instance, a 1998 agreement adopted in the context of the non-international armed conflict in the Philippines by the belligerent parties, which refers to a proper duty to immediately return the bodies of persons who have died in the course of the armed conflict or while in detention to their families.[56] Other example, in the context of the implosion of Yugoslavia (which comported both international and non-international armed conflicts), a plan of operation had been adopted, which required belligerent parties to organize the handover of mortal remains at the request of the party on which the deceased depended.[57]

Even without proper agreements to that effect, exchanges of mortal remains have been conducted in the context of non-international armed conflicts such as in Sri Lanka between the Government and the LTTE fighters in 1998[58] or in Libya between opposing forces in Misrata in 2014[59]. In addition, there are a number of resolutions and other documents adopted in the realm of the United Nations or of the Red Cross and Red Crescent Movement, which call upon belligerent parties to facilitate the return of the dead, irrespectively of the type of armed conflict and sometimes even recognize a right of families to have the bodies of their beloved returned to them.[60] Last but not least, the 2006 UN Convention on Enforced Disappearances provides that States have a duty to locate, respect and return the remains of disappeared persons.[61]

As the ICRC puts it, “in the context of non-international armed conflicts, there is a growing trend towards recognition of the obligation of parties to a conflict to facilitate the return of the remains of the dead to their families upon their request”.[62] To

[54] For State practice, see *ICRC Customary IHL study*, state practice relating to Rule 114. Most examples below are taken from this database.
[55] Colombia, Administrative Tribunal of Cundinamarca, *Case No 4010,* Informe del Tribunal Especial di Instruccion, 6-7 November 1985, cuaderno de pruebas.
[56] *Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines*, The Hague, 16 March 1998, Part IV, Article 3(4).
[57] *Joint Commission to Trace Missing Persons and Mortal Remains : Rules of procedure and Plan of Operation, established on the basis of a Memorandum of Understanding between the Socialist Federal Republic of Yugoslavia, The Republic of Croatia, the Republic of Serbia, the Yugoslav’s People’s Army and the International Committee of the Red Cross*, 16 December 1991. Proposal 2.1.
[58] ICRC, *Annual Report 1998*, Geneva, 1999, p. 175.
[59] ICRC, *Annual Report 2014*, Geneva, 2015, p. 109.
[60] *22nd International Conference of the Red Cross*, Teheran, 8-15 November 1973, Resolution V ; *27th International Conference of the Red Cross and Red Crescent*, Geneva, 1999, resolution 1, Annex 2, Plan of action for the years 2000-2003, final goal 1.1, §e) ; United Nations General Assembly, Resolution 3220 (XXIX), 6 November 1974, §2.
[61] *United Nations International Convention for the Protection of All Persons against Enforced Disappearances*, 2006, art. 24. See also art. 15.
[62] See Rule 114 of the *ICRC Customary IHL Study*.

support this argument, the ICRC referred to the requirement of respect for family life and the "right of families to know the fate of their relatives".[63] It is to be seen, in the future, if such an obligation will be recognized by the international community. Nobody would deny, in any case, that efforts should be made as of now to facilitate the returns of remains in non-international armed conflicts.

b) Return of the personal effects of the dead

The obligation to return the personal effects of the dead, such as money, valuables, but also last wills and other important documents and objects of a sentimental value, is an old rule of international humanitarian law.[64] It is spelled out in the Four Geneva Conventions[65] and the conclusion of agreements to facilitate such return upon request is required by Additional Protocol I.[66] No such rules exist for non-international armed conflicts, be they conventional or customary rules.[67] This issue is thus not addressed by international humanitarian law and left to potential regulation under domestic law.[68]

4. Disposal of the dead

Human remains must be disposed of in a respectful manner. This becomes apparent when reading the 1949 Geneva Conventions which contain detailed prescriptions regarding burials and management of graves.[69] These treaties provide that the dead must be honourably interred, if possible according to the rites of the religion to which they belonged. Cremation shall remain an exception for imperative reasons of hygiene or for motives based on the religion of the deceased. Burial (or cremation) must be performed individually and collective graves avoided as far as possible. The graves must then be respected, grouped according to the nationality of the deceased, properly maintained and marked so that they can be found.[70] Additional Protocol I to the Geneva Conventions adds that parties must conclude agreements to protect and maintain gravesites permanently.[71] Additional Protocol II, which applies in non-international armed conflicts, is not as detailed but it still requires that the dead be decently disposed of.[72] IHL provisions pertaining to non-international armed conflict say nothing about the maintenance of graves, but most legislations do contain provisions on respect and proper maintenance of gravesites.[73] In the ICRC's view, it is therefore a customary rule of IHL applicable in both international and non-international armed conflicts that "the dead must be disposed of in a respectful manner and their graves respected and properly maintained".[74]

[63] See Rule 105 of the *ICRC Customary IHL Study*.
[64] See, e.g. the 1929 *Geneva Convention for the Wounded and Sick in Armies in the Field*.
[65] Arts 16§4 GCI;19§3 GCII; 122§9 GCIII; 139 GCIV.
[66] Art. 34§2 API.
[67] See Commentary to Rule 114 of the *ICRC Customary IHL Study*.
[68] Ibid.
[69] See arts. 17 GCI; 20 GCII; 120 GCIII; 130 GCIV.
[70] Ibid.
[71] Art. 34§2 API.
[72] Art. 8 APII.
[73] Commentary to Rule 115 of the *Customary IHL Study*.
[74] Rule 115 of the *Customary IHL Study*.

The purpose of such IHL rules on disposal of the dead and maintenance of graves is both to respect the dignity and religion of the dead, and to make sure that the body can be recovered at later stages and, if possible, returned to its homeland or family.[75] Proper and timely disposal of the dead might also serve, in some cases, to avoid the spreading of epidemic diseases, such as Ebola,[76] and thus protect the right to health.[77] It should be noted however, that contrary to deeply ingrained fears, the dead, including decomposing bodies, do not spread diseases if they were not infected by an epidemic-causing disease.[78] In the aftermath of disasters or armed conflict where death is mostly caused by trauma, drowning or fire, the risk of spreading disease is minor.[79]

There is virtually no major international case law on the issue of disposal of the dead and maintenance of graves, but a few domestic cases are worth considering. In 1995, the Council of State of Colombia (i.e. Colombian supreme tribunal with jurisdiction over administrative issues) held, in the context of the non-international armed conflict between the Government and the FARC, that mass graves must be avoided and that the deceased must be buried individually subject to all requirements of the law.[80] This is noticeable since IHL for non-international armed conflicts does not specify the prohibition of mass graves but merely mentions the notion of a decent burial.

In the aforementioned *Barake case* (Jenin mortal remain case), the Israeli High Court of Justice reiterated that Israel has the duty under IHL to bury Palestinian dead bodies and it highlighted that such burials "should be performed with respect, according to religious custom, in a timely manner".[81] This duty was reiterated by this same court in a later case called *Physicians for Human Rights v Commander of IDF Forces in the Gaza Strip*.[82] In that case, the Court considered that transferring the bodies to a local hospital is not sufficient.[83] The duty to ensure a dignified burial meant for the court that the military Commander had to negotiate with local authorities to find respectful ways to carry out this duty and had to carefully plan in advance how it will manage dead bodies by establishing clear procedures to that effect.[84]

[75] See supra on the return of human remains.
[76] WHO, *How to conduct safe and dignified burial of a patient who has died from suspected or confirmed Ebola virus disease*, October 2014. Available at : http://apps.who.int/iris/bitstream/10665/137379/1/WHO_EVD_GUIDANCE_Burials_14.2_eng.pdf?ua=1
[77] The right to health is guaranteed for instance by article 12 of the *International Covenant on Economic, Social and Cultural Rights* (1966).
[78] Morris Tidball-Binz, "Managing the dead in catastrophes: guiding principles and practical recommendations for first responders", *International Review of the Red Cross*, Vol. 89, N°866, June 2007, at 426.
[79] Ibid.
[80] Colombia, Council of State, *Administrative Case N°10941*, Judgment, 6 September 1995.
[81] Supra note 11, §11.
[82] Israel, High Court of Justice, *Physicians for Human Rights v. Commander of IDF Forces in the Gaza Strip,* Judgment, 30 May 2004.
[83] Ibid, §27.
[84] Ibid.

In an important case decided in 2007 and concerning the conformity of two domestic legislations with respect to the burial of suspected terrorists with the Constitution,[85] the Russian Federation's constitutional court pointed out that "[t]he right of a person to be buried after death, in accordance with his will, observing the customs and traditions, religious and ritual cults ensues from the Constitution of the Russian Federation, […], which guarantees the protection of human dignity, the right to freedom and personal inviolability, freedom of conscience and religion, freedom of thought and speech, opinion and beliefs, as well as from *universally acknowledged principles and norms of international law*, which, by virtue of Article 15 (4) of the Constitution prevail over national legislation" (emphasis added).[86] The Court nevertheless admitted that a particular legal regime implying restrictive measures regarding the location of the gravesites, were justified in the context of the fight against terrorism in order to maintain law and order.[87] The Court highlighted the risks of inter-ethnic and religious tension arising from the burial of persons suspected of terrorism in close proximity to the graves of the victims of their acts.[88] It also held that the observance of certain rites of burial and remembrance might serve as a mean of terrorist propaganda and it highlighted the need to avoid that burial places of suspected terrorists become terrorist shrines.[89]

This case is particularly interesting. On the one hand, it clearly supports the existence of a customary duty to dispose of every human remains – even those belonging to "terrorists" or enemy combatants/fighters – in a respectful manner and it establishes a link between this duty and human rights, such as the right to physical integrity and freedom of religion. On the other hand, it raises the difficult question of how far States can go to struck a balance between this duty and legitimate security concerns.

In the same vein, a controversial event was the burial in the North Arabian Sea of the remains of Osama Bin Laden by the United States of America after operation "Neptune's Spear". The US had justified this sea burial on the basis of security reasons, i.e. to avoid the creation of a "terrorist shrine", a place of "pilgrimage" for Bin Laden's supporters, as well as practical reasons, i.e. the difficulty of finding a State accepting the body.[90] The US also maintained that it ensured a dignified burial by following Islamic practice and tradition, which involved ritual washing, shrouding and burial within 24 hours.[91] Muslim scholars claimed, however, that sea burial breached sharia law.[92] Moreover, the security reasons to justify the burial at sea could also be challenged. From a policy perspective, the fact that the body was not returned to the family and that the international community has never been in a position to identify

[85] Although Russia never admitted the existence of a non-international armed conflict between the Government and Chechen rebels labelled as terrorist, such a conflict – known as the Second Chechen war – existed between 1999-2009.
[86] Russian Federation, Constitutional Court, *Burial case*, 28 June 2007, §2.
[87] Ibid, §§3.1-3.2
[88] Ibid.
[89] Ibid.
[90] Jonathan Karl, "Osama Bin Laden Body Headed for Burial at Sea", *ABC News*, 2 May 2011. Available at : http://blogs.abcnews.com/thenote/2011/05/osama-bin-laden-body-headed-for-burial-at-sea-officials-say.html
[91] Ibid.
[92] Ian Black and Brian Whitaker, "Sea Burial of Osama Bin Laden breaks sharia law , say Muslim scholars", *The Guardian,* 2 May 2011.

the body of Osama Bin Laden also comports security issues since his actual killing by US forces could be more easily questioned and myths about him still being alive perpetuated.[93]

In any event, the adequacy of sea burials outside the context of naval warfare is questionable. For instance, in 1996, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr Bacre Waly N'diaye, in his mission report concerning Papua New Guinea at the time of the Bougainville Civil War, highlighted as a subject of particular concern the fact that there had been no judicial proceedings after the killing of six civilians and the dumping at sea from helicopter of their bodies by the Papua New Guinea Defence Force.[94]

It is submitted that even if security concerns may be taken into account in assessing the most suitable type of disposal of human remains, these concerns cannot exempt belligerent parties from the general duty of a respectful and dignified burial, a principle which is generally accepted by States as exemplified by the examples concerning, Israel, Russia and the US.

5. Accounting for the dead

Under the 1949 Geneva Conventions, there is an explicit obligation for belligerent parties to identify dead persons of the adverse Party having fallen into their hands.[95] To that effect, they must record any particulars which may assist in the identification of the dead (e.g. name, date of birth, information concerning the belligerent Party on which he/she depends, army, regimental, serial number) and information concerning the cause of death.[96] At the latest, before burial or cremation of a body, a medical examination must be performed with a view to establishing the identity of the dead.[97] Regarding persons who die in detention, such as prisoners of war, or civilian internees, a death certificate showing the cause of death and the conditions under which it occurred must be made out.[98] Moreover, the Detaining Power must conduct an official enquiry each time a detainee has been killed (by a guard, a co-detainee or another person) and each time the cause of the death of a detainee is unknown. [99] This is particularly important since the wilful killing of a detainee by a guard, for instance, does amount to a war crime and must be prosecuted and punished.[100]

Although Common Article 3 to the Geneva Conventions and Additional Protocol II to the Geneva Conventions do not contain any provision on the identification of dead bodies, the ICRC considers, based on an analysis of State practice, that a customary IHL rule applying both in international and non-international armed conflicts exists on

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[93] "66% percent of Pakistanis don't believe Osama bin Laden was killed : Poll", *The Express Tribune*, 6 May 2011. Available at : http://tribune.com.pk/story/163178/66-of-pakistanis-dont-believe-osama-bin-laden-is-dead-poll/

[94] UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Report on his mission to Papua New Guinea island of Bougainville from 23 to 28 October 1995*, UN Doc. E/CN.4/1996/4/Add.2, 27 February 1996, §73.

[95] Arts 16-17 GCI; 19-20 GCII; 120-122 GCIII; 129-131 GCIV, 136-139 GCIV.

[96] Art. 16 GCI ; 19 GCII ; 120 GCIII ; 129 GCIV.

[97] Art. 17 GC I ; 20 GCII.

[98] Art. 120 GCIII ; Art. 129 GCIV.

[99] Art. 121 GCIII and

[100] See, e.g, Art. 129-130 GCIII ; 146-147 GCIV.

the matter.[101] This rule has been summarized as follows : "With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves."[102] Another customary IHL rule on States' duty to investigate war crimes moreover supposes that the circumstances and causes of violent deaths must also be established in the case of alleged war crimes (e.g. willful killing of a detainee) committed in the context of both international and non-international armed conflict.[103]

The IHL rules on identification of dead bodies are essential for several reasons. They are a precondition to the return of dead bodies to their families, They safeguard the rights of the family and avoid that persons become "missing in action" or otherwise disappear in the context of an armed conflict.[104] Further identification of the causes of death are moreover a key step for the purpose of prosecutions of war crimes, and other international crimes such as crimes against humanity and acts of genocide, which are required by international law.[105]

The very strong duty to conduct investigations, which are effective (i.e. independent, impartial, prompt, thorough and involving the next of kin) into possible violations of the right to life further supports the existence of a customary rule applying at all times and requiring not only to identify dead bodies,[106] but also to elucidate the cause of, at the very least, suspicious deaths. Human rights law is even more progressive and precise than IHL in this respect.[107] The case law of the European Court of Human Rights has made clear that

> "neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear."[108]

It is true that in this case as in others concerning Turkey, the Government never acknowledged the existence of a non-international armed conflict on its soil, and that the Court did not legally classify the situation as a non-international armed conflict. But, as evidenced in the aforementioned quotation, the Court nevertheless acknowledges the existence of "violent armed clashes". In a later case, concerning this time an international armed conflict between the United Kingdom and Iraq, the Court also considered that the right to life required that effective investigations be conducted into the killings of four persons who were mistakenly believed to be about

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[101] Rule 116 to the *ICRC Customary IHL Study*.
[102] Ibid.
[103] Rule 158 of the *ICRC Customary IHL Study*.
[104] On missing persons, see below.
[105] See articles 49 GCI ; 50 GCII ; 129 GCIII ; 146 GCIV ; art. 11 and 85 API. See also *Statute of the International Criminal Court*, 1998, preamble, §6.
[106] On the duty as such to identify dead bodies, see : IACtHR, *Neira Alegria and others case*, Judgment, 19 January 1995, §71.
[107] On the interplay between IHL and HRL regarding the duty to investigate, see : G. Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie*, Paris, Pedone, août 2013, pp. 403-435.
[108] ECtHR*, Kaya v. Turkey*, 19 February 1998, § 91. See also, in the same vein and among many others : ECtHR, *Ergi v. Turkey*, 28 July 1998 ; ECtHR, *Salman v. Turkey*, 27 June 2000 ; ECtHR, *Isayeva v. Russia*, 24 December 2005 ; ECtHR, *Hamiyet Kaplan and others v. Turkey*, 13 September 2005.

to conduct an attack against UK soldiers.[109] The Inter-American Court of Human Rights has adopted a similar approach.[110] The UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions also stressed that allegations of violations of the right to life must be investigated, even in international armed conflicts.[111]

This being said, the obligation to account for the dead is again an obligation of means, not an obligation of result. Belligerent parties must use their best efforts and all means at their disposal to identify dead bodies and conduct investigations when appropriate. In practice, such means might vary considerably from one situation to another. They can range from low-cost old methods (e.g. collecting one half of the double identity disc soldiers wear) to forensic scientific methods, including DNA testing, which may be particularly appropriate for identifying compromised human remains. For instance, in the context of the *Abu-Rijwa* case before the Israeli High Court, the Israeli Defense Forces confirmed that they would carry out DNA identification tests when the repatriation of the remains was requested by the next-of-kin.[112] There is no obligation though under IHL to undertake detailed identification measures of the dead, such as DNA testing, if such a method is not available or if the body can be identified by other means.[113]

The discrepancies between the costs and feasibility of various methods of identification and investigation raise difficult issues in context of asymmetric warfare, where the military power and resources of the belligerents considerably differ. It is submitted that the fact that an enemy (e.g. armed group) does not have the capacity or willingness to use expensive forensic methods does not relieve a more powerful belligerent Party of its obligation to do its utmost to identify dead bodies and investigate such deaths when appropriate, using all methods at its disposal. On the other hand, the international community, including humanitarian organizations, may provide technical assistance, training, material or personnel, support and advice regarding modern forensic methods of identification and investigation.

Another difficult issue in the context of applying modern forensic methods of identification and investigation is that they may at times clash with religious beliefs or cultural requirements. For instance, after the Indian Ocean Tsunami, it has been reported that it was a race against time for forensic experts to identify dead bodies, not only because of the number of casualties, but also because local culture required cremation/burial shortly after death.[114] Autopsies are also sometimes considered as

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[109] ECtHR, *Al-Skeini and others v. United Kingdom*, 7 July 2011, paras. 161-177.

[110] Inter-American Court of Human Rights (hereafter: IACtHR), *Myrna Mack Chang v. Guatemala*, 25 November 2003, §§156-157. See also: ICAtHR, *Gómez-Paquiyauri Brothers v. Peru*, 8 July 2004, §131; IACtHR, *Mapiripán Massacre v. Colombia*, 15 September 2005, §§233-234 ; IACtHR, *Pueblo Bello Massacre v. Colombia*, 31 January 2006, §143 and 147.

[111] *Report of the Special Rapporteur on the Extrajudicial, Summary and Arbitrary Executions, Philip Alston: Mission to the United States of America*, 28 May 2009, UN Doc. A/HRC/11/2/Add.5, para. 36.

[112] *Report on the Practice of Israel*, 1997, chapter 5.1., referring to High Court, *Abu-Rijwa case*, Judgment, 15 November 2000.

[113] Marco Sassòli and Marie-Louise Tougas, "The ICRC and the missing," *International Review of the Red Cross*, Vol. 84, No. 848, 2002, pp. 731 and 743.

[114] Oliver W. Morgan, Pongruk Sribanditmongkol, Clifford Perera, Yeddi Sulasmi, Dana Van Alphen, et al., "Mass fatality management following the South Asian tsunami disaster: Case studies in Thailand, Indonesia, and Sri Lanka", *PLoS Med*, Vol. 3(6), 2006.

going against religion (Islam, Judaism), which might also at times lead to difficult dilemmas in contexts where a belligerent party wishes to perform an autopsy as per its obligation to elucidate the cause of death under IHL, while the family or community equates autopsies with bodily intrusion, which violates beliefs about the sanctity of keeping the human body complete.[115] In such situations, it is submitted that religion, culture and other beliefs should as far as possible be taken into account in deciding upon the forensic methods to be used for the identification of dead bodies and for further investigation. The legal requirement to identify and, where necessary, investigate the cause of the death must however be maintained and remain the ultimate objective to be achieved.

6. Accounting for missing persons

There is a close relationship between the need to account for the dead and the need to account for missing persons, since a missing person may either be dead or alive.[116] In some cases, missing persons might even be presumed dead.[117] In practice, the phenomenon of "missing in action" in the aftermath of armed conflicts remains widespread. For instance, the Iran-Iraq War of 1980-1988 left tens of thousands of Iranian and Iraqi combatants and more civilians unaccounted for.[118]

Under the 1949 Geneva Conventions, several provisions aim at avoiding that persons go missing in the context of an international armed conflict. The rules discussed above regarding the collection, identification, proper disposal and return of the dead all contribute to avoid that persons go missing after they die in the context of an armed conflict. In addition to these rules, the Geneva Conventions provide for rules requiring to record prisoners of war and civilian internees upon capture, to centralize and transmit information about their identity, state of health, transfers etc. to the adverse party precisely to avoid their disappearance.[119] Detaining Powers must also put in place appropriate mechanisms to reply to all enquiries concerning prisoners of war or civilian internees.[120] Article 26 of the Fourth Geneva Convention provides that parties to the conflict must facilitate enquiries made by relatives dispersed owing to the war.[121] Even more clearly, Additional Protocol I to the Geneva Conventions requires that each party to the conflict searches for persons who have been reported missing by the adverse party and provides for additional procedures/arrangements to facilitate such gathering and transmission of information.[122]

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[115] Elizabeth C. Burton, "Religions and the Autopsy", *Medscape*, 2012. Available at: http://emedicine.medscape.com/article/1705993-overview#showall.

[116] Théo Boutruche, "Missing and Dead Persons", *Max Planck Encyclopedia of Public International Law*, August 2009, para. 1.

[117] See the case law on enforced disappearances, e.g. IACtHR, *Bámaca-Velásquez v. Guatemala*, 25 November 2000, para. 173; IACtHR, *Velásquez-Rodríguez v. Honduras*, 29 July 1988, para. 147e), 157 and 188; ECtHR, *Timurtaş v. Turkey*, 13 June 2000, para 86; ECtHR, *Imakayeva v. Russia*, 9 November 2006, para. 155.

[118] "Twenty years after the end of the Iran-Iraq war, tens of thousands of combatants still unaccounted for", *ICRC Website,* 16 October 2008.
Available at: https://www.icrc.org/eng/resources/documents/feature/2008/iran-iraq-missing-161008.htm

[119] See art. 16 GCI; 19 GCII; 70, 122§4 and 123 GCIII; 106, 136, 138, 140 GCIV; 33§2a) API.

[120] Art. 122 GCIII and 137 GCIV.

[121] Art. 26 GCIV.

[122] Art. 33 API.

This obligation flows from the "right of families to know the fate of their relatives" as recognized in article 32 of Additional Protocol I.[123] This provision is particularly noticeable as it is very rare (if not unprecedented) for IHL treaties to create – or at least recognize – a new fundamental right[124] whose existence had never been clearly acknowledged in the human rights law sphere.[125] Today, the existence of such a right is however well-established even beyond Additional Protocol I.[126] It has inspired the recognition of a "right to know" or "right to truth" under human rights law,[127] which is however broader in scope.[128]

International humanitarian law provisions pertaining to non-international armed conflicts do not contain specific provisions on the obligation to account for missing persons. Nevertheless, the ICRC considers that under customary law applying to both international and non-international armed conflicts, "each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate."[129] It reached this conclusion on the basis of various State practice, including several resolutions adopted at the international level, most of which "call upon" belligerent parties to elucidate the fate of missing persons.[130] The fact that the duty to account for missing persons can be seen as deriving from other international law obligations such as the obligation to account for the dead or family rights further support this conclusion.

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[123] Art. 32 API.

[124] Sandoz *et al.* (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 8 August 1949,* Geneva/Dordrecht, ICRC/Martinus Nijhoff Publishers, 1987, "Article 32", §1200: "(...) the Rapporteur of the Working Group (...) recognized that "it was unusual to state the premises on which an article was based", but emphasized the fact that the general principle had been incorporated "in response to a strong feeling of many delegations and institutions that it was important to express in the Protocol the idea that families had a right to know what had happened to their relatives"."

[125] G. Gaggioli, "The Prohibition of Enforced Disappearances: A Meaningful Example of a Partial Merger between Human Rights Law and International Humanitarian Law", *in* R. Kolb & G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham UK [etc.], Edward Elgar Publishing, 2013, pp. 320-342.

[126] *ICRC Customary IHL Study*, Rule 117, commentary.

[127] G. Gaggioli, "The Prohibition of Enforced Disappearances: A Meaningful Example of a Partial Merger between Human Rights Law and International Humanitarian Law", *in* R. Kolb & G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham UK [etc.], Edward Elgar Publishing, 2013, pp. 320-342; B. Taxil, « A la confluence des droits: la Convention internationale pour la protection de toutes les personnes contre les disparitions forcées », *Annuaire français de droit international,* LIII, 2007, p. 139. On the right to truth, see also : *Study on the right to the truth of the Office of United Nations human rights to the attention of the Commission on Human Rights*, 2 August 2006, UN Doc. E/CN.4 / 2006/91. See also: Théo Boutruche, "Missing and Dead Persons", *Max Planck Encyclopedia of Public International Law*, August 2009, para. 7.

[128] *Study on the Right to the truth of the Office of United Nations human rights to the attention of Commission on Human Rights,* Ibid. See also: "Amicus Curiae, presented by the International Commission of Jurists, Before the Inter-American Court of Human Rights in the Case of Efraín Bamaca Velasquez v. Guatemala, *" in* Doswald-Beck (ed.), *Impunity, Crimes Against Humanity and Forced Disappearance,* Geneva, International Commission of Jurists, *The Review* No. 62-63, 2001*,* pp.130-145.

[129] *ICRC Customary IHL Study*, Rule 117.

[130] See, e.g. UN General Assembly, *Resolution 3220 (XXIX): Assistance and cooperation in accounting for persons who are missing or dead in armed conflicts*, 2278th plenary meeting, 6 November 1974, para. 4.

The humanitarian considerations which underlie the duty to account for missing persons remain the same independently of the type of armed conflict. The duty to account for missing persons is mainly based on the recognition that knowing the fate of relatives is crucial in the mourning process and helps the next of kin to come to terms with their loss and to move on with their lives. The never-ending wait and the hope that a missing person is still alive and might return can be very destructive. This terrible anguish is palpable when listening to the stories of relatives of disappeared persons in contexts such as Colombia or Nagorni Karabakh.[131]

The obligation to account for missing persons is once again an obligation of means.[132] It arises at the latest after an adverse party provides notification of those who are missing.[133] All the methods used for accounting for the dead, such as exhumations and the use of forensic identification methods, including DNA testing, are obviously also relevant to account for missing persons.[134] In practice, tracing mechanisms are also often set up to account for missing persons.[135] The ICRC, through its Central Tracing Agency, does contribute importantly to the elucidation of the fate of missing persons and to the restoration of family links.[136]

The obligation to account for missing persons can also be found in some shape or form under human rights law. It has clearly materialized in the context of the prohibition of enforced disappearances. This is evidenced notably by article 24, paragraph 3, of the *UN Convention on Enforced Disappearances*, which stipulates that "[e]ach State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains".[137] It shall be noted that this Convention deals however with the prevention and repression of "enforced disappearances", which are restrictively defined as

> "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."[138]

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity.[139] The obligation to account for "missing persons" under IHL

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[131] Christoph Harnisch, Statement: "Colombia: ICRC welcomes measures to find missing people", *ICRC Website*, 9 November 2015; News release: "Nagorny Karabakh: ICRC submits updated list of missing persons", *ICRC Website*, 15 December 2015.
[132] *ICRC Customary IHL Study*, Rule 117, commentary.
[133] Ibid.
[134] Ibid.
[135] Ibid. See e.g. Croatia*, Directive on the Establishment and Functioning of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia*, 1991; Regulations Establishing the Commission for Detained and Missing Persons in Croatia, *Official Gazette*, N°46, 17 May 1993.
[136] See below.
[137] United Nations, *Convention for the Protection of All Persons against Enforced Disappearance,* 2006 (hereinafter Convention against Enforced Disappearance).
[138] Art. 2 of the Convention against Enforced Disappearance.
[139] Article 5 of the Convention against Enforced Disappearances; Article 7(1)(i) of the Rome Statute of the International Criminal Court, 1998.

is thus much wider in scope as it also entails an obligation to search for persons who are missing in action, and whose disappearance does not necessarily involve a crime or a violation of international law.

Human rights practice also strongly supports the existence of a State obligation to conduct a prompt and effective investigation each time a person disappears after having been taken into custody (or each time there is an arguable claim to that effect).[140] The Human Rights Committee also stated in its General Comment n°6 that there is a duty to "investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life ".[141] In situations where enforced disappearances constitute an "administrative practice" or a recurrent "phenomenon" and where the disappearance of a person seems somehow linked to this phenomenon, the total lack of due diligence in investigating a disappearance has even been used by the European Court of Human Rights to prove indirectly the responsibility of the State for the disappearance, or at least its acquiescence to its happening, and to conclude to a violation of the right to life (under its substantial limb).[142]

In a landmark case, entitled *Varnava v. Turkey*, the European Court of Human Rights recognized that Turkey had a continuing obligation to account for missing Cypriot soldiers who had disappeared in the context of the international armed conflict between Turkey and Cyprus in 1974 even in the absence of evidence that the missing person had been captured.[143] To reach this conclusion, the Court took into account IHL and concluded that the right to life requires an investigation into the fate of missing persons in the context of an international armed conflict.[144]

This case is a very good example of possible cross-fertilizations between IHL and human rights law.[145] The IHL obligation to account for missing persons has been incorporated into human rights law, while human rights courts have clarified that the obligation to account for missing persons is open-ended, i.e. that it continues until their fate has been elucidated.

7. Institutional framework

In order to fulfill the obligations previously mentioned regarding the management of dead bodies, the Geneva Conventions and Additional Protocols foresee three main institutional frameworks. These mechanisms are paramount to ensure the

[140] *See* for example : ECtHR, *Cakici v. Turkey*, 8 July 1999, para. 104 : ECtHR, *Imakayeva v. Russia*, 9 November 2006, para. 171. See also : IACtHR, *Bámaca-Velásquez v. Guatemala*, 25 November 2000, para. 211 (among many others).
[141] Human Rights Committee, *General Comment No. 6: Right to life (Article 6),* 1982, para. 4.
[142] ECtHR*, Imakayeva c.Russia,* 9 November 2006, para. 155.
[143] ECtHR [GC], *Varnava and others v. Turkey,* 18 September 2009, para. 186. *See* also ECtHR*, Varnava and others v. Turkey,* 10 January 2008, para. 130.
[144] ECtHR [GC], *Varnava and others v. Turkey,* 18 September 2009, para. 185. *See* also *Varnava and others v. Turkey,* ECtHR, 10 January 2008, para. 130.
[145] Gloria Gaggioli, "The Prohibition of Enforced Disappearances: A Meaningful Example of a Partial Merger between Human Rights Law and International Humanitarian Law", *in* R. Kolb & G. Gaggioli (eds.), *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham UK [etc.], Edward Elgar Publishing, 2013, pp. 320-342.

effectiveness of these norms.[146]

First, according to the Geneva Conventions, belligerent parties must, at the commencement of hostilities, organize an *Official Graves Registration Service*.[147] The functions of this Service can be summarized as follows: 1) ensuring identification of the bodies before their proper disposal; 2) ensuring respect for the graves, their grouping, their proper maintenance and marking; 3) maintaining lists showing the exact location and markings of the graves, for the purpose notably of exchanging them with the graves registration service of the adverse Party; and 4) allowing subsequent exhumations and possible return to the home country.[148] In practice, the majority of States have permanent military graves services, which already function in peacetime for the maintenance of graves of members of the armed forces who have died in armed conflict situations.[149] These services can easily and competently take upon themselves to perform the functions assigned to the official grave registration service.[150] The Official Graves Registration Service may however also be provided by a Government through ministerial departments as it is the case in France and Italy, or by an agency of the executive branch of the Federal Government as in the United States of America or, else, by a private body charged with this task by the State, as in Germany.[151] The exact name of the service varies considerably from one State to the other. However, what matters is that such service exists at the latest when war begins and remains in place after the end of hostilities as long as exhumations and returns of human remains are envisaged.[152]

Second, the Geneva Conventions also foresee the establishment of "Information Bureaux" upon the outbreak of a conflict and in cases of occupation.[153] The functions of these bureaux are mainly: 1) centralizing information on prisoners of wars and civilian internees – including about their deaths; 2) transmitting such information immediately and by the most rapid means to the enemy through Protecting Powers or humanitarian organizations like the ICRC; 3) opening enquiries in order to elucidate the fate of the missing and 4) collect all personal valuables and important documents of prisoners of war and civilian internees and transmit them to their next of kin when they have died for instance.[154] The nature and affiliation of the body is left to the discretion of the belligerent parties, but the efficient work of these bureaux through appropriate funding and staffing is required.[155] The belligerent parties must also implement clear procedures and lines of communication between the

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[146] Théo Boutruche, "Missing and Dead Persons", *Max Planck Encyclopedia of Public International Law*, August 2009, para. 13.
[147] Art. 17 GCI. See also 120§6 GCIII.
[148] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd edition, 2016, Commentary to article 17 GCI, §§1704-1709. Available at: https://ihl-databases.icrc.org/ihl/full/GCI-commentary. Hereafter: *ICRC Commentary on GCI* (2016).
[149] Ibid, Commentary to article 17 GCI, §1700.
[150] Ibid.
[151] Michael Bothe, "War Graves", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4, Amsterdam, North-Holland Publishing Company, 2000, p. 1374 ; Anna Petrig, "The war dead and their gravesites", *International Review of the Red Cross*, Vol. 91, No. 874, June 2009, p. 363.
[152] *ICRC Commentary on GCI* (2016), commentary to article 17 GCI, §1702.
[153] Art. 122 GCIII and 136 GCIV. See also : Arts 16-17 GCI ; 19 GCII ; 74, 119, 120, 124 GCIII and 110, 130, 136-138, 141 GCIV.
[154] Ibid. See also : *ICRC Customary IHL Study*, Rule 117, commentary.
[155] See art. 122 GCIII and 136 GCIV.

Information Bureau and other stakeholders, such as the detaining authorities, hospitals and the official graves registration services in order to ensure the effective transmission of information to the next of kin.[156] New technologies have simplified considerably the work of Information Bureaux. For instance, information concerning prisoners of war or civilian internees can now be transmitted by e-mail.[157] The 1960 ICRC Commentaries consider that "[e]ach country must (…) endeavour, according to its own state of technical progress, to enable the Agency to use the most up-to-date methods".[158]

Third, the Geneva Conventions require the creation of a "Central Information Agency" for prisoners of wars and civilians protected by the Fourth Geneva Convention in a neutral country.[159] The functions foreseen were primarily to 1) centralize information concerning prisoners of war, civilian internees and missing persons and 2) to transmit that information to the home country and families.[160] In brief, the objective of the Central Information Agency is to restore family links and to make sure that persons do not go missing. The information can be collected from National Information Bureaux but also from all kind of other sources. Belligerent parties must give all facilities, including necessary privileges and immunities, and financial support to the Central Information Agency for it to be able to perform its functions.[161] In practice, such an agency has been created by the ICRC in 1960. It is a standing division of the ICRC based in Geneva, Switzerland[162] named the "Central Tracing Agency".[163] This name was adopted to reflect the fact that the Agency has now a broader mandate and that it performs its functions not only for prisoners of war or other protected persons in international armed conflicts, but also for victims of non-international armed conflicts, other situations of violence and natural disasters.[164] The Central Tracing Agency works closely with National Societies (i.e. National Red Crosses and Red Crescents) that know the culture and environment they are operating in very well. Together, they enjoy a worldwide network to restore family links. They locate people, exchange messages – through different means including video-conferences, mobile phones, radios etc. They also reunite families when possible and do their utmost to clarify the fate of missing persons.[165] To be noted that the ICRC has recently created a special website, called "Restoring Family Links", where online tracing is available for specific contexts, such as Haiti after hurricane Matthew, South Sudan or missing migrants in Europe.[166]

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[156] *ICRC Commentary on GCI* (2016), commentary to article 16 GCI, §1587.
[157] Ibid, commentary to article 16 GCI, §1588.
[158] Jean Pictet (ed.), *Convention (III) relative to the treatment of prisoners of war, Geneva, 12 August 1949, Commentary*, Geneva, ICRC, 1952, commentary to article 122, p. 575.
[159] Art. 123 GCIII and 140 GCIV. The Central Agency is mentioned in several other articles. See 19 GCII ; 30, 51, 68, 70, 74, 75, 77, 120, 122, 124 GCIII and 25, 91, 106, 110, 111, 113, 129, 137, 139, 140 and 141 GCIV. See also : Arts 33 API and 78§3 API.
[160] See mainly, art. 123 GCIII, 140 GCIV and 33 API.
[161] Art. 123 GCIII and 140 GCIV.
[162] Ibid ; See also : Interview: "ICRC Central Tracing Agency: half a century of restoring family links", *ICRC Website,* 7 April 2010.
Available at : https://www.icrc.org/eng/resources/documents/interview/centra-tracing-agency-interview-070410.htm
[163] *ICRC Commentary on GCI* (2016), commentary to article 16 GCI, §1591.
[164] Interview: "ICRC Central Tracing Agency: half a century of restoring family links", *ICRC Website,* 7 April 2010.
[165] Ibid.
[166] See : https://familylinks.icrc.org/en/Pages/online-tracing.aspx.

These institutional frameworks are not foreseen in IHL provisions applying to non-international armed conflicts and do not belong to customary international law. In such conflicts, belligerent parties should nevertheless be encouraged to have similar mechanisms in place in order to fulfill their obligations with respect to the management of dead bodies.

Conclusion

International humanitarian law is an international law branch, which has been developed to regulate and, as far as possible, to humanize armed conflicts. Given the high risk of casualties any armed conflict involves, IHL contains a number of detailed rules regarding the management of dead bodies.

In all types of armed conflicts, belligerent parties have duties to 1) search for and collect the dead, 2) to treat the dead in a dignified and respectful manner, 3) to return human remains and personal effects of the dead to their family, 4) to account for the dead and, finally, 5) to account for missing persons, who might have actually passed away. IHL also requires the creation of institutional frameworks, such as the Official Graves Registration Services, the Information Bureaux and the Central Tracing Agency in order to implement or facilitate respect for these obligations.

These legal requirements aim at ensuring respect for a few, easy-to-remember legal principles. These can be summarized as follows. 1) *The dignity of the dead must be respected.* This principle is implicit in many IHL rules, such as those prohibiting mutilation of dead bodies or requiring a proper disposal of human remains. It is also recognized in many domestic legislations and case law. 2) *Families have a right to know the fate of their relatives*. This is why dead bodies must be searched for, collected, identified, and their information must be carefully collected and transmitted so that they reach ultimately the next of kin. 3) *Religion, belief and culture must be respected.* This is owed to the dead and to the next of kin. Thus, the dead must be honorably disposed of and if possible according to the rites of the religion to which they belonged. 4) *The right to health must be protected*. Avoiding the spreading of diseases through a proper and timely disposal of the dead in cases of epidemics is necessary. 5) *Serious violations of international humanitarian law (i.e. war crimes) and other international crimes must be prosecuted*. To that effect, identification of the dead and investigating the causes of deaths where appropriate is crucial.

These principles constitute the pillars of the legal framework for humanitarian forensic action as developed by the ICRC and practised today in many contexts affected by armed conflict, other situations of violence and natural disasters and should always be kept in mind by anyone who is involved in managing dead bodies. If most of the time these principles complement and reinforce each other, in some cases they might clash with one another. This was well illustrated by the response in the aftermath of the Indian Ocean Tsunami, in which respect for religious or cultural practices meant that the identification of dead bodies could often not be performed, which in turn endangered the right of families to know the fate of relatives. Clashes were also exemplified in the context of the Ebola crisis where religious rites contributed to the proliferation of the epidemics and thus endangered the right to health. These types of challenges requiring humanitarian forensic action deserve

being further investigated, as part of the development of this novel and necessary branch of forensic science.