



RESPECT FOR THE DEAD:

FROM THE PERSPECTIVE OF
INTERNATIONAL HUMANITARIAN
LAW (IHL) AND ISLAM



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1. INTRODUCTION

The innate dignity of humanity must be respected in all circumstances, regardless of an individual's sex, race, colour, religion, nationality, political opinion or other status. Unfortunately, however, throughout history civilisation has experienced inhuman and degrading practices. Such treatment frequently extends to the management of the dead and includes examples of mutilation and the failure to provide adequate burials, or cremations, in accordance with religious beliefs and the principle of respect.¹ The savagery of two world wars, in addition to many other battles and conflicts throughout history, bear testimony to this appalling truth. However, in the midst of this anarchic order, the fountains of benevolence were not totally dry. The efforts of a few noble and enlightened souls led to the creation of internationally accepted rules, later to become known as international humanitarian law (IHL), which were devised to limit the effects of armed conflict and to ensure that humane treatment would be provided to the victims of armed conflict.² These protective regimes did not only apply to the living, but ensured protection to

1 This statement finds its recognition in the words of many authors. As for instance, François Bungion mentions that for centuries soldiers who succumbed to death in battle or war were left where they lay or mercilessly thrown into mass graves. The ill fate of the deceased was so dreadful that corpses were not even identified. See Bungion, François, *The International Committee of the Red Cross and the Protection of War Victims*, International Committee of the Red Cross and Macmillan, 1st edition, 2003, p. 498. Gradimir Djurovic, in this regard, also successfully appreciated the psychology of the soldiers fighting in an armed conflict. His comment goes as follows: "At that time armies had little concern for their fighting men and even less for those of their adversaries. After an important battle, the dead were thrown into a common grave and the number of unidentified bodies outnumbered the identifiable ones". See Djurovic, Gradimir, *The Central Tracing Agency of the International Committee of the Red Cross*, Henry Dunant Institute, Geneva, 1986, p. 14, quoted in Bungion, François, *The International Committee of the Red Cross and the Protection of War Victims*, International Committee of the Red Cross and Macmillan, 1st edition, 2003, p. 498. At the end of the Italian campaign of 1859, although the French Army had been constantly victorious, its records listed 2664 missing and 2536 identified dead. The Austrian army had more than 17,000 missing (including 5000 to 6000 prisoners of war) and 5416 identified dead. Dr. J.-C. Chenu, *Statistique medico-Chirurgicale de la champagne d'Italie en 1859-1860*, Librairie militaire de J. Dumaine, Paris, 1869, pp. 851-3. A communication from the Minister of War of the Austrian Empire to the First International Conference of Relief Societies, meeting in Paris in August, 1867 stated that eight months after the Austro-Prussian War of 1866, which lasted only a few weeks, eight-four officers and 12,277 non-commissioned military personnel of the Austrian army were still listed as missing, and it was not known what had happened to them. (*Conférences internationales des Sociétés de Secours aux Blessés militaires des Armées de Terre et de Mer, tenues à Paris en 1867*, second edition, Imprimerie Baillière & fils, Paris, 1867, part II, pp. 90-1). The last two references, like the earlier one, have been produced *verbatim* from Bungion, François, *The International Committee of the Red Cross and the Protection of War Victims*, International Committee of the Red Cross and Macmillan, 1st edition, 2003, p. 505-6.

2 Extensive reading and apposite appraisal of the waves of history unfailingly provide the impetus for Jean Pictet, a leading authority on International Humanitarian Law (IHL), to put firm conviction on his spontaneous statement which runs as follows: "...The laws of war are as old as war itself and war is as old as life on earth". See Pictet, Jean, *Development and Principle of International Humanitarian Law*, Martinus Nijhoff Publishers and Henry Dunand Institute, 1985, p. 6. It is an established fact that the rules, the forerunners of modern IHL, devised in different phases of history, are echoed in the prime literary works of the culture (e.g. *Mahabharata*, the legendary Indian epic as well as an esteemed religious text for Hindus), in the texts of different religions (e.g. the *Bible*, the holy

persons that succumbed to death during armed conflict.³ Undeniably, families of combatants, and other victims of conflict, have always suffered anguish when the fate of their loved one has been unclear. As a result, assisting people to realise their right to know and ensuring respect for the dead⁴ became a priority of the International Committee of the Red Cross (ICRC), an organisation entrusted with the task of guardianship over the IHL regime.

Death is an inevitable feature of warfare and poses challenges in relation to the dignified management of the dead during conflict. The well meshed tapestry of the contemporary IHL regime does, however, encapsulate appropriate protectionsto ensure that the dead are treated with respect.⁵ These protections generally commence with an

text for the Christian, the *Qur'an*, the holy text an bedrock of Islam) or in tenets on the art of war (e.g. the rules of Manu, and the *bushido*, the Japanese Code of behavior). Even in the European Middle Ages the knights of chivalry took pain to adopt stringent rules on fighting. See Gasser, Hans- Peter, *International Humanitarian Law*, translated from German by Fitzgerald, Sheila and Mutti, Susan, from Hans Haug, Humanity for All, the International Committee of the Red Cross and Red Crescent Movement, Henry Dunant Institute, Haupt, 1993, published by International Committee of the Red Cross (ICRC) Regional Delegation for South Asia, Sundar Nagar, p.3. Other scholars also refer the existence of certain rules in 3000 BC. To them, those rules might not be adopted for humanitarian purpose but rather with a purely strategic or economic objective. However they concur that the effects of those rules undoubtedly were humanitarian in nature. See Sass'oli, Marco, Bouvier, Aotone A., Quintin, Anne, *How Does Law Protect in War?* Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian law, International Committee of the Red Cross, Third, Expanded and Updated Edition, 2011, vol. I, p.139. Another noted author splendidly comments that earlier imperatives did not necessarily premise on the same underpinning of that of modern times. However, all civilizations successfully realized the aspirations, demands and values of their own time and society and accordingly contextualized their formulated rules. As for instance, the ancient Greeks were hardly bothered about the fate of prisoners of war, who were enslaved if not slaughtered. See Ducrey, Pierre, *Le traitement des prisonniers de guerre dans la Grèce antiques, Des origines à la conquête romaine*, Paris, Editions E. de Boccard, 1968, quoted in Bungion, François, Customary International Humanitarian Law, *ISIL Yearbook of International Humanitarian and Refugee Law*, The Indian Society of International Law, New Delhi, vol. VII, 2007, p. 2. The modern inception of IHL laid its foundation on the tiny but monumental work of Sir Henry Dunant, a Swiss businessman, namely 'A Memory of Solferino' published in 1862. Moreover, for the rebirth and revival of modern IHL the world is also indebted to Francis Lieber, who, in the context of US Civil War, contributed enormously by codifying the existing laws and customs of war in the *Lieber Code* in April, 1863. See Hartigan, Richard Shelly, *Lieber's Code and the Laws of War*, Chicago, 1983. Martinus Nijhoff Publishers and Henry Dunant Institute, 1985,

- 3 The Ancient Greeks set up an illustrious example by fashioning a magnificent model for the treatment of the dead. After every battle, the conqueror was obliged to declare a truce and to permit the defeated forces to collect their dead and adorn them with their last rights. Mentioned in Bungion, François, Customary International Humanitarian Law, *ISIL Yearbook of International Humanitarian and Refugee Law*, The Indian Society of International Law, New Delhi, vol. VII, 2007, p. 2. He, in this regard, comments that references may be made to many illustrations cited by Thucydides, *History of the Peloponnesian War*, Book I, Chapter I, para, 63; Book II, Chapter II, para, 79; Chapter III, para, 92 etc.
- 4 Different words are used in contemporary regime of IHL on the dead to signify the person who died: 'the dead' [GC I, Art. 15(1) and 17; GC II, Arts. 18(1) and 20(1); AP II, Art. 8; Rules 112 to 116 of Customary International Humanitarian Law], 'dead person' [GC I, Art. 16; GC II, Arts. 19 and 20(2)], 'bodies' [GC I, Art. 17(3)], 'the killed' [GC IV, Art. 15], 'the remains of deceased' [AP I, title of Art. 34], or 'remains of persons who have died' [AP I, Art. 34]. These different expressions should, as one author observes, be understood as synonyms. Petrig, Anna, The War dead and their gravesites, *International Review of the Red Cross*, Humanitarian debate: Law, policy, action: War Victims, International Committee of the Red Cross and Cambridge University Press, vol. 91, No. 874, June 2009, p.344.
- 5 Legal answers to queries as well as questions concerning the protection and management of the dead bodies are embraced by different legal framework namely bilateral or multilateral agreements, general norms of international humanitarian law, international human rights law, international criminal law and domestic law. See note no. 4, pp.342-343.

obligation to search for the missing and extend to the dignified disposal of remains. However, this is a nuanced and often neglected aspect of IHL which will benefit from greater academic focus, inset within the context of the historical and modern day reality of conflict. Irrefutably, the principles of modern day IHL were greatly influenced by the major religions of Asia: namely, Hinduism⁶, Buddhism⁷, Christianity⁸ and Islam⁹. Moreover, although cultural universalism is one of the tenets of IHL, the IHL regime is not oblivious to the existence of cultural diversity, and hence cultural relativism. This aspect of IHL is important to Muslims throughout the world who continue to suffer the effects of conflict and must rely on the protections offered by IHL to ensure that their own system of values and culture are respected in relation to the management of the dead. It follows that it is a necessary exercise to conduct a critical appraisal of IHL in relation to its conformity to, or respect of, Islamic laws of armed conflict.

As with the premise of IHL, Islam recognises the inherent dignity of people, irrespective of sex, race, colour, religion, nationality, political

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- 6 For the contribution of Hinduism in developing the norms of IHL, see Sinha, Manoj Kumar, *Hinduism and International Humanitarian Law*, in *International Humanitarian Law A Reader for South Asia*, Larry Maybee and Benarji Chakka (ed.), International Committee of the Red Cross, Regional Delegation, New Delhi, 1st edition, 2008, pp.123-133. See also Nirmal, B.C. *International Humanitarian Law in Ancient India*, in *Oxford Handbook of International Humanitarian Law*, V.S. Mani (ed.) Oxford University Press, New Delhi, 1st edition, pp.03-13. In order to get a general picture of the Hindu Law of Armed Conflict in Ancient India, see Harbar S. Bhatia (ed.), *International Law and Practice in Ancient India* (1977); Hiralal Chatterjee, *International Law and Inter-State Relations in Ancient India* (1985); Lakshmikanth R. Penna, "Writtten and Customary Provisions relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflicts in Ancient India, *International Review of the Red Cross*, no. 271 (July-August, 1989), pp. 333-348. Mani, V.S. "International Humanitarian Law: An Indo-Asian Perspective", *International Review of the Red Cross*, vol. 83, no. 841 (March 2001), PP. 59-76. Nagendra Singh, *India and International Law*, vol. I (1973). Sekharipuram, V. Viswanatha, *International Law in Ancient India* (1925).
- 7 For appreciating the contribution of Buddhism in shaping IHL see Weeramantry, C.G., *Buddhism and Humanitarian Law*, in *Oxford Handbook of International Humanitarian Law*, V.S. Mani (ed.) Oxford University Press, New Delhi, 1st edition, pp.03-13.
- 8 As to the role of Christianity to enrich IHL see, Mani, V.S. *Christian Traditions of International Humanitarian Law*, in *Oxford Handbook of International Humanitarian Law*, V.S. Mani (ed.) Oxford University Press, New Delhi, 1st edition, pp.14-24.
- 9 For comprehending the contribution of Islam in shaping humanitarian norms, see Zuhili, Sheikh Wahbeh al, *Islam and International Law*, *International Review of the Red Cross*, no. 858 (June 2005), pp. 269-283. See also Alam, Aftab, *The Islamic Concept of Humanitarian Law*, in *Oxford Handbook of International Humanitarian Law*, V.S. Mani (ed.) Oxford University Press, New Delhi, 1st edition, pp.39-45. See also, Muhammad ibn al-Hasan al-Shaybani, *Kitab al-Siyar al-Sagir* (The Shorter Book on Muslim International Law), edited, translated and annotated by Mahmood Ahmad Ghazi, Islamic Research Institute, International Islamic University, Islamabad, (1998). See also, Said El-Dakkak, *International Humanitarian Law between the Islamic Concept and Positive Law*, *International Review of the Red Cross*, no. 275 (March-April 1990), pp. 101-114; Ameer Zemmali, *Combattants et prisonniers de guette en droit islamique et en droit international humanitaire*, Paris, Editions, A. Pedone, 1997. See also Karima Bennoune, 'As-salamu Alaykum? Humanitarian Law in Islamic Jurisprudence', *Michigan Journal of International Law*, 15, 1994, pp. 605-643; James Cockayne, 'Islam and International Humanitarian Law: From a Clash to a Conversation between Civilizations', *International Review of the*

opinion or other status. Within the divinely ordained framework of Islam, this respect is seen as a manifestation of God's grace. Therefore, respect for the dead attracts special attention. This research paper, without focusing on other aspects of warfare, will delve into an arduous but noble venture of elucidating provisions related to respect for the dead under contemporary IHL and Islam. Moreover, we will embark upon a journey which will draw a parallel between these two frameworks. The first part of this paper will focus on the Four Geneva Conventions (and their Additional Protocols) and on principles of customary IHL in order to fully appreciate the current legal position.¹⁰ Although rules relating to the appropriate protection for the dead are found in other international instruments and national practices, legislation and military manuals discussions on these precedents are willingly averted for the purpose of brevity. Subsequently, in the second part of this study, in order to adequately portray how the dead are respected within the Islamic framework, focus will be placed on the Qur'an, Sunnah of the Prophet Muhammad (PBUH), practices of the companions (especially the rightly guided Caliphs) and juristic writing. The final part of this paper intends to draw a parallel between these two frameworks.

Red Cross, 84, 2002, pp. 597-626. Both these articles are reproduced in *International Law and Islamic Law*, Mashood A. Baderin (ed.), Ashgate Publishing Limited, England, 2008, reprinted 2010. For these articles see pp. 140-210. For a meticulous examination of Islamic Jurisprudence in the realm of armed conflict see, Nesrine, Badawi, *Islamic Jurisprudence and the Regulation of Armed Conflict, Program on Humanitarian Policy and Conflict Research*, Harvard University, pp. 1-13. For a critical appraisal of the illegality of terrorism against non-Muslims during armed conflict see Dr. Muhammad Tahir-ul-Qadri, *Fatwa on Terrorism and Suicide Bombings*, Chapter 4: The Unlawfulness of Terrorism against Non-Muslims-Even During Times of War, Rupa Publications India Pvt. Ltd., New Delhi, 2014, pp. 119-139. For a critical appraisal of Islamic Law of Nations by classical scholars see Shaybani, Muhammad ibn al-Hasan al, *The Islamic Law of Nations: Shaybani's Siyar*, translated by Khadduri, Majid, Johns Hopkins University Press, Baltimore, 2001. For a meticulous appreciation of Islamic theory of international relations, see Sulayman, Abdulhamid Abu, *Towards an Islamic Theory of International Relations: New Directions for Methodology & Thought*, International Institute of Islamic Thought (IIIT), 1993. Another eminent scholar has produced a very significant work on *jihad*. See Qaradawi, Dr. Yusuf al, *Fiqh of Jihad*, Wahba Bookshop, 2009. Another scholar has endeavored to portray the relationship between maqasid al shariah (higher purposes of *Shari'ah*) and *Siyar* (Islamic International Law). See Ra'ees, Wahabuddin, *The relationship between the Maqasidic (Higher Purposes of Shari'ah) and Siyar (Foreign Policy of the Islamic State) The Journal of Rotterdam Islamic Social Sciences*, vol. 1, no. 1, 2010.

¹⁰ The four Geneva Conventions of 1949 and Additional Protocol I of 1977 have offered very solid and concrete web of protection and respect for dead. On the contrary, the only provision explicitly makes reference to the dead is Article 8 of AP II of 1977. Thus, the tapestry of humanitarian regime applicable to international armed conflict is efficiently knitted in comparison with that of non-international armed conflict. However, this less densely interwoven fabric does not entitle the parties to a non-international armed conflict to act in a legal vacuum or jurisprudential void. Rather they are under a strict legal obligation to respect general norms of IHL such as the prohibition of outrages upon personal dignity, in particular humiliating and degrading treatment, [GCI-IV, Art. 3(1) (c), and AP II, Art. 4(2)(e)] the prohibition on cruel and inhuman treatment [GCI-IV, Art. 3(1), and AP II, Art. 4(1)], and the prohibition of collective punishment [AP II, Art. 4(2)(b)]. Apart from this, customary international humanitarian law on the dead may act as a panacea to fill protection gaps in both types of armed conflicts. See note no. 4., p.343.

2. RESPECT FOR DEAD UNDER THE CONTEMPORARY IHL REGIME

Mohammad Azharul Islam

IHL endeavours to construct a comprehensive framework to elevate the suffering of victims of armed conflict, the genesis of which can be traced back to the dawn of humanity's cultural consciousness.¹¹ IHL seeks to protect the life and dignity of the wounded, sick, captured or shipwrecked members of the armed forces, and of civilians affected by conflict, by placing restrictions on the means and methods of warfare that combatants may deploy. Comprehending the human psyche, through a study of world history, IHL does not prohibit the use of force (*jus ad bellum* or *jus contra bellum*), instead it regulates the behaviour of combatants during armed conflict (*jus in Bello*). As the principle of humanity serves as a beacon for IHL, this legal framework accords respect and protection not only to living persons but also to the dead.¹²

Meticulous elucidation of IHL provisions relating to the dead¹³ also necessitates the critical appraisal of provisions relevant to the missing.

11 Foreword by Iyer, V. R. Krishna, in Balachandra, M.K., Varghese (ed.) *Introduction to International Humanitarian Law*, International Committee of the Red Cross, Regional Delegation, New Delhi, 1st edition 1997, reprinted 1999, p. vii.

12 This research paper necessarily embraces within its sovereign domain only those dead persons who succumbed to death during armed conflict and most strikingly, due to the reasons related with armed conflict. It is noteworthy to mention that in 2006 the Pan American Health Organization (PAHO), an international health agency established in 1902, and the International Committee of the Red Cross (ICRC), with the participation of the World Health Organization (WHO) and the International Federation of the Red Cross and Red Crescent Societies (IFRC) published *Management of Dead Bodies after Disasters: A Field Manual for First Responders*. This manual is designed to serve two broad objectives; first, to promote the proper and dignified management of dead bodies, and second, to maximize their identification. This manual essentially presents simple and easy recommendations for non-specialist to manage the recovery, basic identification, storage and disposal of dead bodies following disasters. It also touches another significant area namely providing support to bereaved relatives of the dead. Moreover, it also contains suggestions regarding the communication with the public and the media. The very utility of the manual will be evident during the immediate response to a disaster and most significantly where forensic response is unfortunately unavailable. However, proper following of the recommendations will assist the job of forensic specialists when they arrive at the scene. The manual will also help the persons in charge of preparing mass fatality disaster plans. The manual comprises 11 chapters and 7 Annexes. See the manual and for a critical appraisal of the manual see Binz, Morris Tidball, Management of the Dead in Catastrophes: guiding principles and practical recommendations for first responders, *International Review of the Red Cross*, Humanitarian debate: Law, policy, action, Catastrophic events, vol. 89, NO. 866, June 2007, pp. 421-442.

13 Many diversified humanitarian issues and interests are inextricably related with the dead bodies. These issues as well as interests focus on the personal dignity of the dead, rights of the family members regarding the fate of the deceased, identification and recovery of the dead, access to the gravesites, rights of the home countries relating to the maintenance of the gravesites of their own soldiers died in foreign soil, investigation and collection of evidence on the cause, time and circumstances of death by the

Following the outbreak of a conflict, a severe anguish engulfs a myriad of families who no longer know the whereabouts of their loved ones.¹⁴ Emphatically recognising the right of families to know the fate of their loved ones, international humanitarian law not only incorporates provisions related to the respectful management of human remains but also attempts to prevent people from disappearing.¹⁵

2.1 ELUCIDATION OF THE DESTINY OF MISSING PERSONS

The advisory service of the ICRC, in one of their documents entitled “*Missing persons and their families: Recommendation for drafting national legislation*”, focuses on the general obligations applicable to all parties to an international armed conflict (IAC) in relation to missing people. The guidance reiterates that all parties to an IAC must take all feasible measures to elucidate the destiny of missing persons.¹⁶

Without demur it can be stated that families frequently suffer in a myriad of ways following the disappearance of one of their members.

international community mandated under international law for the purpose of ensuring prosecution of crimes committed during armed conflict. See note no. 4. p.342.

14 Neither the Geneva Conventions nor their Additional Protocols define missing persons. The advisory service of the ICRC ventures to define missing persons as those persons whose whereabouts remain obscure to their kith and kin and who, on the basis of unswerving information, have been reported missing in connection with an international or non-international armed conflict, a situation of internal violence or disturbances or any other situation that may necessitate the intercession of a neutral and independent intermediary. See *Missing Persons and their families, recommendations for drafting national legislation*, published by ICRC advisory service. However, the Commentary to Article 33 (1) of Additional Protocol I mentions that after rejecting a definition the working group on this matter adopted a working definition. It suggests that missing persons are those persons who are reported as missing by another party. See Sandoz, Yves, Swinarski, Christophe, Zimmermann, Bruno (ed.) *Commentary on the Additional Protocols of 8 June, 1977 to the Geneva Conventions of 12 August, 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987, p. 351.

15 Apart from IHL, international human rights law (IHRL) has devised its own protective regime to deal with the inhuman practice of enforced disappearance. Declaration on the Protection of All Persons from Enforced Disappearance, 1992 and the International Convention for the Protection of All Persons from Enforced Disappearance, 2006 are noteworthy to mention here. The convention, a milestone in the history of IHRL, is divided into three parts. The first part incorporates the substantive provisions and elucidates the obligations of state parties to take measures to prevent and penalize enforced disappearances. The second part establishes the Committee on Enforced Disappearances, consisting of ten experts having high moral character and recognized competence in the arena of human rights (Article 26). Part III among other ancillary matters focuses on the inevitable relationship between the Convention and IHL. Article 44 of the Convention vehemently stresses that the convention will, in no way, prejudice, the provisions of IHL.

16 The concerned paper refers the following articles in this regard. GC I, arts 19-20; GC II, arts 16-17, GC III, arts 122-125; GC IV, arts 136-141; AP I, arts 32-33.

The uncertainty of the situation is one of the factors detrimental to the family.¹⁷ The psychological impact of a disappearance is reflected in the contents of Article 32 of the First Additional Protocol to the Geneva Conventions (AP I). It reads as follows:

...the activities of the High Contracting parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted by the right of families to know the fate of their relatives.

However, while IHL obliges all parties to a conflict to take all feasible steps to inform concerned families about the fate of their relatives, the obligation does not extend beyond what is feasible in any given situation.¹⁸ The humanitarian obligation to search for missing people only exists at the point at which “circumstances permit, and at the latest from the end of active hostilities”.¹⁹

The Search for Missing Persons

The right of the families to know the fate of their kith and kin is reinforced by Article 33(1) of AP I, which obliges the parties to a conflict to search for persons who have been reported missing.²⁰ This type of search can be contrasted with a general search (required by Article 15 of GC I and Article 33(4) of AP I) of a battlefield following a clash.²¹ Although, the persons that should be searched for under Article 33(1) of AP I are not listed, such a search may be conducted for nationals of the adverse party, refugees, members of the armed

¹⁷ See note no. 14, p. 343.

¹⁸ See note no. 14, pp. 346-347.

¹⁹ See note no. 14, p. 352. It is to be noted that the obligation to search for missing persons applies equally to both members of armed forces and civilians. As regards the search of missing persons two situations are usually plausible: firstly, on taking control of enemy territory an occupying power incurs obligation to search there for persons reported missing; secondly, a party to the conflict sustains obligation to search its own territory for members of an adversary who may have been reported missing. See Gasser, Hans-Peter, ‘Protection of the Civilian Population’, in the Handbook of Humanitarian Law in Armed Conflicts, Dieter Fleck (ed.), Oxford University Press, first edition 1995, paperback 1999, p. 250.

²⁰ See note no. 14, p. 350. It is to be noted that the obligation to search for missing persons applies equally to both members of armed forces and civilians. As regards the search of missing persons two situations are usually plausible: firstly, on taking control of enemy territory an occupying power incurs obligation to search there for persons reported missing; secondly, a party to the conflict sustains obligation to search its own territory for members of an adversary who may have been reported missing. See note no. 19.

²¹ See note no. 14, p. 350. Article 15, para. 1, GC I emphatically puts obligations on the parties to a conflict to search for the wounded, sick and dead ‘at all times, and particularly after an engagement’. Undoubtedly this refers to the very situation existing during after a military engagement. See note no. 19.

forces or any person in whom the searching power has a genuine interest.²²

A search for the missing may follow different phases. The first step may involve inquiries at the last known home address and with registers of detention centres.²³ The latter task can however, become quite complicated where a central register does not exist, or is poorly maintained.²⁴ If these inquiries do not bear fruit, and depending on the context the search is being conducted within (including available infrastructure and topography of the parties to the conflict), investigations may be extended to include retrieving information from family members, neighbours and colleagues.²⁵ In such cases, the National Red Cross, Red Crescent Societies may assist with this process.²⁶

Article 33(1) of AP I in fact obliges an adverse party, who has reported people missing, to provide all relevant information to the concerned authorities in order to facilitate the investigation.²⁷ Relevant information is a generic term that requires contextualisation, however, it would usually include names and identifying characteristics.²⁸ Where necessary, the Central Tracing Agency and the ICRC can assist with collecting and transmitting this information.²⁹

The obligation to search for the missing extends to transmitting information on the fate of the missing to their families. Article 26 of the fourth Geneva Convention (GC IV) urges the parties to the conflict to facilitate the enquiries conducted by the members of a

22 See note no. 14, p. 350. Article 32 of AP I enumerates the principle that family members are entitled to be informed, as a matter of right, about the fate of their relatives. However, the rule, does not adorn the dependants with the right of information from and investigation by the parties to the conflict. See Bothe M./Ipsen, K./Partsch, K.J., 'Die Konferenz über humanitäres Völkerrecht- Verlauf und Ergebnisse', *ZaöRV* 38 (1978), 1-85. Quoted by Rabus, Walter in *Protection of the Wounded, Sick, and Shipwrecked*, in the *Handbook of Humanitarian Law in Armed Conflicts*, Dieter Fleck (ed.), Oxford University Press, first edition 1995, paperback 1999, p. 299.

23 See note no. 14, p. 352.

24 See note no. 14, p. 352.

25 See note no. 14, p. 352. More importantly, to ensure complete documentation of the search for missing persons the parties to the conflict shall also collect information about those persons who do not receive any favourable treatment under the Conventions and the Protocol. See note no. 22.

26 See note no. 14, p. 352.

27 See note no. 14, p. 354.

28 See note no. 14, p. 354.

29 See note no. 14, p. 354.

dispersed family,³⁰ while Rule 117 of the ICRC's Customary International Humanitarian Law Study notes that in both international and non-international armed conflict:

*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.*³¹

This provision is linked with the prohibition on enforced disappearances, respect for family life and the obligation to record all available information prior to the disposal of the dead, articulated in rules 98, 105 and 116, of the ICRC's Customary International Humanitarian Law Study, respectively.³²

If persons who were missing are found alive there are various IHL provisions that will apply to protect them, however, the focus of this paper is on the provisions applicable to the dead.

The Search for, and Collection of, the Dead

The obligation to search for, and collect, the dead³³ applies in both international and non-international armed conflict and is a precondition to ensuring other protections for the dead are respected.³⁴ The obligation applies regardless of whether the dead are civilians or combatants. This obligation was first codified in Article 3

30 Uhler, Oscar, H., Coursier, Henri, Siordet, Frédéric, Pilloud, Calude, Boppe, Roger, Wilhem, René-Jean, Schoenholzer, Jean Pierre, *Commentary IV, Geneva Convention Relative to the Protection of Civilian Persons in the Time of War*, 1949, translated into English from the original French by late Major Griffin, Ronald and Dumbleton, Mr. C.W., published under the General Editorship of Pictet, Jean S., International Committee of the Red Cross, Geneva, 1958, p. 196.

31 Henckaerts, Jean-Marie, and Deck, Louise Doswald with contributions by Alvermann, Carolin, Cotroneo, Angela, Grand, Antoine and Rolfe, Baptiste, *Customary International Humanitarian Law*, vol. I: Rules, Chapter 35: The Dead, Cambridge University Press, 1st edition, 2005 (Reprinted), p.421.

32 Ibid.

33 Art. 13 of GC I and II does not mention the dead but generally the wounded, sick and shipwrecked. However, one author aptly comments that 'the dead' covered by the provisions of the both GCs on the search, collection and evacuation of the dead include within its domain protected persons covered by general *rationae personae* provisions and a party's own nationals despite the fact that the latter are usually excluded from being beneficiaries of the Geneva Conventions. See Anna Petrig, p.349. After skillfully analyzing the relevant provisions of the GCs Anna Petrig concludes that the obligation to search for the dead and prevent their being desecrated applies to both enemy and own nationals. In the context of non-international armed conflict, though Common Article 3 to Four Geneva Conventions does not enlist the dead within its protective regime, the obligation to treat humanely all persons participating in an armed conflict, including...those placed *hors de combat* by [...] any other cause than sickness, wounds, or detention, could arguably apply to the dead persons. Moreover, the obligations espoused in AP II regarding the dead are devised for the benefit of 'all persons affected by an armed conflict' regardless of their location. See note no. 4, pp. 349-350.

34 See note no. 31, p. 406-407.

of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1929³⁵ (1929 GC I) but was most recently reiterated in the Protocols Additional to the Geneva Conventions, wherein the commentary to the relevant provision elucidates the purpose of the search as serving two basic humanitarian objectives, namely informing family members of the deceased about the fate of their relative and, after properly identifying the dead, to make arrangements for ensuring a decent burial behind the lines or on the spot as circumstances permit.³⁶

The obligation to search for the dead arises from an understanding of the risks posed to a corpse during conflict, in particular Article 15 of GC I (relevant to international land warfare) and Article 8 of Additional Protocol II (AP II) relevant to non-international conflict, note the risk of 'being despoiled', while Article 16 of GC IV (relevant to the treatment of civilians) notes the risk of 'ill-treatment'. Article 15 of GC I, unlike Article 3 of the 1929 GC and Article 16 GC Imposed an obligation to search for the dead 'at all times', as a first step to ensuring respect for the dead. That being said, the obligation is qualified, meaning that action is not required that goes beyond the realms of possibility at a given time.³⁷ The Commentary to Article 15 further clarified that this provision is solely and exclusively applicable to operations which take place at the front.³⁸ Moreover, it specified that the dead, or the remains of the dead, must be brought back behind the lines of the battlefield with the utmost care.³⁹ Moreover, it points out that if only the scattered remains of a person is found that must also be carefully collected.⁴⁰ Commentary to First Geneva Convention, as one noted author observes, undoubtedly echoes a traditional concept of warfare since it provides that the commonest

35 See note no. 31, p. 406. See also Henckaerts, Jean-Marie, and Deck, Louise Doswald with contributions by Alvermann, Carolin, Cotroneo, Angela, Grand, Antoine and Rolfe, Baptiste, *Customary International Humanitarian Law*, vol. II: Practices, Part 2, Chapter 35: The Dead, Cambridge University Press, 1st edition, 2005 (Reprinted), p.2655.

36 See note no. 14, p. 362.

37 Pictet, Jean S. with contributions by Sordet, Frédéric, Pilloud, Calude, Schoenholzer, Jean Pierre, Wilhem, René- Jean, Uhler, Oscar, H. *Commentary I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949, Translated from the original French, published under the General Editorship of Pictet, Jean S., International Committee of the Red Cross, Geneva, 1952, p. 151. This is due to the nature and feasibility of the intended actions during armed conflict. It is undoubtedly not beyond our contemplation that sometimes medical personnel, due to the severity of the casualty, will be compelled to give up their humanitarian activities despite their strong willingness and devotion.

38 Ibid, p. 150.

39 See note no. 37.

40 See note no. 37.

and the most significant case will be that of enemy troops retiring in the face of an attack. The occupying forces of the battlefield, therefore, are legally obliged to conduct an immediate thorough search of the captured ground to pick up all the victims of armed conflict.⁴¹ But this method of search and collection of the dead will naturally be at stake during remote warfare because of the physical absence of the enemy troops on the battlefield at that moment.⁴² This basic protection mechanism for the dead, namely: searching, collecting and evacuation of the dead without adverse distinction has also achieved customary law status, as reflected in Rule 112 of the ICRC Customary International Humanitarian Law Study.⁴³

Article 18 of the second Geneva Convention (GC II) corresponds with Article 15 of GC I. However, there are a few divergences due to the nature of sea warfare, such as the obligation becoming applicable “after each engagement”.⁴⁴ The Commentary to that Article further points out that all items in the vicinity of the dead should also be collected, with a view to facilitating the task of identifying the dead.⁴⁵ Moreover, as international fellowship is more required at sea than on land,⁴⁶ Article 21 of GC II incorporated a significant humanitarian provision to assist with the collection of the dead. The provision permitted the parties to a conflict to appeal to the charity of commanders of neutral merchant vessels, yachts or other craft⁴⁷ to help with the collection of the dead.

This provision is similar to that contained in Article 17(2) of AP I which permits the parties to a conflict, if the situation demands, to appeal for the help of the civilian population and aid societies to

41 See note no. 4, p. 348. As proof, the author refers to the commentary to Art. 15 of GC I, vol. I, p.151.

42 See note no. 4, p. 348.

43 See note no. 31, p. 406.

44 Pictet, Jean S. with the co-operation of Mouton, Rear-Admiral M.W. and Siordet, Frédéric, Pilloud, Calude, Schoenholzer, Jean Pierre, Wilhem, René- Jean, Uhler, Oscar, H. *Commentary II, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea*, 1949, translated into English from the original French by Henry, A.P. de, published under the General Editorship of Pictet, Jean S., International Committee of the Red Cross, Geneva, 1960, p.132.

45 Ibid, p.133.

46 See note no. 44, p. 151.

47 Commentary to Article 15 clarifies that these terms also refer warships, non-commercial public vessels. See note no. 44, p. 151.

conduct searches.⁴⁸ However, for hygiene reasons, the role of civilians and aid societies should be limited to the search for, and reporting the location of, the dead to the concerned authorities.⁴⁹ The underlying intention of the drafters behind Article 17 of AP I, was to limit the responsibility of civilian population and aid societies to searching for the dead and reporting their location, and to exclude the collection of the dead by them.⁵⁰

Ensuring that well organised teams are involved in any search is important. Article 33(4) of AP I, which is intended as a supplement to Article 15 of GC I⁵¹, provides that the parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from the battlefield. Although the obligation espoused in Article 33(4) is not absolute⁵² it is clearly a useful practical step to include adversaries as well as personnel of international humanitarian organizations in the team, in order to facilitate the act of searching, identifying and recovering the dead from the area controlled by the adverse party.

Thus, the obvious discrepancy is easily discernible from Articles 17 and 33(4) of AP I or from their interpretations by commentators. But this incongruity does not appear to stand in the way of humanitarian organizations assisting parties to conflict in the collection of the dead.⁵³ One scholar elucidates this absurdity by citing the activities of the ICRC and National Societies. He mentions that the ICRC and National Societies not only employ its expertise in searching for and reporting the location of the dead, but also in the collection of the mortal remains.⁵⁴

The obligation to search for and collect the dead body is also applicable during Non-International Armed Conflict. Article 3 common to the four Geneva Conventions does not explicitly deal with this issue. However, it, as one author meticulously argues,

48 Parties to an armed conflict cannot oblige the civilians and aid societies to search for the dead. Rather they may appeal to them but are not entitled to mobilize them. See note no 14, p. 218.

49 See note no. 14, p.218.

50 See note no. 4, p. 349. The author refers commentary to AP I, Art. 17, p. 218, para, 724.

51 See note no. 14, p. 361.

52 See note no. 14, p.362.

53 See note no. 4, p. 349.

54 *Annual Report 2008*, ICRC, Geneva, 2008, p. 187 (on ICRC activities in Afghanistan pertaining to the collection, burial and/or repatriation of human remains after fighting) and p. 350 (on ICRC help for the Palestine Red Crescent and Ministry of Health emergency services in the collection of dead bodies), quoted in note 4, p. 349.

implies that not only the ratifying (state) party, but each and every party to a non-international armed conflict, is obliged to apply its guarantees due to the very fact of that Party's existence and the existence of and armed conflict between it and the other party.⁵⁵ Article 8 of AP II lays down that whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay,...to search for the dead, prevent their being despoiled, and decently dispose of them.⁵⁶

Thus, Article 8 of AP II as applicable exclusively to Non-International Armed Conflict, articulates the basic protection mechanisms to the dead namely searching, prevention of despoliation and the requirement for a decent burial with the purpose of informing the members of the deceased regarding his/her fate.⁵⁷ Though it naturally follows that non-state parties to an armed conflict are duty bound to search for, collect and evacuate the dead, successful discharge of certain obligations essentially require a certain degree of control over the territory. The inevitable ramification of this issue is that all parties to an armed conflict might fail to perform all of their obligations to the same extent at all times.⁵⁸

As regards the carrying out the search and collection of dead, the law of non-international armed conflict does not specify the method.⁵⁹ But since relief societies and the civilian population may offer their services for the collection and care of the wounded, sick and

55 See note no. 4, p. 348. She refers, in this regard, commentary to Art. 3 to four Geneva Conventions. Vol. I, Art. 3, p. 51.

56 While the wordings used in GC I and GC II focus on the principle of humanity, GC IV puts emphasis on the principle of military necessity. However, the ICRC commentary to the concerned GCs clarifies that the distinction is more apparent than real and the scope and extent of the obligation under GC IV would be similar to that under GC I and GC II. The underlying cause of using different expressions is attributable to the very fact that the service responsible for searching wounded and dead is placed under the civilian authorities instead of military authorities and the former could not send relief teams into the combat zone without considering the essential military requirements and for this reason, the Diplomatic Conference rejected different proposals for omission of reservation. Anna Petrig, after consulting the ICRC Commentaries and ICRC study on Customary International Humanitarian Law, wonderfully, observes that the wording 'at all times' used in GC I might be misleading since the obligation to search is no way absolute but concentrates on the stern realities of the warfare and battlefield. On the contrary, the very wordings '[a]s far as military considerations allow' used in GC IV could entail that considerations of humanity should not be given overriding weight when deciding upon a rescue operation. She, however, agrees that the wording incorporated in Article 8 of AP II and the Rule 112 of customary norm- '[w]henver circumstances permit, and particularly after an engagement'- might be best suited to reflect the current understanding of time and circumstances of search, collection and evacuation carried out in international or non-international armed conflict for the purpose of rescue operation. See note 4, pp.347-348.

57 While fourth Geneva Convention applies to the whole civilian population of the countries Article 8 of AP II voluntarily does not maintain any distinction. See note no. 31, p. 408.

58 See note no. 4, p. 348.

59 See note no. 4, p. 349.

shipwrecked, they should, as one author observes, by analogy be able to do so with regard to the dead.⁶⁰

2.2 APPROPRIATE TREATMENT OF THE DEAD

Belligerents, or parties to the conflict, are required to show unequivocal respect for the dead. However, the history of armed conflict bears the vestige of outrages upon the dignity of the dead through mutilations and lack of decent burials. In order to address this challenge, the act of despoiling or mutilating a corpse is now considered to be a war crime.⁶¹

The Second paragraph to Article 16 of GC IV states that, as far as military considerations allow, each party to the conflict shall facilitate the steps taken... to protect the [killed] against... ill treatment. The commentary to this paragraph clarifies that it requires belligerents to assist with the arrangements to thwart any repulsive act of pillage⁶² or ill-treatment⁶³, either by civilians or combatants, irrespective of their nationality.⁶⁴ Moreover, forestalling the dead from being robbed⁶⁵ is another serious responsibility of each and every party involved in the conflict. In the *Pohl* case the US Military Tribunal at Nuremberg stated that robbing the dead 'is and always has been a crime'.⁶⁶

Such protection extends to the remains of the deceased, who have died for reasons related to hostilities, as clarified in Article 34(1) of AP I which strengthened the protections offered by the Geneva Conventions. Commentators have elucidated that this provision should be read so as to prevent the remains of a person from being

⁶⁰ See note no. 4, p. 349.

⁶¹ The rigorous proscription against mutilation of the dead in international armed conflicts is embraced by the crime of "committing outrages upon personal dignity" under the Statute of the International Criminal Court, which as per the Elements of Crimes dictate, also applies to dead persons. This interpretation is applicable to both international and non-international armed conflict. See Elements of Crimes for the ICC, Definition of committing outrages upon personal dignity as a war crime (ICC Statute, Footnote 49 relating to Article 8(2)(b)(xxi)); quoted in note no. 31, p. 409.

⁶² Though the presence of hordes of pillagers, formerly known as "hyenas of the battlefield", is quite infrequent in contemporary armed conflict, the personal belongings of the dead may stimulate the gluttony and voracity of unscrupulous soldiers and provoke them to pillage. See note no. 30, p.137.

⁶³ It is not possible to delimit the scope of ill-treatment since it may take different forms and patterns. Moreover, it is very much contextualised and a question of fact whether ill-treatment, in a given situation, has taken place or not.

⁶⁴ See note no. 30, p.137.

⁶⁵ See note no. 30, p.137.

⁶⁶ See note no. 4, p. 351. She mentions in her article that trials held in the aftermath of World War II revealed different sorts of barbaric practices including abhorrent acts of mutilation of dead bodies as well as cannibalism.

desecrated or exposed to public curiosity before burial or cremation.⁶⁷ Moreover, it is possible to read protection of the dead into the fundamental guarantees set out in Article 4 of AP II. To do so would protect the deceased's person and honour and proscribe outrages upon their dignity.⁶⁸ It is also clear that burial or cremation of the dead should be conducted in accordance with the last wish, or the religious convictions, of the deceased.⁶⁹

Protection of the Dead against Despoliation

Measures taken to protect dead bodies from being despoiled constitute a significant aspect of the protection afforded to the dead. Article 16 of the 1907 Hague Convention (X) codified the rules relating to the protection of the dead from pillage and despoilment.⁷⁰ Similarly, the first paragraph of Article 15 of GC I, the first paragraph to Article 18 of GC II, the second paragraph to Article 16 GC IV and Article 4 of AP II all prohibit despoilment, which has also been recognised as a norm of IHL for both international and non-international armed conflicts, as codified in Rule 113 of the ICRC Customary International Humanitarian Law Study. The wording of the first paragraph of Article 15 of GC I states that at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to...prevent [the dead from] being despoiled. The article also contains an implicit proscription of pillage. The Commentary to Article 15, footnote no. 2, which is equally applicable to the other provisions mentioned above, clarifies that:

Although this Article speaks only of measures to prevent the “despoiling” (French *dépouillement*) of the dead, it incontestably involves a prohibition of “pillage” (French *pillage*) of the dead.

This protection of the dead includes, where necessary, using force.⁷¹ The Commentary to Article 15, notes that both medical personnel and combatants are authorised to protect the dead against any sort of attack by the military or by civilians.

⁶⁷ See note no. 14, p. 369.

⁶⁸ The prohibition against despoliation of dead bodies is generally construed as an application of the general prohibition of pillage, as incorporated in Article 4(2)(g) of AP II. See note no. 31, p. 410.

⁶⁹ See note no. 14, p.369.

⁷⁰ See note no. 31, p.409, See also note 35, p.2669.

⁷¹ See note no. 37, p. 152. Article 22, subparagraph (1) authorises medical personnel to carry arms and use them, if necessary, to exercise their right of private defence or to defend the wounded and sick under their care, charge and supervision.

Identification of the Dead

After collecting the dead it is necessary that various pieces of information are collected (including the date, place and cause of death) in order to assist in the identification process. The obligation to collect identifying information has been identified as a norm of customary international law applicable in both international and non-international armed conflict, as outlined in Rule 116 of the ICRC Customary International Humanitarian Law Study.⁷² Moreover, it is essential that identification occur prior to the disposal of the remains as without knowing the identity of the deceased it will be impossible to ensure that the disposal occurs in accordance with the last wishes. Moreover, identification enables the belligerents to return the remains of the deceased, and any personal belongings, to the home country. Not surprisingly enough, very often only the official record of death can shut the door of uncertainty and put an end to relatives' false hopes. This official establishment of death also facilitates the family of the deceased to initiate the first step in the mourning process.⁷³

Furthermore, it is the right of the family of the deceased to know the cause of death, and to this end a proper medical examination is a *sine qua non*. Proper identification and recording of information on the dead is also inextricably related with the right of human beings not to lose their identity even after death.⁷⁴ The first codification, in this regard, is found in Article 4 of the 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, which emphasised the obligation, if possible, to ensure a decent burial or cremation was preceded by a careful and vigilant medical examination to verify death and ascertain identity. Subsequently, Article 16 of GC I specified the type of information that the parties to a conflict should record, in order to assist with identifying each wounded, sick or dead person of the adverse party who were now under their control.⁷⁵ A similar provision was also contained in Article 19 of GC II relevant to warfare at sea, with the

⁷² See note no. 31, p. 417. This rule, as Customary International Humanitarian Law Study suggests, is reinforced by the requirement of respect for family life as spelt out in Rule 105 and the right of families to know the fate of their kith and kin as incorporated in Rule 117.

⁷³ See note no. 4, p.351.

⁷⁴ Interpol, ICPO-Interpol General Assembly, 65th session, Resolution, AGN/65/RES/13 (1996), available at: http://www.interpol.int/Public/ICPO/General_Assembly/Agn65/Resolutions/AGN65RES13.asp (last visited 21 May, 2009) quoted in note no. 4, pp. 351-352.

⁷⁵ Persons who die due to armed conflict often remain unaccounted for because the information relating to their death is not recorded. Moreover, the task of the recording of the information eventually become very complicated and tough if the bodies or mortal remains of those killed in action or in extrajudicial

inclusion of a few additional provisions related to when the identifying information should be transmitted to the concerned authorities, and exceptions to who can provide medical particulars in the absence of the ship's doctor⁷⁶. These lists suggest the inclusion of the following information in the records that should be maintained:

- (a) designation of the power on which he depends;
- (b) army, regimental, personal or serial number;
- (c) surname;
- (d) first name or names;
- (e) date of birth;
- (f) any other particulars shown on his identity card or disc;
- (g) date and place of capture or death; and
- (h) Particulars concerning wounds or illness, or cause of death.

The particulars appearing on an identity card are a particularly significant source of information for the purpose of identification, which should be sufficient to trace the dead.⁷⁷ In addition to the details mentioned above, the identity card may also bear the signature, fingerprints⁷⁸, religion⁷⁹, blood group or photograph⁸⁰ of its owner.⁸¹ While there is no requirement for these details to be

killings are not collected. See ICRC, *Operational Best Practices Regarding the Management of Human Remains and Information on the Dead by Non-Specialists, For All Armed Forces, For All Humanitarian Organizations*, p. 9, available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0858/\\$File/ICRC_002_858.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0858/$File/ICRC_002_858.PDF!Open) (last visited 20 May, 2009), See note no. 4 p.346. Anna Petrig also cites, in her article, that the death of thousands of persons who breathed their last in concentration camp during the World War II, whose mortal remains were burned or otherwise disappeared, could only be established by assembling information found in the paper trail left by Nazis, such as 'Totenbüchern' ('death books'). But these books fail to account for every dead person because Nazis destroyed many death books and such books were not kept in extermination camps. See http://www.its-aroslen.org/en/help_and_faq/glossary/index.html (last visited 20 May 2009). To collect a list of other documents used by the International Tracing Service to trace missing persons and to ascertain the ill fate of victims of Nazi prosecution, see http://www.its-aroslen.org/en.help_and_faq/dokumentenbeispiele/index.html (last visited 20 May 2009) quoted in note no. 4 p.346

76 See note no. 44, p.140.

77 See note no. 37, p.163.

78 Second sentence of paragraph 3 of Article 17 of GC III

79 Inscription of religious denomination on the identity card is essential to help the adverse belligerent party dispose of the deceased in accordance with their religious convictions. Article 17, GC III. See note no. 30, p.162. Preux, Jean De, with contributions by Sjordet, Frédéric, Pilloud, Calude, Coursier, Henri, Wilhem, René- Jean, Uhler, Oscar, H., Schoenholzer, Jean Pierre, *Commentary III, Geneva Convention Relative to the Treatment of Prisoner of War, 1949*, translated into English from the original French by Henry, A.P. de, published under the General Editorship of Pictet, Jean S., International Committee of the Red Cross, Geneva, 1960, pp.161-162.

80 This is highly desirable to prevent the exchange of identity cards as well as to identify the dead with the help of his fellow soldiers in the case of destruction of other information on the identity card. See note no. 30, p.162.

81 This optional measure is premised on the very phrase 'other particulars' spelt out in Article 16(f). Moreover, this Article 16(5) should be interpreted in reference to second sentence of paragraph 3 of Article 17 of GC III. See note no. 37, p.164. See also note no. 79, pp.161-162.

included, the ease in which they can be recorded and their usefulness in terms of identification (in the case of partial destruction of the card) means there is great merit in their inclusion.

Recording the date^{81A} and place of death, while useful for the purposes of identification, will be a difficult task, especially when the dead is picked up from the battlefield or found drowned at sea.⁸² However, modern developments in medical science are likely to assist belligerents to identify the date of death with precision.⁸³ Consequently, medical examinations of the deceased should be forwarded to the concerned authority.⁸⁴ Apart from these conventional identification measures, depending on the context and the warring parties, more modern and elaborate means such as DNA samples may be used.⁸⁵

Family members of the deceased are entitled to know the cause of death. Therefore, the obligation to record, with as many details as possible, information about wounds and illnesses, with the help of a competent doctor or medical team, is vital.⁸⁶

Finally, it should be clarified that the commentary to this Article very clearly highlights that the list mentioned above is not exhaustive, but is inclusive in nature:

The list in Article 16 is neither limitative nor imperative, as is shown by the introductory phrase: "These records should, if possible, include." It indicates the particulars which would appear most likely to assist in establishing the identity of an individual. But additions may be made to the list, and where certain of the particulars indicated are missing, others (such as photographs, body measurements, or descriptions of teeth or special features which the families of the individuals concerned may be expected to know) may be supplied in their place.⁸⁷

It is necessary to point out that the very wording 'Parties to the conflict shall ensure...' used in the respective provisions in essence, constitutes an obligation. This obligation obliges parties to devise all

81A See Annexure 1, p. 76.

82 See note no. 44, p.140.

83 See note no. 37, p.164.

84 See note no. 37, p. 164.

85 See note no. 4, p. 352.

86 See note no. 37, p.164.

87 See note no. 37, p.162.

sorts of measures to carry out their prescribed task accordingly. They, in no way, think that this task is optional.⁸⁸ Recognizing the realistic theatre of battlefield, one author, however, opines that the aforesaid obligation should be regarded as fulfilled as long as parties explore every feasible and viable effort to accomplish the prescribed task even though they fail to identify the person or persons.⁸⁹ He vehemently spells out that other interests namely public health concerns may prompt the parties to take recourse to swift burials and make the identification of all persons impossible (as was the case in Chad in 2008).⁹⁰

Examination of the Body to Confirm Death and to Establish the Identity of the Dead

The first Paragraphs of Article 17 and 20 of GC I and GC II, respectively, impose a strict obligation on belligerents to conduct, before burial or cremation, on land or at sea, a meticulous medical examination of the bodies, preferably by a doctor or in his absence by the best competent veteran and accomplished officer, to make sure that no trace of life remains and, where necessary, to establish the identity of the deceased.⁹¹ Paragraph 2 of Article 129 of GC IV goes further in the case of the death of an internee, as this must be certified in accordance with the laws of the country where it occurred, and preferably by a doctor of the same nationality. As it is foreseeable that compensation may be claimed for the death it is advisable that the record be countersigned by the concerned medical authorities of the Detaining Power.⁹²

Although in many circumstances the identity of a Prisoner of War (PoW) should be determined at the beginning of captivity, through a process of questioning as provided for in Article 17 of GC III, there

⁸⁸ See note no. 4, p. 352. She refers to commentary to Art. 16, Vol. I, GC I, pp.176-177.

⁸⁹ See note 4, p. 352.

⁹⁰ ICRC, *Chad: Saving lives as fighting subsides*, Operational Update, 7 February, 2008, available at: <http://icrc.org/web/eng/siteeng0.nsf/html/chad-update-070208> (last visited 30 March, 2009), quoted in note no. 4, 352.

⁹¹ See note no. 37, pp. 176-177. The commentary to paragraph 1 of Article 17 goes to the extent of emphasising the need for two careful medical examinations before burial or cremation, even if they are to be placed in a common grave. See also note no. 44, p. 148.

⁹² See note no. 81, pp.504-505.

are instances in which this will not have been possible. In such circumstances a thorough medical examination will be appropriate before burial or cremation.⁹³ Moreover, in addition to establishing identity a medical examination is also required by paragraph 3 of Article 120 of GC III to verify death and to identify its causes. An examination may also be necessary to establish the time of death, if this cannot be ascertained by any other means e.g. eye witness accounts.⁹⁴

Furthermore, Article 121 of GC III revolutionises and strengthens respect for the dead by authorising the Detaining Power's camp military judicial authorities to conduct an official inquiry into the causes of a PoW's death.⁹⁵ In such incidences the body will be examined by a proficient person in forensic medicine and eye witnesses will be questioned.⁹⁶ Where wrong doing is established the third paragraph of Article 121 obliges the Detaining Power to punish those responsible for causing the death. This obligation applies equally to military staff and other PoW's who should both be punished in accordance with the laws in force for the Armed Forces of the Detaining Power. However, if the person responsible for the death is not military staff, or a PoW, punishment should in accordance with the applicable municipal law.⁹⁷

Similarly, the first paragraph to Article 131 of GC IV obliges the Detaining power to conduct an official inquiry into the causes of death should an internee die in custody, where the reason for the death is *prima facie* unknown. Paragraph 3 is the operative paragraph in terms of prosecuting anyone deemed responsible for the death. Where the person responsible is a national of the Detaining Power, prosecution should be under domestic law,⁹⁸ whereas if the person deemed responsible is an internee punishment should be in accordance with the laws in force on the relevant territory, as set out in paragraph 1 of Article 117 GC IV.⁹⁹

93 See note no. 79, pp. 564-565.

94 See note no. 79, p.564.

95 See note no. 79, pp.569-570. The commentary clarifies that unknown reasons may be construed to mean illness and violent death.

96 See note no. 79, p.570.

97 See note no. 79, p.571.

98 See note no. 79, p.510.

99 See note no. 79, p.510.

Death Certificates

Death certificate contain specifics about identity and the date, time, place and causes of death. Moreover, they should detail the place and date of burial or cremation, and if cremation was the method of disposal, the reasons for choosing this method. The death certificate should be able to answer the questions that the family of the deceased may have regarding the fate or their loved one, allow the identification of the burial site or grave¹⁰⁰ and resolve many pending legal issues. In order to assist the belligerents, a model death certificate is provided in Annex IV (D) to GC III.¹⁰¹

100 One author meticulously deals with this issue. She, after commenting that the very term 'dead' is self-explanatory, opines that a clear and explicit definition of the terms 'grave' (para 3, Art. 17, GC I, para 6, Art. 120, GC III), 'gravesite' (Art. 34, AP I), or 'other locations of the remains of persons' (Para 2, Art. 34, AP I), is missing in the contemporary tapestry of IHL. The very wording of paragraph 2 of Art. 34 of AP I- 'graves and as, the case may be, other locations of the remains of persons'- suggests a wider connotation of these terminologies. Commentary on the Additional Protocols of 08 June, 1977, in its paragraph 1314, p. 370, suggests: 'The fact that "other locations of the remains" of such persons are mentioned in addition to graves is in order to take into account all eventualities, lawful or unlawful, such as, in particular, cremation, collective graves, and even mass graves consequent upon atrocities committed during hostilities.' Or: 'This broad terminology has been chosen in order to cover any form of disposal of the remains. It covers cemeteries, any place, where urns are stored, etc.' For the last comment, see, Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, p. 177. Such an understanding, as the author opines, seems justified, in the backdrop of diversified religious and cultural practices to dispose of the deceased. Moreover, only an inclusive proper reading of the term 'gravesite' ensures that locations containing mortal remains other than sites established for the purpose of commemoration, e.g. mass graves constructed with a view to concealing the commission of crimes, are embraced by IHL. Though a generic understanding and eventual broad reading of the notion 'gravesites' apparently seems justified, it requires to be determined whether sites not containing any human remains could qualify as a gravesite, namely the Cenotaph in Whitehall, an empty tomb in London symbolizing the tomb of all persons died in the World War I or the Monument to the Missing at Thiepval, a monument in France displaying on its internal walls the names of approximately 73,000 British and Allied men died in the Battle of Somme in 1916 whose bodies were never found. See, Jay Winter, *Sites of Memory, Sites of Mourning: The Great War in European Cultural History*, Cambridge University Press, Cambridge, 1995, pp. 102-105, quoted in note 4, p. 345. After analyzing the wording of various gravesites provisions namely paragraph 4, Art. 17, GC I, paragraph 6, Art. 120, GC III, title of Art. 34, AP I, paragraph 2, Art. 34, AP I, she opines that site in question must contain human remains and thus monuments or memorials that are exclusively a remembrance without hosting any dead cannot be embraced under the term 'gravesite' as reflected in treaty language. However, if a memorial or monument forms a unity with the grave namely the statues by German sculptor Käthe Kollwitz at the German war cemetery at Roggevelde where her son was buried (See Jay Winter, pp. 108-113),- the notion of 'gravesite' could be construed to encompass the memorial or monument. The American Battle Monuments Commission, which assumes the tasks assigned by IHL to a Graves Registration Service, differentiates between 'memorials' and 'cemeteries'. For a list of memorials, see <http://www.abmc.gov/memorials/index.php> (last visited 20 May, 2009); for a list of permanent American burial grounds on foreign soil, see <http://www.abmc.gov/cemeteries/cemeteries.php> (last visited 20 May, 2009), quoted in note no. 4, p. 345. Furthermore, if a gravesite contained some human remains at some point in time, it should suffice to be treated as a gravesite. For this reason, the author observes that the responsibility to maintain a cemetery should not end once the remains are completely decomposed, or when it becomes impossible to physically transfer all remains when a gravesite is relocated years after its construction. See note 4, pp. 344-345. Warships sunk with their crews are regarded as war graves. Illustrations can easily be gathered from the chronicles of World War I. British warships *Royal Oak*, *Edinburgh*, and *Repulse*, and also the *Hampshire* which sank with Lord Kitchener aboard were considered as war graves. See O'Connell, D.P., *The International Law of the Sea* (Ed. I.A. Shearer), vol. II, Oxford (1984), p. 912, quoted in note no. 19, p. 300. However, it is a matter of great significance to determine whether those ships sank in international or national waters. In case of wrecks in national waters the issue will be decided in accordance with municipal law. See note no. 19, p. 300.

101 See note no. 79, p.563.

Death certificates can also be a way for belligerents to fulfil their obligations under paragraph 2 of Article 120 of GC III to inform the Prisoner of War Information Bureau (established in accordance with Article 122 of GC III), as soon as possible, of the names of all PoWs who die while in captivity.¹⁰² As the commentary based on the Report on the Work of the Conference of Government Experts suggests, this information may be commuted in the form of certificates, either individual or collective.¹⁰³

Where persons are detained who do not enjoy more favourable treatment under the four Geneva Conventions and AP I, the belligerents are obliged, under paragraph 2, sub-paragraph (a) of Article 33 of AP I to record the information listed in Article 138 of GC IV¹⁰⁴. Moreover, paragraph 2, sub-paragraph (b) obliges the belligerents to facilitate¹⁰⁵ and, if required, search for and record information concerning such people if they die in other circumstances related to the hostilities or occupation.

2.3 RETURN OF THE REMAINS AND PERSONAL EFFECTS OF THE DEAD

Return of the Remains of the Dead

The existing order of IHL intends to construct an effective regime to ensure that those who die as a result of conflict are treated with respect. To this end, the international community, in the backdrop of a variety of different state practices, incorporates an option to repatriate the remains or ashes of the dead. To facilitate this humanitarian act, the parties to the conflict are enjoined, at the commencement of the hostilities, to organise an Official Grave

¹⁰² See note no. 79, p.563.

¹⁰³ See note no. 79, p.563.

¹⁰⁴ The information set out in Article 138 of GC IV is not exhaustive, rather it is inclusive, and thus the list is kept open to incorporate other additional information, if necessary. As per Article 138 the information relating to surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence to him may be sent, the name and address of the person to be informed shall have to be included.

¹⁰⁵ As the commentary premised on the argument given by a delegate at the conference suggests, since in occupied territory the search for and recording of information concerning the persons of the above-mentioned category is usually left to the local municipality, the wording 'to facilitate; and if essential 'carry out' as spelt out in sub-paragraph (b), paragraph 2 of Article 33 is appositely justified. See note no. 14, p.360.

Registration Service by Article 17 of GC I¹⁰⁶. The Grave Registration Service is also required to hold any ashes until the home country communicates its final decision on what should be done with them.¹⁰⁷ Ashes should therefore be collected in urns which are labelled in such a way as to enable their contents to be properly identified.¹⁰⁸ Moreover, the urns should be kept in an appropriate place and be protected from sacrilege, profanity and disrespect.¹⁰⁹ The establishment of the Grave Registration Service is however optional as it is designed to accommodate the diversity of customs related to the transportation of the dead.¹¹⁰ While similar provisions exist for the repatriation of the remains and ashes of PoWs, there are also additional requirements. Paragraph six of Article 120 of GC III places an obligation on an Occupying Power to keep a record of every time a corpse is moved.¹¹¹

Repatriation of remains is discussed in sub-paragraph (c) of paragraph 2 of Article 34 of AP I, which obliges the High Contracting Parties to enter into agreements to achieve this. Repatriation can either be requested by the home nation of the deceased, or by the next of kin. However, the home country is able to veto the request of the next of kin. The underlying philosophy behind the incorporation of the veto power of the home country may be attributable to the significant cause of maintenance of war cemeteries in foreign lands.¹¹² Particularly, countries belonging to British Commonwealth followed a policy of burying their soldiers in pretty great war cemeteries in the country where they fell- for example, the Tyne Cot cemetery in Belgium hosting fallen soldiers from the Great War.¹¹³

The return of mortal remains often takes place after a long time of the actual end of armed conflicts.¹¹⁴ As for instance, in 1991 Indonesia handed over of the ashes of 3500 Japanese soldiers killed during

106 This task, in the majority of States, is usually performed by permanent military grave services which, in peace time, are duty bound to maintain the graves of their own nationals who died in battle, see note no. 79, p. 568.

107 See note no. 37, p.181.

108 See note no. 37, p.181.

109 See note no. 37, p.181.

110 See note no. 37, p.181.

111 See note no. 79, p.568.

112 See note no. 4, p. 353.

113 The Commonwealth War Graves Commission offers an account of this war cemetery. See http://www.cwgc.org/search/cemetery_details.aspx?cemetery=85900&mode=1 (last visited 21 May, 2009), quoted in note no. 4, p. 353.

114 See note no. 4, p. 353.

World War II to the Japanese ambassador in Jakarta.¹¹⁵ It is worth mentioning here that ICRC often acts as a neutral and unbiased intermediary between belligerents for this purpose.¹¹⁶ The handover of deceased persons between the Israeli authorities and Hezbollah in July, 2008 can be cited to illustrate the role of ICRC in this regard.¹¹⁷

In non-international armed conflict, as regards return of mortal remains, a genuine gap is easily discernible since neither a treaty nor a customary rule expressly embraces this issue.¹¹⁸ However, ICRC study on customary international humanitarian law only recognizes a trend towards an obligation for the belligerents to return the remains of the dead and personal effects of the deceased.¹¹⁹ Considering the general principles and norms of IHL, one author aptly argues that not returning the mortal remains to the relatives constitutes a form of collective punishment and strikes the proscription of cruel or inhuman treatment and of outrages upon personal dignity, in particular humiliating and degrading treatment.¹²⁰ However, it is not unlikely that the laws of certain states may develop legal framework which has the propensity to violate the international standard on this issue by prohibiting the return of mortal remains and personal effects of the deceased.¹²¹

115 See note no. 4, p. 353.

116 See note no. 4, p. 353.

117 'Hezbollah, Israel swap corpses on Lebanon border', *Reuters*, 16 July, 2008, available at: http://www.reuters.com/article/homepageCrisis/idUSL16516924_CH_2400 (last visited 21 May, 2009), quoted in note no. 4, p. 353.

118 See note no. 4, p. 353.

119 CIHL, vol. I, p. 411-412. See note no. 4, p. 353.

120 See note 4, p. 354. She made references to Art. 4(2)(b), GC I-IV, AP II, Art. 3(1) GC I-IV, and Art. 4(1), AP II, Art. 3(1)(c) GC I-IV, and Art. 4(2)(e), AP II.

121 As for instance, in Russia, a federal law prohibits authorities to return the bodies of persons qualified as terrorists to their families or to inform the kith and kin about their burial place. In the backdrop of this law, the mortal remains of several people killed in Chechnya, who were qualified as terrorists, were not handed over to their families for burial despite tremendous pleas and persistent efforts. Russia's Constitutional Court, after delving into strict legal positivism, upheld the ban and knocked down several appeals filed by relatives of the deceased. This judgment of the Constitutional Court of Russia unquestionably has violated the international standard as regards the prohibition of collective punishment by depriving the relatives of the deceased to perform funeral rites. Moreover, the judgment has also frustrated the proscription on inhuman treatment as well as has constituted outrages upon personal dignity by refusing to inform the relatives even about the burying places of the deceased persons qualified as terrorists by the Russian Court. 'Court upholds ban on returning terrorists' bodies to relatives', *RIA Novosti*, 28 June, 2008, available at: <http://en.rian.ru/russia/20070628/67977135.html> (last visited 21 May, 2009); Shudha Ramaachandran, 'The dreadful dead of terror', *Asia Times Online*, 7 July, 2004, available at: http://www.atimes.com/atimes/South_Asia/FGO7Df05.html (last visited 21 May, 2009), quoted in note no. 4, p. 354.

Return of the Personal Effects of the Dead

The provisions related to returning the personal effects of the deceased seek to respond to the sentimental and emotional needs of the family. IHL therefore incorporates provisions for the return of money, articles with an intrinsic or sentimental value and materials of a personal nature to the home country. However, weapons, ammunitions as well as other military equipment or material may be kept as war booty.¹²² Paragraph 4 of Article 16 of GC I and paragraph 3 of Article 19 of GC II impose a strict obligation on belligerents to return, through the National Information Bureau¹²³, the following effects of the dead:

- (a) one half of a double identity disc;
- (b) last wills or other documents of significance;
- (c) money;
- (d) articles of an intrinsic or sentimental value; and
- (e) unidentified articles.¹²⁴

Since wills and bequests carry special legal significance for the distribution of the deceased's estate, they must be returned with extreme care. Moreover, personal effects, even where there is little monetary value attached, should also be collected and returned as they may be of sentimental value to the relatives of the deceased.¹²⁵ There is also, therefore, an obligation to ensure that items are sent with the utmost care, in sealed packets, accompanied by a statement on the identity of the deceased and an inventory of the contents.¹²⁶

Unidentified articles¹²⁷, in the absence of personal effects, can assist the Power of Origin to identify the deceased.¹²⁸ However, there is risk associated with identifying persons from effects, as they may have merely been lost. Thus, extreme precautions and care must be taken to confirm the identity of a deceased, before notifying their family, in order to avoid legal complications and psychological stress.¹²⁹

¹²² See note no. 4, p. 354. She refers to CIHL, vol. I, p. 413.

¹²³ As delineated in Article 122 of GC III.

¹²⁴ See note no. 37, p.170.

¹²⁵ See note no. 37, p.171.

¹²⁶ See note no. 37, p.172.

¹²⁷ It may happen that vessels or aircrafts are smacked so suddenly with such severe and violent force that nothing is left of them and their occupants except a few stray objects, usually of metal, strewn around, floating in the sea. See note no. 37, p.172. See also note no. 44, p. 144.

¹²⁸ See note no. 37, p.172.

¹²⁹ See note no. 37, p.172.

Under the ninth paragraph of Article 122 of GC III and 139 of GC IV, the main task of the Official Information Bureau is to collect the personal valuables¹³⁰ and significant documents from a deceased PoW, or detainee, with the help of the administrative services of the detaining State's armed forces, to transmit those items to the Powers concerned.¹³¹ However, the last sentence of the ninth paragraph of Art. 122 of GC III clarifies that the obligation on the Bureau only applies with respect to articles and documents which are not voluminous and can be sent in packages exempt of postal charges. Other items such as attire or apparel, books, musical instruments and works of art will be transferred under special arrangements¹³² agreed between the belligerents, due to the high costs associated with such transfers.¹³³

While the obligation to return personal effects arises automatically under the four Geneva Conventions, and is reflected in Rule 114 of the ICRC Customary International Humanitarian Law Study, Article 34(2) (c) of AP I places emphasis on the need to conclude agreements to allow the return of personal effects.¹³⁴

2.4 DISPOSAL OF THE DEAD^{134A}

The principle of respect requires the belligerents to properly dispose of the dead. Paragraph 5 of Article 4 of GC I 1929, for the first time, obliged the belligerents to take proper steps to ensure that the dead would be honourably interred. Similarly, paragraph 3 of Article 76 of the 1929 Geneva PoW Convention sought to ensure that PoWs who died in captivity were honourably buried.

In the same way, Articles 17 GC I, 20 GC II, 120 GC III and 130 GC IV contain provisions relating to the proper disposal of the dead in a respectful manner. Importing the aforesaid standard solely applicable during international armed conflict, Article 8 of AP II unhesitatingly incorporated the provision of decent disposal of the dead to non-

¹³⁰ Commentary to GC III emphatically suggests that the very term "personal valuables" must require elucidation as a generic term encompassing each and everything that has sentimental value to the next of kin of the deceased, see note no. 81, p. 580. On the other hand, commentary to Art. 139 of GC IV explicitly clarifies that the very term 'personal valuables' refers to all articles which have a commercial or sentimental value which belonged to the deceased, see note no. 30 p. 538.

¹³¹ See note no. 81, p. 580.

¹³² Such arrangements usually relate to the means of transportation and to the payment of the expenses.

¹³³ See note no. 81, p.580.

¹³⁴ See note no. 14, p.373-374.

^{134A} See Annexure I, p. 76.

international armed conflict. One scholar, however, argues that only the law of international armed conflict clarifies what is meant by disposal of the dead respectfully since it stipulates for individual burial according to religious conviction of the deceased and the grouping of graves. She tries to strengthen her argument by illustrating that even the interpretive text of the ICRC study on Customary International Humanitarian Law bears the sign of hesitation while states that 'It is likely that some of these requirements also apply in non-international armed conflict on the basis of national law'. But as per the text of Art. 8 of AP II and its interpretation as espoused in commentary are concerned, the very words 'decently dispose of them' may in all aspects be construed to ensure a proper burial after observing religious rites in appropriate manner. The commentary in para no. 4656 clarify this by saying that 'they are entitled to be paid their last respects. i.e., they must be decently buried (apart from cases of disposal of the body at sea and cremation) after a religious service, if required.'¹³⁵

Therefore, the disposal of the dead in a reverent manner is now considered a norm of customary international humanitarian law applicable in both international and non-international armed conflict, as outlined in Rule 115 of the ICRC Customary International Humanitarian Law Study.

Respect for the Religious Convictions of the Dead

Religious convictions undoubtedly play a vital role in shaping the lives of human beings in terms of conduct, attitude, attire and lifestyle. Religion is so inextricably related with an individual that even after death religious beliefs often play a role in determining how a body should be disposed of. All religions, beliefs and rituals demand special respect, both from within and outside the community of believers.

The existing IHL regime incorporates respect for different religious beliefs, including with relation to the burial of dead. The third paragraph of Article 17 of GC I, the fourth paragraph of Article 120 of GC III and the first paragraph of Article 130 of GC IV all note that the dead should be interred, if possible, in accordance with the rites of the religion to which they belonged. This reference to the observance of religious rites, as introduced by the Conference of

¹³⁵ See note no. 14, p.1415.

Government of Experts, 1947¹³⁶, is not made mandatory since harsh reality of an armed conflict sometimes may debar the belligerents to observe rites mandated by certain religions properly.¹³⁷ As for instance, it becomes really difficult when one religion requires to sacrifice an animal or use of certain rare substances. Situation may get worse if the death toll is high and resources are scarce.¹³⁸

Cremation

Cremation of the dead can be justified during times of conflict based on hygiene, religion or the personal wishes of the deceased, as noted in Article 17 of GC I (and the accompanying commentary¹³⁹), Article 120 of GC III and Article 130 of GC IV. However, as noted in the second paragraph 2 of Article 17 of GC I the circumstances and reasons for cremation are to be detailed in the death certificate, or on the authenticated list of the dead.¹⁴⁰ This requirement eventually makes it possible to preserve the traces of the deceased and ensures the accounting for every dead.¹⁴¹ Therefore the practice of cremation is kept to a minimum, only being used where it can be justified.

Burial in Individual or Collective Graves

A proper burial demands due respect to be accorded to the deceased by the belligerents. This extends beyond the performance of religious rites to ensuring that a deceased is buried in an individual grave, unless military necessity requires collective burials. It is worth mentioning here that the underlying rationale behind the incorporation of the provisions in GCs generally prescribing burial in individual graves instead of collective graves is due to the inherent psychology of human being that common graves conflicts with the emotions and sentiments of respect for the dead.¹⁴² Moreover, burial in collective graves make subsequent exhumation more complex.¹⁴³ The four Geneva Conventions of 1949 embody provisions relating to this issue in a cogent and reasoned manner.

¹³⁶ See *Report on the Work of the Conference of Government Experts*, 1947, p. 248.

¹³⁷ See note no. 37, p. 179, See note no. 79, p. 565.

¹³⁸ See noteno. no. 4, p. 355.

¹³⁹ See note no. no. 37, p. 179.

¹⁴⁰ See note no. 37, p. 178.

¹⁴¹ See note no. 4, p. 356.

¹⁴² See note no. 37, p. 177.

¹⁴³ See note no. 37, p. 177.

The first paragraph of Article 17 of GC I, fifth paragraph of Article 120 GC III and the second paragraph of Article 130 of GC IV, in order to ensure respect for the dead, honour the family of the deceased and to facilitate the process of subsequent exhumation, require burials and cremations to be carried out individually.¹⁴⁴ However, since legal provisions should not be impractical¹⁴⁵ this provision permits burial in a common grave if it is deemed impossible to comply with the general rule.¹⁴⁶

The term ‘unavoidable circumstances’ is used to establish when it would be permissible to conduct collective burials. This term has been appropriately construed in the commentary of GC IV in the following manner:

*reasons of force majeure, during an epidemic, for example, if the death of an excessively large number of persons created a danger of infection which did not allow time for the digging of individual graves, or again if warlike operations obliged the Detaining Power to retreat and before retreating and from lack of time it undertook collective burials in the interests of public health.*¹⁴⁷

Provisions also exist to ensure individual burials at sea under the first paragraph of Article 20 of GC II. The intention of the drafter here is not to preclude “the committal of several bodies at the same time but to ensure that each body is committed separately in a weighed sailcloth bag”¹⁴⁸.

Grouping of Graves according to Nationality

During the burial process preference is given to the practice of grouping graves according to the nationality of the deceased, as described in the third paragraph of Article 17 of GC I and the fourth paragraph of Article 120 of GC III. This practice, while not obligatory, is generally complied with by the military authorities.¹⁴⁹ The philosophy underlying grave grouping is to prevent hasty burials

144 See note no. 37, p.177.

145 See note no. 37, p. 177.

146 See note no. 37, p. 177.

147 See note no. 30, p. 507.

148 See note no. 44, p.148.

149 See note no. 37, p. 180.

by the roadside¹⁵⁰ and to help a country pay homage to their dead if they wish to visit the gravesite.¹⁵¹

Respect for, and Maintenance, of Graves

Respect for gravesites is crucial to all religions. Therefore, the principle of respect dictates that graves should be maintained and protected from damage. The basic philosophy behind the respect of gravesites and maintenance of gravesites is epitomized in the following words:

*While the obligation to respect gravesites aims at preventing graves from being vandalized and the peace of the dead being disturbed, the obligation to maintain gravesites points towards activities to keep and conserve locations where persons are buried.*¹⁵²

Such respect was first provided for in the fifth paragraph of Article 4 of the 1929 GC and the third paragraph of Article 76 of the 1929 PoW Convention. Subsequently, it has been recognised as a norm of customary international humanitarian law¹⁵³ and can be found in the third paragraph of Article 17 of GC I, the fourth paragraph of Article 120 of GC III, the first paragraph of Article 130 of GC IV and the first paragraph of Article 34 of AP I. These provisions obliged the parties to a conflict to ensure unqualified and absolute respect towards graves. Respect under this paragraph implied requiring active measures of protection.¹⁵⁴ Although the primary obligation to prevent any sort of violence, breach of legal or moral standards, profanity or sacrilege of a grave rests with the Grave Registration Service, in fact the duty actually applies to everyone.¹⁵⁵

AP I takes the duty further by providing that if due to financial necessity, or any other reason, the home country or family of the deceased fail to conclude agreements to arrange payment for expenses related to the maintenance of the gravesite, the High Contracting Party in whose territory such gravesites are situated may

¹⁵⁰ See note no. 79, p. 566.

¹⁵¹ See note no. 37, p. 180, See also note no. 79, p. 566.

¹⁵² See note no. 4, p. 358.

¹⁵³ See note no. 31, p. 414.

¹⁵⁴ See note no. 37, pp. 179-180.

¹⁵⁵ See note no. 37, p. 180. See also note no. 79, p. 566.

offer to facilitate the return of the remains of the deceased to the home country.¹⁵⁶ However, the return of remains is also likely to incur expense for the home country.¹⁵⁷ In case a return agreement is not reached, the High Contracting party has the discretion to adopt arrangements laid down in its own laws regarding maintenance of cemeteries and graves.¹⁵⁸ However, this provision is an exception, only to be applied when the home country will not pay for the maintenance of the graves. Where the home country of the deceased is ready to meet maintenance charges there is a strict obligation on the country where the grave is located to maintain it.¹⁵⁹ The law relating to non-international armed conflict does not embody any provision regarding respect for and maintenance of graves since the performance of these obligations generally requires a degree of territorial control which states are quite unwilling to concede non-state actors as having. But, this should not *per se*, as one author comments, be a hitch to a normative development in that sense—‘all the more as the application of AP II is likewise conditional on territorial control.’¹⁶⁰ The respect towards graves and their proper maintenance are recognized as a norm of customary international humanitarian law.¹⁶¹

Since maintenance of gravesites entails financial expenditure, this obligation sometimes breeds tense relationship and causes dispute between the deceased’s home country and the state where graves are located.¹⁶² National authorities of different countries even sometimes refuse to comply with international law in this regard.¹⁶³

156 See note no. 14, p. 376.

157 See note no. 14, p. 376.

158 It is quite natural that practices relating to graves and cemeteries are diverse. It is not unusual to close cemeteries due to the absence of financial support. See note no. 14, p. 376.

159 See note no. 14, p. 376.

160 See note no. 4, pp. 357-358. The author refers, in this regard, Art. 1(1), AP II, 1977.

161 Rule 115 of CIHL.

162 See note no. 4, p. 358.

163 For instance, in Norway, a public debate took place in 2008 on whether the state incurs obligations in the contemporary tapestry of IHL vis-à-vis the combatants deceased in the World War II and their gravesites located on the territory of Norway. The Ministry of Culture and Church Affairs took the standing that the job accomplished by the Norwegian Official Graves Registration Service, which is, *inter alia*, accountable for the administration of all war graves in Norway, would not be based on any international law. See Norwegian Parliament, written question from Ine Marie Søreide (H) to the Minister of Culture and Church - (*Stortingent, Skriftlig spørsmål fra Ine Marie Eriksen Søreide (H) til kultur- og kirkeminis-teren*), 16 June, 2008, available at: <http://www.stortinger.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=40641> (last visited 21 May, 2009), quoted in note no. 4, p.358.

While the obligation applies *rationaletemporiseat* at all times, it is not so clear for how long state will incur obligation to maintain gravesites. One scholar has properly identified the issue and endeavoured to provide the solution. She states:

Article 34 of AP I neither specifies how long the obligation lasts nor does it provide clear guidance on how to fulfil it. Rather it provides a procedural answer on how to deal with war graves, stipulating that as soon as circumstances and the relations between the adverse parties permit, the High Contracting Parties in whose territory graves are situated shall conclude agreements in order to protect and maintain gravesites permanently. It is in these agreements that questions pertaining to the maintenance of burial places would then be comprehensively regulated...The Geneva Conventions do not explicitly state a time limit for the maintenance of gravesites. The wording of the provisions on the marking of graves-‘so that they may always be found’ and ‘so as to found at any time’-could suggest that the obligation lasts ad infinitum. The commentators on the Geneva Conventions seem to hold this view when explaining that the essential point about marking it ‘that it should always be possible to find the grave of any combatant’. However, the Commentary on AP I takes a different standpoint in that it qualifies the absence of a time limit in the Geneva Conventions as an ‘obvious gap’ rather than interpreting the obligation as one lasting ad infinitum and thus beyond the existence of any humanitarian interest. The commentators therefore suggest that the system foreseen in Article 34 of the Protocol should apply not only to graves covered by that provision but also to those covered by the four Geneva Conventions.¹⁶⁴

Marking of Graves¹⁶⁵ and Access to Gravesites^{165A}

Properly marking of graves will allow the relatives of the deceased to pay homage to the deceased. The necessity of marking graves was first

¹⁶⁴ See note no. 4, pp. 359-360.

¹⁶⁵ The very obligation to mark graves is intrinsically linked to two other obligations namely maintenance of war graves and prerequisite to guarantee access to gravesites. See note no. 4, p. 358.

^{165A} See Annexure 1, p. 76.

set out in the fifth paragraph of Article 4 of the 1929 GC and in the third paragraph of Article 76 of the 1929 PoW Convention. This was reiterated in the third paragraph of Article 17 of GC I, the fourth paragraph of Article 120 of GC III, the first paragraph of Article 130 of GC IV and the first paragraph of Article 34 of AP I which state that graves must be marked in such a manner that they can be identified at any time. Though, these provisions omit to provide details on what should be contained in the markings, the premise is that marking should be done in such a way as to assist people to find the gravesite.¹⁶⁶ Therefore, the use of mere numbers or symbols will not suffice. In addition to any particular reference number, the surname, first names and date of birth (if known) should also be inscribed in a durable fashion¹⁶⁷ or in an indelible manner.¹⁶⁸ As the commentary reveals, this provision is equally applicable to common graves.¹⁶⁹ Article 120, fourth paragraph, GC III and Article 130, first paragraph, GC IV speak in a similar way.¹⁷⁰

AP I also places emphasis on the accessibility of a grave. Sub-paragraph (a) of paragraph 2 of Article 34 of AP I urges belligerents, in whose territories graves, remains or sites of death are situated, to conclude agreements with a view to facilitating access to these sites by the kith and kin of the deceased and representatives of the official graves registration services¹⁷¹. The commentary to this sub-paragraph, after recalling the linguistic ambiguity involved in the wording “*facilitate access to gravesites*”, takes pain to clarify that this wording implies that persons should be allowed to enter the territory,

166 See note no. 37, p. 180. See also note no. 79, p. 566.

167 See note no. 30, p. 507.

168 See note no. 37, p. 180. See also note no. 79, p. 566.

169 See note no. 37, p. 180. See also note no. 79, p. 566.

170 In Norway, the removal of name plates of war graves caused concern, since without this significant information the dead become unaccounted for. See note no. 4, p. 358.

171 Graves Registration Services, are usually assigned tasks both within the actual theatre of war e.g. identification of the dead) and beyond the end of hostilities (e.g. maintenance of war cemeteries). Though it is obligatory to establish Graves Registration Services as soon as hostilities break out under paragraph 3 of Art. 17 of GC I, the respective IHL treaties remain do not specify how these services, in practice, be organized. Rather, the matter is left to the good judgment of the respective state which require to establish it after proper appreciation of the context. Governmental agencies can perform the functions of the Graves Registration Service. As for example, special ministerial departments were established in France and Italy; in the USA, Congress in 1923, established the American Battle Monuments Commission, which is an agency of the Executive Branch of the Federal Government. For a proper comprehension of its mandate and functions, see : <http://www.abmc.gov/commission/index.php> (last visited 20 May, 2009), quoted in note no. 4, p. 363. However, a private body may be entrusted to carry out the functions of Graves Registration Service. As for instance, in Germany, *Volksbund Deutsche Kriegsgräberfürsorge e. V.* was given mandate to, *inter alia*, maintain war cemeteries. See note no. 4, p. 363.

and if required, should be granted visas for the purpose of visiting the site.¹⁷² Moreover, appropriate visitors should be informed about the exact location of the graves.¹⁷³ However, a well augmented interpretation of the wording “regulate the practical arrangements for such access” suggests that special transports and vehicles, in order to facilitate access to gravesites, should be made available and even specific dates should be fixed to avert possible overcrowding.¹⁷⁴ Moreover, to materialise these arrangements effectively, experienced and skilled officials should be employed at the site to help concerned persons find the desired grave.¹⁷⁵

Recording the Location of Graves

Information relating to location, markings and distinguishing features of a grave should be recorded in order to facilitate its tracing. This principle is now a norm of customary international humanitarian law, applicable in both international and non-international armed conflict.¹⁷⁶

The first codification of this principle was in the sixth and seventh paragraphs of Article 4 of the 1929 GC which provided that:

At the commencement of hostilities, [the belligerents]¹⁷⁷ shall organize officially a graves registration service, to render eventual exhumations possible, and to ensure the identification of bodies whatever may be the subsequent site of the grave. After the cessation of hostilities they shall exchange the list of graves and of dead interred in their cemeteries and elsewhere.

This was confirmed in paragraph 4 of Article 17 of GC I, paragraph 6 of Article 120 of GC III and paragraph 3 of Article 130 of GC IV which confirmed that the Graves Registration Service would require the opposing parties to exchange, as soon as circumstances permitted, and at the latest at the end of hostilities, a single list¹⁷⁸ of all information relating to the deceased, the funeral and how to

¹⁷² See note no. 14, p. 372.

¹⁷³ See note no. 14, p. 372.

¹⁷⁴ See note no. 14, p. 372.

¹⁷⁵ See note no. 14, p. 372.

¹⁷⁶ Rule 116 of CIHL.

¹⁷⁷ See note no. 35, p. 2724.

¹⁷⁸ Article 138 of GC IV. refers Information Bureau.

identify the grave.¹⁷⁹ It can be noticed that GC I introduced the concept of exchanging the information ‘as soon as possible’. The change in wording is due to the practice followed during World War II, when such information was usually communicated during the hostilities, sometimes by telegram, when temporal or geographical conditions required.¹⁸⁰

Identification of the Dead after Disposal

It is foreseeable that there will be graves which contain unidentified corpses. The sixth paragraph of Article 4 of the 1929 GC therefore provided that at the commencement of hostilities, the belligerents¹⁸¹ shall organise a Graves Registration Service which can coordinate future exhumations to ensure the proper identification of bodies. This provision was expanded in the third paragraph of Article 17 of GC I which required the Graves Registration Service to keep an up-to-date record of all graves (including all records of transfers) of enemy combatants, to mark all unmarked or ineffectively marked graves, maintain all graves and ensure the proper grouping of graves.¹⁸²

The purpose of the service is to facilitate exhumations, ensure the proper identification of bodies and to enable exhumation and transportation to the home country where appropriate. However, paragraph 4 of Article 34 of AP I sets out that exhumations¹⁸³ are permitted only in certain circumstances. These are:

- a) where it is conducted in accordance with an agreement under paragraph 2(c) of Article 34 of AP I;
- b) where it is conducted in accordance with paragraph 3 of the aforesaid article, in the absence of such agreements;
- c) where it is required in cases of compelling or overriding public necessity, including cases of medical and investigative necessity. However, in the last case exhumation is based on a

¹⁷⁹ See note no. 37, p. 182.

¹⁸⁰ See *Report of the International Committee of the Red Cross on its activities during the Second World War*, vol. I, p. 301. Quoted in note no. 79, p. 568, note no. 30, pp. 507-508.

¹⁸¹ See note no. 35, p. 2724.

¹⁸² See note no. 37, p. 181.

¹⁸³ The very restrictions on exhumations as espoused in para 4 of Article 34 of AP I are, generally addressed to the High Contracting Parties on whose territory graves are located. However, this provision, as it is evident from the interpretive of declaration of one delegation during the Diplomatic Conference, 1974-1977, the provision in no way, limit the task of Grave Registration Services. See note no. 4, p. 361.

unilateral decision of the party in whose territory the gravesite is located.¹⁸⁴

The fulfilment of IHL obligations regarding dead and their burial places also potentially meets the necessity criterion¹⁸⁵; in this regard the comment of the Rapporteur of the Working Group dealing with exhumation deserves special attention. The comment runs as follows:

*Where adequate protection and maintenance was not otherwise possible—for instance, in the case of scattered and temporary graves made during a battle—exhumation for the purpose of regrouping graves in one location would be a matter of public necessity.*¹⁸⁶

Though the very term ‘overriding public necessity’ is demonstrably clearly defined, it should nonetheless, be noted, as the Rapporteur of the Working Group stated, that, “it would of course be for the country in whose territory the graves were situated to decide whether or not exhumation was a matter of overriding public necessity”. In this regard the interpretative declaration by one delegation should be taken into consideration:

*Paragraph 4 of the article in no way prevents the exhumation of the remains in temporary graves at the end of an armed conflict by or on behalf of a Graves Registration Service for the purpose of providing permanent gravesites, as was done after the last two European conflicts.*¹⁸⁷

The commentary to paragraph 4 of Art. 34 of AP I further elucidates that in the context of only aforesaid cases where exhumation is carried out for reasons relevant to the state in whose territory the graves are situated, three additional obligations are specified with which it must comply:

- to treat the mortal remains always with great reverence. Moreover, even reasons of overriding public necessity, a contextualized issue and a question of fact, cannot even justify a lack of respect for the remains of the dead.

¹⁸⁴ See note no. 14, p. 377.

¹⁸⁵ See note no. 4, p. 361.

¹⁸⁶ See note no. 14, p. 378, para. 1359.

¹⁸⁷ See note no.14, P. 378, para 1361.

- to serve notice to the home country of the deceased to signify the intention to exhume. Though the home country cannot object to the exhumation, it can express its views regarding this issue. On the other hand, on this occasion it could still put a proposition for the repatriation of the mortal remains in accordance with a procedure to be determined.
- to furnish the home country with the details of the intended place of reburial. Certainly, the right of the families to access to graves of their deceased relatives expressly demands the transmission of such information and the home country is accountable for transmitting it to the families concerned.¹⁸⁸

Though drafting of the provision relating to exhumation in the late 1970s was merely a theoretical concept, the establishment of a number of fact-finding commissions and international criminal tribunals at the turn of this century provided enough impetus to prove the utility of this provision especially in the arena of criminal investigation.¹⁸⁹ However, the intricacies, dilemmas and challenges involved in exhumation specifically the symbiotic relationship between forensic evidence intended to be extracted through exhumation and the criminal investigation by the international criminal tribunals cannot be swept away so easily. Moreover, the complexity usually may reach its peak if the tribunals suffer from scant resources and lack political will to undertake forensic investigations to identify the dead.¹⁹⁰ Exhumation may also come into conflict with the wishes of the families of the deceased.¹⁹¹ All these issues are addressed by one scholar in the following words:

...practice has shown that needs of the victim's families can easily clash with the interests of investigative or prosecuting bodies. A conflict of interest can manifest itself in two ways. On the one hand, relatives might disapprove of exhumations, given that the dead and their graves should be respected and not disturbed. On the other hand, the extent of exhumations and the degree of identification might not go far enough for relatives who have an interest in recovering the mortal remains of their loved ones.

¹⁸⁸ These three obligations are spelt out in commentary to AP, paragraph 1362, p.379.

¹⁸⁹ See note no. 4, p. 361.

¹⁹⁰ See note no. 4, p. 361.

¹⁹¹ See note no. 4, p. 361.

International criminal tribunals often lack the resources or political will to undertake forensic investigations aimed at identifying all the dead, and confine themselves to the evidence needed to prove specific allegations. Furthermore, the 'personal identification' of the dead might not be their prime concern. For a genocide charge, for instance, the 'categorical identification' of the dead—such as the victim's ethnicity, religion or race—might suffice to establish that the perpetrator acted with intent to destroy a particular group.¹⁹² With the growing number of forensic investigations conducted, the need to develop and adhere to ethical and scientific standards for the exhumation and post-mortem examination of remains, which bring the interests of families and justice into the equation, has become apparent.¹⁹³

The foregoing discussion sought to give an appraisal of the current position of IHL on the management of the dead^{193A}. It is indisputably clear that the substantive provisions of IHL designed to ensure respect for dead are quite comprehensive and effectively regulate most of the pertinent issues relating to persons succumbed to death in an armed conflict.¹⁹⁴ Furthermore, it is to be noted that these provisions apply not only during but also after an armed conflict.¹⁹⁵ These provisions will also be equally applicable to both men and women.^{195A} However, comprehensive character of these provisions

192 Eric Stover and Rachel Shigekane, 'The missing in the aftermath of war: When do the needs of victims' families and international war crimes tribunals clash?', *International Review of the Red Cross*, vol. 84, No. 848, December 2002, pp. 845-847, quoted in See note no. 4, p. 361.

193 See note no. 4, pp. 361-362. See , the recommendations formulated in ICRC, *Operational Best Practices*, above note 44, p. 9; *ICRC Report: The Missing and Their Families*, Recommendation No. 23, pp. 31-32, available at: [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5JADR8/\\$File/ICRC_TheMissing_012003_EN_10.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5JADR8/$File/ICRC_TheMissing_012003_EN_10.pdf) (last visited 21 May 2009), quoted in note no. 4, pp. 361-362.

193A See Annexure 1, p. 76.

194 See note no. 4, p. 368.

195 See note no. 4, p. 368.

195A Generally, the protective regime of IHL is equally applicable to both men and women. IHL, as one author mentions, first accords protection to women if they are wounded, sick or shipwrecked, as civilians, as members of the civilian population or as combatants, according to their status. If we thoroughly analyze Common Article 3 to Four Geneva Conventions, Article 12 of GC I and II, Article 16 of GC III, Articles 13 and 27(3) of GC IV, then it will be easily noticeable that women must and invariably will be benefitted from the same protection as accorded to men without any sort of discrimination. Moreover, IHL is not oblivious of the vulnerability of women during armed conflicts. Recognizing this fact, IHL offers preferential treatment to women in some cases. To protect the sexual integrity and modesty of women special protections are accorded to them against rape, enforced prostitution or any other form of indecent assault. [GC IV, Art. 27, AP I, Art. 76(1)]. Pregnant and nursing mothers are also entitled to special treatment. [GC IV, Articles 14, 15, 16, 27, 50, AP I, Articles 70(1) and 76]. Provisions for separate detention quarters and sanitary facilities for female prisoners of

are only in relation to content, protection gaps exist in the thread of four Geneva Conventions, namely narrow scope of application especially meant for protected persons.¹⁹⁶ Moreover, only a limited number of specific substantive provisions are found in the arena of law of non-international armed conflict.¹⁹⁷ However, for the purpose of protection of deceased, it would be erroneous to lay on the protective wall of IHL only¹⁹⁸ since international human rights law, international refugee law as well as international criminal law should also be taken into consideration to construct a comprehensive regime to ensure proper respect for dead. Last but not least, IHL, though bearing the stamp of cultural universalism, does also offer a nod to cultural relativism. It has been demonstrated that the IHL provisions relating to the management of the dead have demonstrated respect for the needs of protection, legal certainty, economic interests of the deceased's family, culture of the deceased, religion of the deceased and public health and hygiene. This humane aspect of the law thus requires appropriate implementation to ensure proper respect for the dead.

war and immediate supervision by women have also strengthened this protective thread. [Articles 25(4), 29(2) and 108 of GC III]. This stance of IHL, however, has received severe criticisms from feminist theorists. (See, Judith Gardam & Michelle J. Jarvis, *Women, Armed Conflict and International Law*, The Hague, Kluwer Law International, 2001, 283). They regard IHL as inherently discriminatory since, to them, this branch of public international law considers women, in most cases, as victims and men as combatants. Furthermore, the proper of elucidation of hierarchy of IHL rules reveal that the provisions on women do not maintain parity in comparison with those of men. As for instance, provisions on women instead of imposing rigorous prohibitions intend to ensure protection and the offence of rape does not even finds its place in the list of grave breaches (GC I-IV Arts 50/51/130/147; AP I Art. 85). In response to these allegations few scholars argue that the offence of rape and the generic category of sexual violence has evolved in international criminal law and now a days such offences are often prosecuted as grave breaches. Moreover, though the morphological aspect of IHL texts may be outdated, the provisions of women should be annotated in the light of their contemporary meaning. The crux of the problem lies not in the weakness of texts rather in the arena of implementation and enforcement of relevant rules. See Sass`oli, Marco, Bouvier, Anotine A., Quintin, Anne, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian law*, International Committee of the Red Cross, Third, Expanded and Updated Edition, 2011, vol. I, pp.213-215. For a critical appraisal of the impact of armed conflict on women, see Lindsey, Charlotte, *Women facing war*, International Committee of the Red Cross, Geneva, 2001.

In the light of aforesaid discussion, it can be articulated that the dead includes both men and women. Secondly, dead women will, in each and every sphere, receive equal treatment like dead men. Thirdly, in few spheres, special protections shall be accorded to dead women, whether civilian or combatant. As for instance, investigation of the cause of death, pre-burial ceremony, burial process, exhumation, if necessary, must be done under the immediate supervision of women. Moreover, during search for dead, women should be kept with men to employ their skills while any woman is found dead in the battlefield. This principle is equally applicable to all spheres of activities.

196 See note no. 4, p. 368.

197 See note no. 4, p. 368.

198 See note no. 4, p. 369.

3. RESPECT FOR THE DEAD: AN ISLAMIC PERSPECTIVE

Maulana Obaid Ullah Hamzah

The religion of Islam is the complete acceptance of, and obedience to the teachings of Allah, as revealed to His Prophet, Muhammad, upon whom be peace and blessings.

It is worth mentioning that the word Islam is derived from the Arabic root “SILM” which means, among other things, peace and submission¹⁹⁹. In the religious sense the essence of Islam is submission to the Will of Allah and obedience to His law. The connection between the original and religious meaning of the word is that only through submission to the Will of Allah and by acting upon His instructions can one achieve peace in all aspects of life, including in relation to achieving peace with other people. It will also bring eternal peace in the Hereafter.

3.1 HUMAN DIGNITY IN ISLAM

In Islamic teachings all human beings are equal at the time of birth, as are all creatures’ of Allah. However, they are not necessarily identical: people may have different abilities, potentials and social status, but these things do not make one person superior to another. The colour of skin, the language spoken, the country of residence, the amount of wealth and the degrees of prestige enjoyed, do not change the true stature of a person in the sight of Allah. Equality, dignity and honour are not a matter of charity but an article of faith which a Muslim takes seriously. A Muslim believes that all of mankind belong to the human race and share equality in the common parentage of Adam and Eve. A Muslim also believes that all were created by the One and the same Eternal God, the Supreme Creator of all. If this value is deeply rooted in our mind, then there will be no room for oppression, persecution, prejudice and any sort of act that hurts human dignity, even after death. Here are some facts that explicitly and excellently prove the existence of human dignity:

¹⁹⁹ Ibn Manzur, Abul Fadl Jamaliddin Muhammad Ibn Mukarram, Lisanul Arab vol.12, P.293, Al-Mu’jamulwaseet p.446

²⁰⁰ Al- Mu’jamulwaseet P.768

1- Man was created in the most beautiful form and best appearance

Allah swears four times saying:

وَالَّتَيْنِ وَالزَّيْتُونَ (1) وَطُورِ سَيْنِينَ (2) وَهَذَا الْبَلَدِ الْأَمِينِ
(3) لَقَدْ خَلَقْنَا الْإِنْسَانَ فِي أَحْسَنِ تَقْوِيمٍ (4) (95:1-4)

By the fig and the olive and by the Mount Sinai and by this secure city (Makkah), surely we have created man in the best stature. (95: 1-4)

These verses take an oath by four objects with religious and historic significance. The word “*Taqwim*“ literally means to set a thing aright or to form something into an appropriate shape in a proportionate manner²⁰⁰. The man, as the verse signifies, has been adorned with reason, able to follow commands, by means of discernment. He is upright, picking up his food with his hand. Allah bestowed on him knowledge, power, intellect, reason, speech, hearing, sight, free will, planning and wisdom. All these, in fact, are the qualities of Allah – the Creator. He created him in His image. The Prophet said:

إِنَّ اللَّهَ خَلَقَ آدَمَ عَلَى صُورَتِهِ (البخارى ومسلم)

“Allah created Adam upon His image”²⁰¹. It means that Adam, the first man, has been characterised by some of the qualities of Allah. This does not mean resembling or having a likeness. Rather, the image that is for Allah is not like the image that is for the creation. It only means that the creation is hearing, seeing, and speaking of free will. And thus did Allah create Adam as one who is hearing, seeing and speaking whenever he wishes to do so.

اللَّهُ الَّذِي جَعَلَ لَكُمْ الْأَرْضَ قَرَارًا وَالسَّمَاءَ بِنَاءً وَصَوَّرَكُمْ فَأَحْسَنَ
صُورَكُمْ وَرَزَقَكُمْ مِنَ الطَّيِّبَاتِ ذَلِكُمْ اللَّهُ رَبُّكُمُ فَتَبَارَكَ اللَّهُ رَبُّ
الْعَالَمِينَ (40:64)

201 ShahihBukhari Hadith no 5873. vol 5 P.2299, Shahih Muslim, Hadith no.6821,vol.8 p.32

It is Allah who made for you the earth a place of settlement and the sky a structure (i.e., ceiling) and formed you and perfected your forms and provided you with good provision. That is Allah, your Lord; then blessed is Allah, Lord of the worlds. (40:64)

All commentators of the Quran agree that this verse refers to the physical form as well as to the innate moral and spiritual capacities of people.²⁰²

2- Allah honoured the children of Adam

وَلَقَدْ كَرَّمْنَا بَنِي آدَمَ وَحَمَلْنَاهُمْ فِي الْبَرِّ وَالْبَحْرِ وَرَزَقْنَاهُمْ مِنَ الطَّيِّبَاتِ وَفَضَّلْنَاهُمْ عَلَى كَثِيرٍ مِمَّنْ خَلَقْنَا تَفْضِيلًا (17:70)

We have certainly honoured the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what we have created with preference. (17: 70)

The Qur'an commentator al-Alusi's observation that "everyone and all members of the human race, including the pious and the sinner, are endowed with dignity"²⁰³. Twentieth century Muslim jurists and commentators have also gone on record to note that dignity is not earned by meritorious conduct; it is established as an expression of God's grace; and also that dignity is a natural and absolute right which is inherent in every human person as of the moment of birth. It is God-given and natural; hence no individual nor can State take it away from anyone. All human rights have been derived from this human dignity.

3- Allah the Almighty is very close to humans:

Allah says:

وَلَقَدْ خَلَقْنَا الْإِنْسَانَ وَنَعْلَمُ مَا تُوَسْوِسُ بِهِ نَفْسُهُ وَنَحْنُ أَقْرَبُ إِلَيْهِ مِنْ حَبْلِ الْوَرِيدِ (50:16)

202 The meaning of the Holy Qur'an by Abdullah Yusuf Ali, P.1222

203 Al-Alusi, RuhulMa'ani vol.8 p.151

“We have already created man and know what his soul whispers to him and We are closer to him than his jugular vein”. (50: 16)

Allah said:

قَالَ يَا إِبْلِيسُ مَا مَنَعَكَ أَنْ تَسْجُدَ لِمَا خَلَقْتُ بِإِيْدِيَّ أَسْتَكْبَرْتَ أَمْ
كُنْتَ مِنَ الْعَالِينَ (38:75)

“O Iblees (Satan) what prevented you from prostrating to that which I created with My hands? Were you (then), or were you (already) among the haughty?” (38: 75)

But more explicitly, this intimacy is shown in God’s illustrious affirmation:

فَإِذَا سَوَّيْتُهُ وَنَفَخْتُ فِيهِ مِنْ رُوحِي فَقَعُوا لَهُ سَاجِدِينَ (38:72)

“So when I proportioned him and breathed into him (Adam) of My Own spirit, then fall down to him in prostration” (38:72).

Allah also said:

وَإِذَا سَأَلَكَ عِبَادِي عَنِّي فَإِنِّي قَرِيبٌ أُجِيبُ دَعْوَةَ الدَّاعِ إِذَا دَعَانِ (2:186)

And when my servants ask you (O Muhammad) concerning me indeed I am near. I respond to the invocation of the supplicant when he calls upon Me (2: 186)

A level of intimacy and closeness is also shown in the divine affirmation that “I created (Adam) with My own Hand.”

For in other places concerning His creation When He decrees a matter, He says to it “Be” and it is (2:117)

All these verses show how close a human is to the Creator. This ensures a sense of security, safety and confidence.

4- Human is Vicegerent on the earth:

وَإِذْ قَالَ رَبُّكَ لِلْمَلَائِكَةِ إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً قَالُوا
أَتَجْعَلُ فِيهَا مَنْ يُفْسِدُ فِيهَا وَيَسْفِكُ الدِّمَاءَ وَنَحْنُ نُسَبِّحُ بِحَمْدِكَ
وَنُقَدِّسُ لَكَ قَالَ إِنِّي أَعْلَمُ مَا لَا تَعْلَمُونَ (2:30)

“(Mention O Muhammad) when your Lord said to the angels” Indeed I will make upon the earth vicegerent. They said, will You place upon it on one who causes corruption therein and shed bloods while we declare Your praise and sanctify You. He said indeed I know that which you do not know”. (2: 30)

It is a great honour for human being to be vicegerent and slave of Allah and he must recognise it. No other creature, not even the angels enjoy such a great honour. This is why humans are believed to be the most superiorly created beings. In order to show it in a more visible way He commanded angels to fall down in prostration to Adam.

Allah said:

وَإِذْ قُلْنَا لِلْمَلَائِكَةِ اسْجُدُوا لِآدَمَ فَسَجَدُوا إِلَّا إِبْلِيسَ أَبَىٰ وَاسْتَكْبَرَ
وَكَانَ مِنَ الْكَافِرِينَ (2:34)

“And We said to the angels “prostrate before Adam” so they prostrated except for Iblees. He refused and was arrogant and became of the disbelievers”. (2: 34)

5- Mankind is descended from one pair of parents

Allah said:

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ
لِتَعَارَفُوا (49:13)

“O mankind, indeed We have created you from male and female and made you peoples and tribes that you may know one another”. (49: 13)

Allah also said in this regard:

يَا أَيُّهَا النَّاسُ اتَّقُوا رَبَّكُمُ الَّذِي خَلَقَكُمْ مِنْ نَفْسٍ وَاحِدَةٍ وَخَلَقَ
مِنْهَا زَوْجَهَا وَبَثَّ مِنْهُمَا رِجَالًا كَثِيرًا وَنِسَاءً وَاتَّقُوا اللَّهَ الَّذِي
تَسَاءَلُونَ بِهِ وَالرَّحَامَ إِنَّ اللَّهَ كَانَ عَلَيْكُمْ رَقِيبًا (4:1)

“O mankind , fear Your Lord, who created you from one soul and created it from its mate and dispersed from both of them many men and women and fear Allah, through whom ,you ask one another and the wombs. Indeed Allah is ever over an Observer” (4:1)

This verse could be explained as follows: first, the people have been urged to fear Allah so as to escape His displeasure. Second, people have been reminded that all human beings have sprung from one and the same parents and are thus closely related to one another therefore, they should strictly observe the ties and obligations of kinship especially with close relatives of blood relation (father, mother, children, aunt, uncle, wife and husband)²⁰⁴

The Qur'anic vision of humankind is that of a single fraternity which is endorsed by the affirmation of unity and equality of all of its members. Thus in a reference to the creation of humankind, it is provided: "God created you from a single soul (khalaqakum min nafsawahidatin) and created its mate of the same (kind) and created from them multitudes of men and women..." Then they are all enjoined, in the same verse, to "observe the ties of kinship (al-arham) among yourselves.

6- Saving human life as a major goal of Shari'ah

Essential Objectives (Maqassid) of Sharia (Islamic Law) are five, namely protection of deen (religion), life, intellect, property and lineage/honour. In addition, there are the necessary (Hajiyah – A great number of the rukhas– concessions- such as the shortening of the salah and the forgoing of the fast by the sick and the traveller, may be classified as hajiyyah. In almost all areas of obligatory` Ibadah the Shari'ah has granted such concessions) and the desirable or the embellishments (Tahsiniyyah- are in the nature of desirability's- supererogatory prayers and voluntary fasting).

Muslim scholars have further extended the list of the essential objectives to include human dignity, freedom, social welfare (economic development and the development of science and technology) and human fraternity (the fulfilment of contracts, the preservation of the ties of kinship and respect for the rights of one's neighbours).

The essential objectives, must be observed and protected by the mukallaf (Rational adult who received the call of Islam) regardless of his personal predilections, whereas the latter, the supplementary maqasid, or the hajiyyat, are those objectives over which the mukallaf has some flexibility and choice.

204 Ma'arifur Qur'an vol 2 p.294 (English version)

The primary goal of Shari'ah is to preserve the Religion:

“This day have I perfected your religion for you, completed my favour upon you,

And have chosen for you Islam (Submission) as your religion (deen).
(5:3)

7- Man is master of the earth

هُوَ الَّذِي خَلَقَ لَكُمْ مَا فِي الْأَرْضِ جَمِيعًا ثُمَّ اسْتَوَىٰ إِلَى السَّمَاءِ
فَسَوَّاهُنَّ سَبْعَ سَمَاوَاتٍ وَهُوَ بِكُلِّ شَيْءٍ عَلِيمٌ (2:29)

“It is he who created for you all that is on the earth. Then, he directed Himself to the heaven and made them seven heavens and He is knowing of all things”. (2: 29)

Man was endowed with knowledge and intellect that enables him to harness nature. All things in this planet were created for the wellbeing of mankind. From a tiny creature in the forest to mammoth creature in the sea, from a small plant to vast oceans, all of them are serving mankind.

Allah said:

أَلَمْ تَرَوْا أَنَّ اللَّهَ سَخَّرَ لَكُمْ مَا فِي السَّمَاوَاتِ وَمَا فِي الْأَرْضِ وَأَسْبَغَ
عَلَيْكُمْ نِعْمَهُ ظَاهِرَةً وَبَاطِنَةً (31:20)

“Do you not see that Allah has made subject to you whatever is in the heavens and whatever is on the earth and amply bestowed upon you both apparent and unapparent?” (31:20)

Though, Allah's creation is independent of man but Allah, in His infinite mercy, has given the faculty to subdue the forces of nature and to penetrate high mysteries with his powers of intellect and insight.

3.2 DIGNITY OF A DECEASED PERSON

A human being is a dignified being whether alive or dead.

In Islam, a person after death is washed, shrouded and a funeral prayer is offered before burial. There is a consensus among all the great Muslim jurists that a funeral prayer for a deceased person is a collective obligation- a duty whose performance is a must on a community of members as a whole. However, if some of the community carried out the job, it would be settled on behalf of all, but failure of anyone to perform it will make all of them sinners.

The Prophet (PBUH), commanded the Muslims to offer it and they have been doing so ever since they received the commandment.

The prophet (PBUH) said:

قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ : حَقُّ الْمُسْلِمِ عَلَى
الْمُسْلِمِ خَمْسٌ : رَدُّ السَّلَامِ وَعِيَادَةُ الْمَرِيضِ وَاتِّبَاعُ الْجَنَائِزِ
وَإِجَابَةُ الدَّعْوَةِ وَتَشْمِيتُ الْعَاطِسِ (البخاري ومسلم)

The rights of one Muslim over another are five: returning *salaam*, visiting the sick, attending funerals, accepting invitations and blessing the one who sneezes.²⁰⁵ (Bukhari and Muslim)

Standing for the funeral procession of a Jew.

عَنْ جَابِرِ بْنِ عَبْدِ اللَّهِ رَضِيَ اللَّهُ عَنْهُ قَالَ مَرَّ بِنَا جَنَازَةً فَقَامَ
لَهَا النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَقُمْنَا لَهُ فَقُلْنَا يَا رَسُولَ اللَّهِ إِنَّهَا
جَنَازَةٌ يَهُودِيٌّ ! قَالَ إِذَا رَأَيْتُمُ الْجَنَازَةَ فَقُومُوا وَفِي رِوَايَةٍ
أُخْرَى ”أَوْ مَا كَانَتْ نَفْسًا“ (البخاري : كتاب الجنائز)

Narrated Jabir bin Abdullah, may Allah be pleased with him: A funeral procession passed in front of us and the prophet (PBUH) stood up and we too stood up. We said, O Messenger of Allah, this is the funeral procession of a Jew. He said: Whenever you see a funeral procession, you should stand up.²⁰⁶

205 ShahihBukhari, Hadith no 1240, vol.2 p.30, Shahih Muslim vol.2. p.213

206 ShahihBukhari vol.1 p.175

In another narration, the prophet said, Was not he a human being?
The prophet (PBUH) said:

عَنْ عَامِرِ بْنِ رَبِيعَةَ عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ إِذَا
رَأَى أَحَدَكُمْ جَنَازَةً فَإِنْ لَمْ يَكُنْ مَاشِيًا مَعَهَا فَلْيَقُمْ حَتَّى يُخَلَّفَهَا
أَوْ تُخَلَّفَهُ أَوْ تُوَضَعَ مِنْ قَبْلِ أَنْ تُخَلَّفَهُ (البخارى)

Amir bin Rabiah narrated that Allah's Messenger said : "If anyone of you see a funeral procession and he is not going along with it, he should stand and remain standing till he gets behind it or it leaves him behind or the coffin is put down before it goes ahead of him (Bukhari, the book of Funeral)²⁰⁷.

To break the bone of a dead body is a crime and considered desecrating it.

عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ
وَسَلَّمَ قَالَ كَسْرُ عَظْمِ الْمَيِّتِ كَكَسْرِهِ حَيًّا (ابن ماجه)

Ayesha, may Allah be pleased with her, reported that, the prophet (PBUH) said:

Breaking a dead person's bone is similar in sin to breaking it when he is alive.²⁰⁸

Imam, Abu Ja'far al-Tahawi (Allah have mercy on him) states in the explanation of this Hadith: The Hadith shows that the bone of a dead person has the same sanctity and honour as the bone of a living person.²⁰⁹ It is worth mentioning that no consensus exists on this explanation as some consider it possible to break a bone of a deceased for medical uses.

Allama Ibn Abidin (Allah have mercy on him) stated:

A human being is honoured according to Shari'ah even if one is a non-Muslim and the meaning is that one's body and organs are sacred. Hence, it will not be permissible to even break the bone of a dead non-Muslims body.²¹⁰

207 ShahihBukhari vol.1 p.175

208 Sunan Abu Dawood p.458 Sunan Ibn Majah p.116

209 Mushkil al-Athar

210 Fatwa Shami vol.6, p.229,313

Thus the human body, dead or alive, has great sanctity. It is honoured and sacred, and because of the sanctity that is attached to it, it will be unlawful to tamper with it, cut parts off it or dishonour it in any other way.

Allama Ibn Hajar Asqalani said: Any act that violates the dignity of a living man is forbidden, more so, when it violates that of the dead.

Mutilation is forbidden

The prophet (PBUH) was very shocked at the sight of the mutilated body of his uncle Hamzah after the battle of Uhud and he said: “Never yet have I felt more anger than now I feel; and when next Allah gives me a victory over Quraysh I will mutilate thirty of their dead.” But soon after this there came the revelation:

وَإِنْ عَاقَبْتُمْ فَعَاقِبُوا بِمِثْلِ مَا عُوقِبْتُمْ بِهِ وَلَئِنْ صَبَرْتُمْ لَهُوَ خَيْرٌ
لِّلصَّابِرِينَ (126) وَأَصْبِرْ وَمَا صَبْرُكَ إِلَّا بِاللَّهِ وَلَا تَحْزَنْ عَلَيْهِمْ وَلَا
تَكُ فِي ضَيْقٍ مِّمَّا يَمْكُرُونَ (127) إِنَّ اللَّهَ مَعَ الَّذِينَ اتَّقَوْا وَالَّذِينَ هُمْ
مُحْسِنُونَ (16:126-128)

“If you inflict punishment, then inflict only so much as you have suffered; but if you endure patiently, that is better for the one who hold patience. And be patient | O Muhammad | and your patience is not but through Allah. And do not grieve over them and do not be on distress over what they conspire. Indeed, Allah is with those who fear Him and those who are doers of good. (16: 126 -128)

And not only did he not fulfil his threat but he expressly forbade mutilation after every battle. Moreover, with regards fighting itself, he told them to respect the human face as being the most godlike part of the body. He said “when one of you strikes a blow, let him avoid striking the face for God created Adam in His image.

There is another Hadith

عَنْ سَمْرَةَ بِنِ جُنْدُبٍ قَالَتْ : كَانَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَنْهَى عَنِ الْمُتَلَّةِ وَيَحْتُ عَلَى الصَّدَقَةِ (المعجم
الكبير رقم الحديث 6944)

Samura bin Jundub narrated that the Prophet, (PBUH) used to forbid mutilation and encourage us to give Alms²¹¹.

عَنْ ابْنِ عُمَرَ : أَنَّ النَّبِيَّ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ نَهَى عَنِ
الْمُتْلَةِ (الطبرانى رقم الحديث 13485)

Ibne Umar said that the prophet forbade mutilation²¹².

أَنَّ رَجُلًا أَتَى عِمْرَانَ بْنَ حُصَيْنٍ فَقَالَ : إِنَّ عَبْدِي أَبَقَ
وَأَنِّي نَذَرْتُ لِنِ رَدِّهِ اللهُ لَأَقْطَعَنَّ يَدَهُ قَالَ : فَلَا تَقْطَعْ يَدَهُ
فَإِنَّ رَسُولَ اللهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَ كَانَ يَأْمُرُ بِالصَّدَقَةِ
وَيَنْهَى عَنِ الْمُتْلَةِ (المعجم الكبير للطبرانى 326)

A man ran away to Imran bin Hussain and then said: “I avowed, if Allah give him back to me I will cut his hand off. He said; do not cut his hand as the Prophet (PBUH) used to enjoin the charity and forbid the mutilation”²¹³

مَرَّ الْمُغْبِيرَةُ بْنُ شُعْبَةَ بِالْحَيْرَةِ فَإِذَا قَوْمٌ قَدْ نَصَبُوا ثَعْلَبًا
يَرْمُونَهُ غَرَضًا فَوَقَّفَ عَلَيْهِمْ فَقَالَ سَمِعْتُ رَسُولَ اللهِ صَلَّى
اللهُ عَلَيْهِ وَسَلَّمَ نَهَى عَنِ الْمُتْلَةِ (المعجم الكبير 894)

(a) Mughira bin Shubah – a companion of the prophet – passed by al-Hira when he saw a people who fixed a fox to be target and stood over them saying “I have heard the Prophet forbidding mutilation.”²¹⁴

عَنِ الْقَاسِمِ بْنِ مُحَمَّدٍ قَالَ : جَاءَتْ أَسْمَاءُ مَعَ جَوَارِي لَهَا
وَقَدْ ذَهَبَ بَصْرُهَا فَقَالَتْ : أَيْنَ الْحَجَّاجُ ؟ فَقُلْنَا لَيْسَ هُنَا

211 Tabarani Hadith no:6944

212 Tabarani Hadith no:13485 vol 12 p.403

213 Muajamekabir 894, vol.20 p.381

214 Tabarani 271, vol.24 p.100

قَالَتْ : فَمَرُّوهُ فَلْيَأْمُرْ لَنَا بِهِذِهِ الْعِظَامِ فَإِنِّي سَمِعْتُ رَسُولَ
 اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَنْهَى عَنِ الْمُتْلَةِ (المعجم الكبير
 للطبراني 271)

(b) Qasem bin Muhammad said, Asma came with her slave when she lost her sight and said, where is Hajjaj? We said, he is not here. She said, tell him to explain about these (broken) bones as I heard the prophet (PBUH) forbid mutilation.²¹⁵

أَنَّ عَمْرَو بْنَ أَبِي أَرَاكَةَ، صَاحِبَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ
 وَسَلَّمَ كَانَ جَالِسًا مَعَ زِيَادِ بْنِ أَبِي سُفْيَانَ عَلَى سَرِيرِهِ، فَأُتِيَ
 بِشَاهِدٍ أَرَاهُ مَالَ فِي شَهَادَتِهِ، فَقَالَ لَهُ زِيَادٌ: وَاللَّهِ لَأَقْطَعَنَّ
 لِسَانَكَ، فَقَالَ لَهُ عَمْرُو بْنُ أَبِي أَرَاكَةَ: سَمِعْتُ النَّبِيَّ صَلَّى
 اللَّهُ عَلَيْهِ وَسَلَّمَ " يَنْهَى عَنِ الْمُتْلَةِ ، وَيَأْمُرُ بِالصَّدَقَةِ "
 (معرفة الصحابة لأبي نعيم رقم الحديث 5076)

(c) Amr bin Abu Araka – a companion of the Prophet PBUH was sitting with Ziyad bin Abu Sufyan at his bed while a witness who lied in his testimony was brought to him. Ziyad said By Allah, I will cut your tongue. Amr bin Abu Araka said I heard the Prophet PBUH forbid mutilation and enjoin charity.²¹⁶

قَالَ عَلِيُّ بْنُ الْحَسَنِ رَضِيَ اللَّهُ عَنْهُمَا : إِنَّ بَقِيَّتُ رَأَيْتُ فِيهِ
 رَأْيِي وَإِنْ هَلَكَتْ مِنْ ضَرْبَتِي هَذِهِ فَاضْرِبْهُ ضَرْبَةً وَلَا تَمْتَلُ
 بِهِ فَإِنِّي سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَنْهَى عَنِ
 الْمُتْلَةِ وَلَوْ بِالْكَلْبِ الْعُقُورِ (الطبراني رقم الحديث 168)

215 MarefatusSahaba by Abu Naeem no: 5076 vol.14 p.271

216 Tabarani Hadith no: 168, vol.1 p.97

(d) Ali said to his son Hassan, if I am going to live, I will make my best judgment about him. If I die because of this attack, strike him and do not mutilate him as I heard the Prophet forbid mutilation even though it be a mad dog.²¹⁷

In another narration Ali was reported to have said:

أَطْعِمُوهُ وَأَسْفُوهُ وَأَحْسِنُوا إِسَارَهُ إِنْ عِشْتَ فَأَنَا وَلِي دَمِي
أَعْفُو إِنْ شِئْتُ ، وَإِنْ شِئْتُ اسْتَفَدْتُ ، وَإِنْ مِتَّ فَقَتَلْتُمُوهُ فَلَا
تَمْتَلُوا (الأم للشافعي ج 4 ص 136 ، مسند الإمام
للشافعي ص 313)

(E) “Feed him and give him drink and fasten him in a good manner. If I am going to live, I am guardian of my own blood. I will either pardon him if I wish to do so, or I will take revenge. If I die, and you kill him do not mutilate him”²¹⁸

This narration has very special significance because Ali- the fourth Caliph of Islam - after a brutal attack by ibn Miljam, was vocal and conscious enough to advise his son not to take revenge from the killer in a way that is not permissible in Islam. Moreover, he strongly told him not to mutilate.

عَنْ عَمْرَةَ بِنْتِ عَبْدِ الرَّحْمَنِ قَالَتْ : لَعَنَ رَسُولُ اللَّهِ صَلَّى اللَّهُ
عَلَيْهِ وَسَلَّمَ الْمُخْتَفِيَ وَالْمُخْتَفِيَةَ (الموطا للإمام مالك)

The shroud of the deceased is considered as sacred and important as the clothes of a living person.

Narrated Amrah bint Abdur Rahman that Messenger of Allah (PBUH) cursed the one, male or female, who steals the shroud of the deceased²¹⁹.

It shows that a person's shroud has more significance and inviolability than that of a living person's clothes.

²¹⁷ Musnad by Imam Shafie, page 313

²¹⁸ Al-Muatta vol.1 p.283

²¹⁹ Al-Mustardrak by Al-Hakim vol.1. p.541 hadith 1419

Deceased must not be reviled:

The Prophet (PBUH) said:

لَا تَسُبُّوا الْأَمْوَاتِ فَإِنَّهُمْ أَفْضَلُوا إِلَى مَا قَدَّمُوا (المستدرک
 کتاب الجنائز)

Do not revile the dead because they have reached to what they forwarded (to their deeds, actions, etc. in this world)²²⁰

In another narration the Prophet (PBUH) said:

أَذْكُرُوا مَحَاسِنَ مَوْتَاكُمْ وَكُفُّوا عَنْ مَسَاوِيهِمْ (ابوداؤد
 والترمذی)

“Mention the good deeds of your dead and cover their evil deeds”.²²¹

In Islam, Allah’s right upon His slaves if violated or not carried out might be forgiven By Him if He wishes to do so. But he will never forgive the one who violated the rights of a fellow human being. There are many Quranic verses and Prophetic sayings which suggest a person should take seriously the rights and dues of other people, as failing to do so will cause him irreparable loss on the day of Accountability. If one falls short in paying a due to a living person, he has a chance to settle it down in an amicable way. But if a dead person is reviled for no justifiable reason, then there is obviously no way to say sorry. In addition, it hurts the living relatives of the dead. This is why Islam attaches so much importance to this subject and advises its followers not to speak badly of people, even after their death.

Prohibition of sitting, leaning and walking on graves

From the viewpoint of human dignity, even after death, Islam forbids the sitting, leaning or walking on graves. This is based on a hadith.

عَنْ عَمْرٍو بْنِ حَزْمٍ قَالَ : رَأَى رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ
 وَسَلَّمَ مُتَّكِنًا عَلَى قَبْرِ فَقَالَ " لَا تُؤْذِ صَاحِبَ هَذَا
 الْقَبْرِ " (رواه أحمد)

²²⁰ Abu Dawood hadith no 4902, vol.4. p.426

²²¹ Musnad Ahmad/ Fiqhus Sunnah, vol.4. p.71 (English version)

Amr Ibn Hazm reported that the prophet, (PBUH), saw me leaning on a grave, so he said: Do not harm the dweller in this grave. ²²²

وَعَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ " لَأَنْ يَجْلِسَ أَحَدُكُمْ عَلَى جَمْرَةٍ فَتُحْرِقَ ثِيَابَهُ فَتَخْلُصَ إِلَى جِلْدِهِ خَيْرٌ لَهُ مِنْ أَنْ يَجْلِسَ عَلَى قَبْرِهِ (رواه أحمد ومسلم وابوداؤد)

Abu Hurairah reported: The Prophet (PBUH) said: It is better for one of you to sit on a glowing coal that burns through his clothes to his skin than to sit on a grave.²²³

Recovery of dead bodies:

Body recovery is the first step in managing the dead. In Islam, to assist others in times of disaster or calamity is a form of charity in general, and an obligation for some. It is not permitted for any Muslim to be buried without a funeral prayer being offered. Therefore, recovery is the first step in carrying out these obligations. Islam commands its followers to do all possible kindness to human beings, whether alive or dead. Kindness is of immense importance when a person is in dire need. Human beings deserve proper attention and care, even more so after death as they are obviously not able to support themselves. Soon After the end battle of Badr, the Prophet gave orders that bodies of the enemy killed during the battle should be collected and then buried in one single trench.

Identification

Identification of dead bodies is to be done sooner rather than later, as decomposed bodies are much more difficult to identify and may require forensic expertise in order to do this. All humans have the right to be treated with respect, even after death. However, medico legal efforts to identify an individual can sometimes conflict with the beliefs or practices of their families. For example, the family of a

²²² Shahih Muslim vol.1. p.213

²²³ Abu Dawood vol.2. p.260

deceased person may not wish to have certain medical procedures conducted on their loved one, or agree with the methods that are required for identification. Specific religious requirements for the proper handling and treatment of the body after death strongly influence a family's reaction to the need for an autopsy. Islam (Judaism in some cases) teaches that a body must be buried soon after death and does not allow voluntary autopsies because they are considered a desecration of the person. However, most religious leaders agree that there are exceptions. For example, an autopsy may be permitted if the information gleaned from it might save a life. Similarly, if foul play is suspected, an autopsy is allowed in order to help the police solve the crime.

As in most aspects of life, professionals working with human remains must be sensitive to different perspectives and try to accommodate their needs as best they can. In general, death investigators strive to respect religious wishes and to treat all human remains with respect and dignity. In addition, they make every effort to perform their duties as efficiently as possible to minimize any additional stress to the family. It is also important however to remember that investigators are primarily responsible for determining the circumstances of a death, but cultural and religious concerns may have to be kept in mind in order to understand what happened. This is especially true if a crime has been committed. In this respect, an investigator's first duty is to the deceased - to their identification and to the resolution and prevention of the conditions that caused the death. Islam, for the sake of socio-justice, considers all procedures that are aimed at bringing culprits to account as justified and necessary.

Identification of the dead is required as a death will have many religious and legal implications for Muslims. For instance, a woman whose husband's death is confirmed enjoys the right to remarry, after observing a certain period of waiting, for her marriage contract is considered dissolved.

Allah said:

وَالَّذِينَ يُتَوَقَّوْنَ مِنْكُمْ وَيَذَرُونَ أَزْوَاجًا يَتَرَبَّصْنَ بِأَنْفُسِهِنَّ
أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا فَإِذَا بَلَغْنَ أَجَلَهُنَّ فَلَا جُنَاحَ عَلَيْكُمْ فِيمَا
فَعَلْنَ فِي أَنْفُسِهِنَّ بِالْمَعْرُوفِ وَاللَّهُ بِمَا تَعْمَلُونَ خَبِيرٌ (2:234)

And those who are taken in death among you and leave wives behind – they (the wives shall) wait four months and ten days. And when they have fulfilled their term, then there is no blame upon you for what they do for themselves in an acceptable manner. And Allah is fully aware of what you do (2: 234)

عَنْ أُمِّ عَطِيَّةَ، أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: " لَا تُحْدِ
إِمْرَأَةٌ عَلَى مَيِّتٍ فَوْقَ ثَلَاثِ إِلَّا عَلَى زَوْجٍ فَإِنَّهَا تُحْدِ عَلَيْهِ
أَرْبَعَةَ أَشْهُرٍ وَعَشْرًا (سنن ابى داؤد الجزء 2 ص 260)

Umm Atiyyah reported that the Messenger of Allah said: "A woman should not mourn for any deceased person for more than three days, except in the case of her husband's death, which she may mourn for a period of four months and ten days."²²⁴

It should be mentioned that the mourning period of four months and ten days is a legally prescribed period of waiting, or Iddah²²⁵, for wives.

The issue of inheritance is also of great importance in Islam, for it has a very significant impact on the proper distribution of wealth. There are prescribed shares to be given to relatives, but the shares of heirs vary depending on the strength of relationship with the deceased. The verses of chapter 4 from 7 to 11 deal with this important topic. The Proper handling of heritage depends, first and foremost, on the scrupulous identification of the dead, or in other words, on the recognition of who exactly died.

Identification is also important to settle any debts of the dead

The Prophet said:

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ : أَنَّ النَّبِيَّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ كَانَ يُؤْتَى بِالرَّجُلِ الْمُتَوَفَّى عَلَيْهِ الدَّيْنُ فَيَسْأَلُ
هَلْ تَرَكَ لِدِينِهِ فَضْلًا ؟ فَإِنْ حَدَّثَ أَنَّهُ تَرَكَ وَفَاءً صَلَّى ،

²²⁴ In Islam, Iddah is the period a woman must observe after the death of her spouse or after a divorce, during which she may not marry another man.

وَاللَّا قَالَ لِلْمُسْلِمِينَ : صَلُّوا عَلَيَّ صَاحِبِكُمْ (البخارى
ومسلم)

Abu Hurairah reported that when the Prophet (PBUH), was informed of the death of a person, he used to ask: is anything owed to anyone? If the answer was in the affirmative, he would then ask: has anything been left to settle his debt? If something had been left he would offer the funeral prayer for him. Otherwise, he would say to the Muslims: Offer a funeral prayer for your brother.²²⁶

Identification of the dead is also necessary for implementing death rites and burial. Islam gives detailed instructions on how to carry out various rites in respect of shrouding, funeral prayers, grave digging, burials and visiting graves. Without an accurate identification of a body these rites and rituals cannot be observed.

Even offering condolences, which is very desirable in Islam, depends on identification. Offering one's condolence to someone means sharing the grief and encouraging patience. Condolences should be offered to the entire family of the deceased, old and young, men and women.

The prophet (PBUH) said:

عَنْ عَمْرٍو بْنِ حَزْمٍ عَنِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنَّهُ
قَالَ مَا مِنْ مُؤْمِنٍ يَعْزِي أَخَاهُ بِمُصِيبَتِهِ إِلَّا كَسَاهُ اللَّهُ سُبْحَانَهُ
مِنْ حَلَلِ الْكِرَامَةِ يَوْمَ الْقِيَامَةِ (ابن ماجه الجزء 1 ص
(511

Amr bin Hazm reported that the Prophet (PBUH) said: Every believer who consoles his brother on distress will be dressed by Allah in an apparel of honour on the Day of Resurrection.²²⁷

Returning the dead to the relatives

Dead bodies should be returned to the relatives, or the concerned authorities if they so demand. In a battle, when the Prophet was asked

225 ShahihBukhari, vol.2. p.805, hadith no 2176

226 Ibn Majah vol.1 p.511

227 Shahih Muslim hadith no.2305 vol1 p.314

to hand over the dead of the enemy, he said: take your fallen comrades. I do not sell dead bodies. However, Islam, in principle, suggests that people should be buried at the place of their death. As for transferring the dead body from one grave to another, it is prohibited or undesirable unless there is a valid reason for doing so, for example, if the deceased was buried without a proper wash, or the grave was damaged by a flood or damp.

According to the Maliki School, it is permissible to move a body before or after burial for a genuine reason, for example, when relatives want to bury the deceased near to their home so that they may visit it more easily. Visiting graves is a desirable act.

عَنْ ابْنِ بُرَيْدَةَ عَنْ أَبِيهِ قَالَ قَالَ رَسُولُ اللَّهِ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - نَهَيْتُكُمْ عَنْ زِيَارَةِ الْقُبُورِ فَزُورُوهَا
(صحيح مسلم رقم الحديث : 2305)

Abdullah in Buraidah reported that the Prophet (PBUH) said: I had forbidden you to visit graves but now you may visit them.²²⁸

عَنْ أَبِي هُرَيْرَةَ قَالَ زَارَ النَّبِيُّ - صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ - قَبْرَ أُمِّهِ فَبَكَى وَأَبَكَى مِنْ حَوْلِهِ فَقَالَ اسْتَأْذَنْتُ رَبِّي فِي أَنْ أَسْتَغْفِرَ لَهَا فَلَمْ يُؤْذَنْ لِي وَاسْتَأْذَنْتُهُ فِي أَنْ أَزُورَ قَبْرَهَا فَأُذِنَ لِي فَزُورُوا الْقُبُورَ فَإِنَّهَا تُذَكِّرُ الْمَوْتَ (صحيح مسلم رقم الحديث : 2304)

Abdu Hurairah reported: “The Prophet (PBUH) visited his mother’s grave and cried and everyone there cried with him. Then, the Prophet (PBUH) said: I sought my Lord’s permission to seek forgiveness for her but he did not permit me. Then, I sought permission to visit her grave and He permitted me to do this. You should visit graves, because they will remind you of death.²²⁹

There are cases during the era of the prophet’s companions when that deceased were transferred from one town to another. The bodies of

228 Shahih Muslim, hadith no2304, vol.1 p.314

229 Fiqhus Sunnah by As-SayyidSabiq vol.4 p.79 (English version)

Saad bin AbiWaqas and Sai'd bin Zaid were transferred from Aqiq to Madinah and the body of Abdur Rahman bin Abu Bakr was carried from Abyssinia to Makkah where he was buried.²³⁰

To hand over the dead, if requested, and to move the body, for a genuine reason is therefore very much in line with the spirit of Islam, its general rules and goals. Moreover, as Muslim countries are signatories to the Geneva Conventions, to act upon those agreements is recommended by the Shar'ah, because they are in accordance with the humanitarian principles laid down in Islam.

Burial of the deceased

All humans have the right to be treated with respect, even after death. All Muslims, rich, poor, king or commoner are all buried following the same procedure. The deceased person must be buried very quickly to avoid decay.

It is permissible to bury the dead anytime during the day or night. The burial will save the dead from being eaten by various beasts and birds and will prevent its stench from fouling the atmosphere. The grave must be deep enough for a man's height or for half of the average height of a man.

Allah the Almighty said:

أَلَمْ نَجْعَلِ الْأَرْضَ كِفَاتًا (25) أَحْيَاءً وَأَمْوَاتًا (77: 25-26)

“Have We not caused the earth to hold within itself the living and the dead”. (77: 25-26)

The first incident of murder shows us how important it is in the sight of Allah to bury a dead body. Allah says:

فَبَعَثَ اللَّهُ غُرَابًا يَبْحَثُ فِي الْأَرْضِ لِيُرِيَهُ كَيْفَ يُوَارِي سَوْءَةَ
أَخِيهِ قَالَ يَا وَيْلَتَا أَعَجَزْتُ أَنْ أَكُونَ مِثْلَ هَذَا الْغُرَابِ فَأُوَارِيَ
سَوْءَةَ أَخِي فَأَصْبَحَ مِنَ النَّادِمِينَ (5:31)

Then, Allah sent a crow searching in the ground to show him how to hide the disgrace of his brother. He said, O woe to me, Have I failed

²³⁰ Darqutni vol.2 p.473

to be like this crow and hid the disgrace of my brother. And he became regretful. (5:31)

The prophet (PBUH) said:

عَنْ عُمَرَ بْنِ عَبْدِ اللَّهِ بْنِ يَعْلَى بْنِ مُرَّةَ التَّقْفِيِّ عَنْ أَبِيهِ قَالَ
سَمِعْتُ يَعْلَى بْنَ مُرَّةٍ يَقُولُ سَافَرْتُ مَعَ رَسُولِ اللَّهِ صَلَّى اللَّهُ
عَلَيْهِ وَسَلَّمَ غَيْرَ مَرَّةٍ فَمَا رَأَيْتُهُ يَمُرُّ بِجَبْقَةٍ إِنْسَانٍ فَيُجَاوِزُهَا
حَتَّى يَأْمُرَ بِدَفْنِهَا لَأَ يَسْأَلَ أَمْسَلِمٌ هُوَ أَمْ كَافِرٌ (الدارقطني ج 2
ص 473)

Umar bin Abdullah bin Yala reported his father saying that I heard Yala bin Murrah saying that he travelled with the Prophet, PBUH, more than once. He had never seen him passing by any human dead body without commanding that it be buried, without questioning whether the person was Muslim or non- Muslim.²³¹

Some important things to know regarding the dead in Islam

- The body of the deceased person must be prepared for burial, washed and shrouded and a funeral prayer must be offered for him.
- The shrouding the dead body is a collective obligation, even it be with just one piece of cloth.
- The shroud should be nice, clean, and large enough to cover the entire body, white and preferably scented and perfumed (Tirmidhi, Ibn Majah, Musnad Ahmad).
- It is not permissible to use silk cloth for a male, nor for a female.
- A funeral prayer for the deceased is a collective obligation or FardhKifyah. It is a very rewarding worship too.
- A single funeral prayer can be offered for a number of bodies. They should be placed in separates rows with the best among them nearer to the Imam.

231 Al-Sira Al Nababiya Ibn hisham vol.3,p155

- It is permissible to bury more than one body in one grave, if there is scarcity of graves compared with the number of corpses.
- It is undesirable to transfer a body from the place of death to another city or country, according to the Hanafi School. There is, however, some scope of doing so according to the Maliki School.
- It is not permitted to sell a dead body
- Within Islam, desecration of the enemies dead was forbidden by the Prophet Muhammad himself. When warriors mutilated dead Muslim soldiers during one battle, Muhammad (PBUH) commanded his soldiers not to do the same. At another battle, the opposing army offered to pay Muslims for the return of one of its famed warriors. The Prophet Muhammad, (PBUH), responded, “I do not sell dead bodies. You can take away the corpse of your fallen comrade”.²³²
- If a pregnant woman dies with her baby alive in her stomach, it will be necessary to cut open her body and remove the baby. However, if the baby was also dead, it will not be permitted to cut open her body.²³³
- Carrying out post-mortems on the dead, without an extremely valid reason is not allowed in Islam, because it causes the dead a great degree of desecration.
- If more than half of the Muslim’s body is found, then it should be washed and funeral prayers offered for it.

All major religions, human values and customs strongly advocate for human dignity to be respected. Human dignity is inviolable and sacred, whether alive or dead. Any act that causes desecration of the dead is condemned and prohibited in Islam. Mutilation, tampering with the dead, or any other form of desecrating the body is a heinous crimes. These acts are in violation of all religious teachings and international humanitarian law. In Islam, great importance is given to washing the body of the deceased, shrouding it with a cloth, offering prayers for it and finally burying it. These all things that are

²³² Al-Fatawa al-Hindiyya and Fath Al-Qadir

²³³ See for details GC I, Arts. 19-20, GC II, Arts. 16-17, GC III, Arts. 122-125, GC IV, Arts. 26, 136-141, AP I, Arts. 32-34, CIHL, Rule 117.

considered fardhKifaya, or a collective obligation. International Humanitarian law regarding dead body management are true reflections of all religious and human values.

4. DRAWING A PARALLEL BETWEEN RESPECT FOR THE DEAD IN ISLAM AND IN IHL

- **Mohammad Azharul Islam**
- **Maulana Obaid Ullah Hamzah**

In the previous two chapters we endeavoured to illustrate how international humanitarian law (IHL) and Islam ensure respect for the dead. It is evident that under both IHL and Islam, dead people enjoy special protection and reverence: from identification to disposal. This does not, however, necessarily mean that both Islam and IHL share an identical set of values and rules. In this section of the paper we intend to conduct a comparative analysis of how IHL and Islam ensure respect for the dead.

4.1 SEARCH FOR THE MISSING²³⁴

Under the current IHL framework, parties to an international armed conflict (IAC) must devise and take all feasible steps to elucidate the fate of a missing person. The underlying motivation for this obligation is the value attributed to the victims of conflict, the need to protect the family unit and the importance of reinstating communications between family members. Having endorsed the right of the family to know the fate of their missing members, IHL attempts to ensure that steps are taken which will allow them to be notified about the whereabouts of their kith and kin, and where necessary to assist with the grieving process.

In order to effectuate the right of families to know the whereabouts of their missing members, IHL obliges parties to a conflict to search for persons who have been reported missing. When the missing are found, protective provisions become applicable. Where the individual is not found alive, respect for the dead provisions become operational.

Searching for the missing is also an imperative in Islam. In Islam a missing person is considered alive until it is proved otherwise. There

²³⁴ See for details GC I, Art. 15, GC II, Arts. 18, 21, GC IV, Art. 16, AP I, Arts. 17, 33, CIHL, Rule 112.

are many rulings on this which have relevance to property, financial transactions and family systems. In Islam, urgency is required, if circumstances permit, when searching for the missing, in order to help alleviate suffering. In Islam if anyone saves the life of one it is as if he has saved the life of the whole of mankind.

Allah said:

because of that , We decreed upon the children of Israel that whoever kills a soul unless for a soul or for a corruption (done) in the land – it as if he had slain mankind entirely and whoever saves one – it is as if he had saved mankind entirely (al Quran 5: 32)

Search for and Collection of the Dead²³⁵

In order to prevent the dead from being despoiled and to ensure a decent disposal of the body, different provisions of the four Geneva Conventions, Additional Protocols and Customary International Humanitarian law impose very strict obligations on the parties to a conflict. One such obligation is to search for and collect the dead without any adverse distinction between people.

Similarly, the collection of the dead is the first step towards carrying out all Islamic obligations towards a fellow human being after their death. For instance, it is not permitted for any Muslim to be buried without a funeral prayer being offered. Moreover, soon after the end of the battle of Badr, the Prophet gave orders to collect the dead from the battlefield and to bury them before they were despoiled.

4.2 RESPECT FOR THE DEAD²³⁶

Bearing in mind the historical atrocities and outrages upon personal dignity, such as mutilation of the dead, IHL stresses the construction of an effective protective regime with the objective of preventing inhuman, humiliating and degrading treatment of the dead, including pillage and sacrilege.

Similarly, it is an Islamic religious command to show respect for the dead, irrespective of the religion of that person. The Prophet

²³⁵ See for details, GC IV, Art. 16, AP I, Art. 34, AP II, Art. 4.

²³⁶ See for details, GC I, Art. 15, GC II, Art. 18, GC IV, Art. 16, AP II, Arts. 4, 8, CIHL, Rule 113.

Muhammad himself gave a marvellous example when he stood up for the funeral procession of a Jew. He, even, told his companions to do the same for any funeral procession. In fact, this conduct of the Prophet, along with his command, shows that human dignity should be upheld, even after death, regardless of one's religious identity. Islam strongly prohibits the mutilation of the dead. It is prohibited to tamper with, cut, dishonour or break the bones of a corpse. In Islam, a crime against a dead person is similar, in terms of the level of sin, as a crime against a living person. The Prophet said in a hadith narrated by Ibn Maja that breaking a dead person's bone is similar in sin to breaking it when he was alive. It proves beyond doubt that a human being is entitled to respect for their dignity, even after death.

Protection of the Dead against Despoliation²³⁷

Respect for the dead includes protection from despoilment. To ensure despoilment is prevented, IHL requires the parties to a conflict to take immediate measures to prevent this. Likewise, Islam advises followers, in all circumstances, to take measures to protect dead bodies from being despoiled. This is why in Islam, it is recommended that the dead are buried as soon as possible.

Identification of the Dead prior to Disposal²³⁸

After collecting the dead, but before disposing of them, parties to the conflict must collect various types of information, including name, date of birth, date and place of death and particulars regarding any wounds, illnesses or cause of death that could be used to identify the body. This obligation is imposed on the parties to a conflict to ensure that a decent burial, in accordance with the dead's convictions, can be carried out and that the remains and personal effects of the deceased can be returned to the country of origin.

In Islam the dead should be identified before burial. Moreover similar information as was mentioned in the preceding paragraph should be collected. In Islam, no crime should go unpunished. For the sake of socio-justice, it is necessary to know who committed a crime and who the victim was. There are also many Shraiah rulings that can

²³⁷ See GC I, Art. 16, GC II, Art. 19, CIHL, Rule 116.

²³⁸ See for details, GC I, Art. 17, GC II, Art. 20, GC III, Arts. 17, 120, 121, GC IV, Art. 131.

only be finalised after the verification of this information. For instance, if the victim was a married man, his widow should start her waiting period from the date of his death. Moreover, the information may also have an impact on inheritance and divorce.

Examination of the Body²³⁹

Upon finding a body IHL dictates that a thorough medical investigation be undertaken by a qualified doctor, or in the absence of a doctor by the most eligible veteran and accomplished officer present, to check for any signs of life. Where there are no signs of life the examination should proceed to establishing the cause and time of death. Additionally, IHL obliges the parties to a conflict to conduct an inquiry into the circumstances of the death and to punish those found responsible under the applicable law. Such an examination is permitted in Islam as no crime is allowed to go unpunished.

Issuance of Death Certificates²⁴⁰

As death certificates incorporate information about the circumstances of death, disposal of the body and location of remains, IHL requires the issuance of these certificates in order to resolve many civil law issues. Such a certificate is also highly recommended in Islam as it will facilitate relevant rulings on inheritance, divorce and waiting periods. Islam has advised that daily transactions, such as lending and borrowing, be written and be witnessed by two signatures, in the longest verse of the Quran. It follows that an issue related to a death deserves even more precautions.

Return of the Remains of the Dead²⁴¹

As a result of diverse wishes and cultural practices related to the transportation of remains IHL recommends the establishment of an Official Grave Registration Service to facilitate transportation to the home country and ensure that in so doing the remains are protected from any sort of ill treatment or disrespect. In general, Islam advises its followers to bury the dead at the place of death, thereby not

²³⁹ See for details GC III, Art. 120, GC IV, Arts. 129, 138 AP I, Art. 33.

²⁴⁰ See for details GC I, Art. 17, GC III, Art. 120, AP I, Art. 34.

²⁴¹ See for details GC I, Art. 16, GC II, Art. 19, GC III, Art. 122, GC IV, Art. 139, AP I, Art. 34, CIHL, Rule 114.

encouraging the transportation of remains to the home country. However, according to the Maliki school of thought, there is no harm in transporting body home, if the family so desires.

Return of the Personal Effects of the Dead²⁴²

Recognising the sentimental and emotional attachment the family of a deceased may put on the objects in the possession of the deceased, IHL imposes stringent obligations on the belligerents to carefully return such objects, in sealed packets, accompanied by identity information of the deceased and an inventory of contents. In Islam, all personal belongings of the deceased must be handed over to the legitimate guardian and heirs. "Indeed, Allah commands you to render trusts to whom they are due. "(4:58)

Since wills or bequests carry obligatory status in the distribution of the estate of the deceased, these must also be returned with extreme care. Allah said: prescribed for you when death approaches any one of you if he leaves wealth is that he should bequest for the parents and near relatives according to what is acceptable - a duty upon the righteous. (2:180)

4.3 DISPOSAL OF THE DEAD²⁴³

Under IHL, belligerents are obliged to take proper steps to dispose of the dead honourably and in accordance with the wishes of the deceased. Similarly, disposal of the dead is an obligatory act, a collective duty, in Islam. In Islam, however, the only way to dispose of the dead is through burial, as after the first incidence of murder Allah taught mankind, through a crow, that dead human beings must be buried. Umar bin Abdullah bin Yala reported that his father had said that he had heard Yala bin Murrah say that when he travelled with the Prophet, PBUH, he had never seen him passing by any human dead body without commanding that it should be buried, regardless of the religion of the corpse. While IHL offers a clear preference for burial it does permit cremation where health, hygiene, religious convictions or personal wishes of the deceased would justify cremation. Islam does not forbid the followers of other religions from

²⁴² See for details GC I, Art. 17, GC II, Art. 20, GC III, Art. 120, GC IV, Art. 130, CIHL, Rule 115.

²⁴³ See for details GC I, Art. 17, GC III, Art. 120, GC IV, Art. 130, AP I, 34, CIHL, Rule 115.

disposing of the dead according to their religious convictions, however, a Muslim is not allowed to observe rites and rituals that are not approved by the Islamic Shari'ah. Islam does not consider that cremation is befitting of human dignity, as the Qur'anic verses show, it was with fire sent from heaven that Allah destroyed the rebellious people. Therefore burning a person in Islam is considered a form of punishment.

Generally, IHL requires the parties to the conflict to dispose of the dead individually i.e. individual graves and individual cremations. However, a realistic topography of the battlefield, fuelled by military or climate considerations, permits the collective disposal of bodies where necessary. Similarly, in Islam it is preferable to bury each dead in one grave, but there is no harm to bury the dead in collective graves when circumstances require this. The Prophet (PBUH) gave the order to bury the fallen soldiers of Makkah in a collective grave.

To prevent hasty burials as well as to facilitate visits to the graveyard, or cemetery, IHL emphasises the importance of grouping graves according to nationality. While there is nothing in Islam to prohibit the grouping of graves according to nationality, Islamic teachings do not place much significance on doing this.

Respect for and Maintenance of Graves²⁴⁴

Respect for the dead in no way excludes respect for and maintenance of graves. Under IHL parties to the conflict are obliged to devise both active and passive measures to strengthen the web of absolute and unqualified respect for graves, by protecting them from all forms of profanity and sacrilege. Moreover, if the home country of the deceased agrees to meet the expenses of the maintenance of the graves the high contracting party in whose territory the gravesites are situated are under a very strict obligation to maintain them. From the viewpoint of human dignity after death, Islam forbids the sitting, leaning or walking on graves. This is based on a *hadith* reported by Amr bin Hazm who said: "*The prophet, peace be upon him, saw me leaning on a grave, so he said: Do not harm the dweller in this grave.*" (Musnad Ahmad) Abu Hurairah reported: "*The Prophet, peace be upon him, said: It is better for one of you to sit on a glowing coal that burns through his clothes to his skin than to sit on a grave.*" (Ahmad, Muslim and Abu Dawood)

²⁴⁴ See for details GC I, Art. 17, GC III, Art. 120, GC IV, Art. 130, AP I, Art. 34.

Marking of Graves and Access to Gravesites²⁴⁵

Access to gravesites is essentially related to paying homage to the deceased and to performing religious rituals. Comprehending this psychological need of the family of the dead, IHL directs belligerents to mark graves by inscribing the name, date of birth, special symbols and reference number on the gravestone, or cross, in a durable fashion, so that the grave can be identified. Moreover, administrative mechanisms should be devised to allow access to the gravesites. In Islam it is permitted to mark graves so that relatives, and well-wishers, of the deceased can visit. Visiting graves and praying for the eternal peace of the deceased is an act of worship. The Prophet told his companions to visit the graves as it reminded one of the life in the hereafter and the inevitable fate one is going to meet. Visiting the grave will be easier if it is marked and the location is properly recorded. If the location of graves is not properly recorded marking of graves, and the right to access to gravesites will be futile. Moreover, in Islam the sanctity of a graveyard should be strictly observed. To keep it safe from any possible violation, it is better to record the location of the graves.

Identification of the Dead after Disposal²⁴⁶

Under the IHL regime, the Official Graves Registration Service should maintain an up-to-date record of all graves, in order to facilitate a request for exhumation and transportation of remains to the home country. Often such a request will be a result of an administrative policy or be designed to assist relatives to visit the grave. Visiting graves to pray for the salvation of the deceased is a rewarding act of worship in Islam.

This discussion makes clear that Islamic legal principles and IHL related to human dignity are mutually reinforcing. Human dignity is so revered that even after death basic protections and respect subsist. There are of course some occasions where there is divergence in views between IHL and Islamic scholars. The underlying cause of this is attributable to the fact that while Islam is a revealed religion and a comprehensive code of life applicable in each and every sphere of life, IHL is a product of noble human efforts, especially applicable during armed conflict.

²⁴⁵ See for details GC I, Art. 17, AP I, Art. 34.

²⁴⁶ See for details GC I, Art. 17, AP I, Art. 34.

5. BIOGRAPHY OF THE AUTHORS

Short Biography of **Mohammad Azharul Islam**

Mohammad Azharul Islam is currently an Assistant Professor in the Department of Law, University of Dhaka, Bangladesh. He graduated with an LL.B. and an LL.M. from the University of Dhaka. He teaches International Law and International Humanitarian Law at the University of Dhaka. In addition to the University of Dhaka, he has taught at many universities as adjunct faculty. He has been awarded many prestigious accolades and scholarships for his outstanding academic results. His research interests include International Law, International Humanitarian law, Legal Philosophy, Constitutional Law, Islamic Law and Commercial Law. He has lectured extensively on International Humanitarian Law and Islamic Law at various universities in Bangladesh. He is an enrolled advocate of the Dhaka Judge Court, Bangladesh. He serves as a member of the Shariah Supervisory Board of a few Conventional and Islamic financial institutions and social enterprise. He is involved with a few research organisations. He has worked as a consultant in various projects initiated by the International Committee of the Red Cross (ICRC). Moreover, he also worked as a consultant for the Bangladesh Bar Council. He has participated in different training programs on International Humanitarian Law in Bangladesh, India and Nepal. He has also worked as a resource person for the ICRC. His articles have featured in leading research journals.

Short Biography of **Maulana Obaid Ullah Hamzah**

Maulana Obaid Ullah Hamzah is a Professor of Qur'anic Sciences and Islamic Economics at Al Jameah Al Islamiah Patiya, Chittagong, Bangladesh. He has completed his Masters on Islamic Studies (Dawra-e-Hadith) from Al Jameah Al Islamiah Patiya, Chittagong. He stood first class first all over the country in Qwami Madrasha Education board in 1992. He has further completed a Master's degree on Islamic studies from Darul Ihsan University Bangladesh. He attended an Arabic language course organized by Imam Muhammad Bin Saud University, Riyadh, Kingdom of Saudi Arabia and obtained the highest mark among the participants.

Maulana Obaid Ullah Hamzah started his career as a Muhaddith at Jamia Darus Sunnah Nihla, Teknaf in Cox's Bazar district. Later, he was appointed to teach at an Islamic Centre, Zulfi, Riyadh, by the Ministry of Religious Affairs, Saudi Arabia. He then moved to the Ministry of Defence and Aviation, Kingdom of Saudi Arabia to work as an Interpreter at the Military hospital Riyadh. Since 2001, he has been working as a Professor at Al Jameah Al Islamiah Patiya, Chittagong. Currently, he is the Editor of a periodical Arabic magazine Balag-ash-Sharq and Assistant Editor of a renowned monthly Islamic magazine At-Tawheed, published in Chittagong. He is a Member of Shari'ah Supervisory Committee of Social Islami Bank Bangladesh Ltd. In addition, he is Khatib of Central Mosque at Haliashohor Chittagong. He is also affiliated with many socio-cultural organisations and educational institutions in Bangladesh.

Maulana Obaid Ullah Hamzah participated in many seminars and workshops on Inter-faith dialogue, International Humanitarian Law, Dawah and Islamic Economics held in Saudi Arabia, U.A.E, Oman, Pakistan, Thailand, Lebanon and South Africa. He has to his credit several books on Women's rights and status, the Qur'an and modern sciences and Islamic Economics. His research articles are widely published in leading English dailies and monthly journals in Bangladesh. He has also taken part as a facilitator in a number of ICRC organised programmes.

ANNEXURE 1

- 81A Date is specifically important for the purpose of civil law, namely determination of heirs, distribution of property, regulation of marital matter and so on. See note no. 37, p.164.
- 134A The opening sentence of Article 3 of AP I reads '[w]ithout prejudice to the provisions which are applicable at all times...'. So, construction of this sentence reveals that some provisions of IHL apply even beyond the armed conflict. The ICRC Commentary divides provisions into different categories and it is discernible that the provisions on missing and dead persons (AP I, Art. 33 and 34), return of dispersed families (AP I, Art. 74), repression of breaches of Protocol I (AP I, Art. 85) and mutual assistance in criminal matters (AP I, Art. 88) belong to the category of those provisions which may continue even beyond the termination of armed conflict. On the other hand, in case of non-international armed conflict, the picture is different. Common Article 3 to Four Geneva Conventions and Art. 8 of AP II applies only to situations reaching the threshold of a non-international armed conflict, these provisions have no application beyond the armed conflict. See note no. 4, pp. 363-365.
- 165A Access to gravesites has to be ensured by certain competent authorities. A plain reading of the provisions on gravesites reveal that these are generally addressed to the 'Parties to the conflict' (Art. 17, GC I, Art. 20, GC II) or to the 'detaining authorities' or 'Detaining Power', respectively (Art. 120, GC III, Art. 130, GC IV). It is noteworthy to mention that neutral countries can also play the role of detaining powers. As for instance, Soviet soldiers captured in 1982 by opposition movements in Afghanistan were eventually interned in Switzerland. See Marco Sassòli, 'Internment' in Rüdiger Wollfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition available at: www.mpepil.com (last visited 30 January, 2009) quoted in note no. 4, p.362. However, Article 34 of AP I substantially amplifies the circle of addresses since its obligations are addressed to the 'High Contracting Parties in whose territories graves and [...] other locations of the remains of persons [...] are situated. Thus, it is not essential for the state concerned to be a party to the conflict or a detaining authority or power. Consequently, this broader *ratione personae* concept, as one author observes, maintains congruency with the intention pursued by Article 34 of AP I, namely to bridge the protection gaps left by the GCS regime. See note no. 4, p. 362.
- 193A Legal debates with regard to human remains or war cemeteries arise not only during armed conflict, or at the time of death of an individual or at the time of construction of gravesites, but also decades later. Legal question may be relating to the maintenance of gravesites, construction of conflicting project, transfer or removal of war memorial, excavation of collective graves to ensure individual burial. This debate is fuelled by the evolving character of law which as a natural corollary, applies to IHL as well. In the backdrop of this legal intricacy, the question which haunts the concerned authorities is which norms of IHL, past or present shall prevail to regulate the aforesaid issues. The doctrine of intertemporal law as devised by Arbitrator Max Huber in the leading case of *Island of Palmas* (United States of America vs. The Netherlands, 1928) acts as a beacon to decide the aforesaid issue. In the words of Arbitrator Huber, "a juridical fact must be appreciated in the light of law contemporary with it, and not of the law as in force at the time when a dispute in regard to it arises or falls to be settled". Since most situations regarding human remains or war cemeteries or gravesites cannot be qualified as past/completed acts, they are necessarily of a continuing or ever present nature. This continuing or ever present nature of the above facts facilitate the application of intertemporal law which requires contemporaneity between fact and law and thus directs that the IHL in force today will be applicable to those facts. See note no. 4, pp.365-367.



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