

*Dead body management in armed conflict:
paradoxes in trying to do justice to the dead*

Dead body management in armed conflict:
paradoxes in trying to do justice to the dead

International legal framework, recent
developments, and future perspectives for
a general duty of care for the dead

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To the people in South Sudan, who continue to face violence, and to my friends and colleagues in Malakal, who work to mitigate the effects of this war. Special thoughts go to Joseph Pio and Francis Jeremiah Shuei Dii, for their dedication to restoring some dignity to the dead.

Preface

The choice of topic for this paper was born when I worked for the UN peace-keeping mission in South Sudan during the outbreak of a violent crisis in December 2013. Shocked by how the dead bodies of civilians and combatants were left to the elements, I looked into the rules and regulations for handling the dead in wartime and set up a system of body collection, burial and registration. This worked well, and my colleagues and I were able to put many bodies to rest. Yet in the process it became apparent that there was little recognition for the importance of managing the dead and minimal institutional support for the task. This experience and the subsequent research, of which this paper is the result, demonstrated to me that despite all the (infra-legal) manuals, philosophical writings, conventions, declarations, exhumation reports, best practice documents and other publications, many challenges remain before the living will be able to achieve for their war dead the level of justice, dignity and humanity so ambitiously strived for in all the rules and regulations.

Table of contents

1	INTRODUCTION	1
2	OBLIGATIONS ON DEAD BODY MANAGEMENT UNDER INTERNATIONAL HUMANITARIAN LAW	3
2.1	Pre-WWII: the development of basic principles on the treatment of the dead in wartime	3
2.1.1	Early morality on the dead	3
2.1.2	The principle of <i>Integrity of the dead human body</i>	4
2.1.3	The principles of <i>Identification and Information sharing on identity</i>	4
2.1.4	The principle of <i>Respectful disposal</i>	5
2.1.5	Definitions and dilemmas	6
2.2	Post-WWII: dead body management rules in the Geneva Conventions and Additional Protocols	7
2.2.1	A general duty of care for the dead in conventional IHL	7
2.2.2	The 'humanization' of dead body management in conventional IHL	8
2.3	Customary IHL: new priorities in dead body management	9
2.3.1	A general duty of care for the dead in customary IHL	9
2.3.2	The 'humanization' of dead body management in customary IHL	10
2.3.3	Dead body management in IAC and NIAC	11
2.4	Recent developments	11
2.5	Conclusions	12
3	DEAD BODY MANAGEMENT IN PRACTICE: BURYING THE DEAD	13
3.1	Providing practical guidance for dead body handling	13
3.2	The manuals' relations with international law	14
3.3	The manuals' status in international law	15
3.4	Conclusions	15
4	INTERNATIONAL CRIMINAL LAW AND DEAD BODY MANAGEMENT: INVESTIGATING THE DEAD	17
4.1	Exhumation in IHL dead body management rules	17
4.1.1	Exhumation in conventional IHL	17
4.1.2	Exhumation in customary IHL	18
4.1.3	IHL dead body management and the search for missing persons	19

4.2	Exhumation as an instrument for international criminal justice	21
4.2.1	Legal framework of ICL exhumations	21
4.2.2	Professional standards for ICL exhumations	22
4.3	Compatibility of IHL dead body management and ICL exhumations	22
4.3.1	Applicability of IHL dead body management rules	22
4.3.2	Diverging objectives	23
4.3.3	Practical challenges	24
4.4	Conclusions	25
5	INTERNATIONAL HUMAN RIGHTS AND DEAD BODY MANAGEMENT: IDENTIFYING THE MISSING	27
5.1	Missing and disappeared persons in wartime: from IHL to human rights	27
5.1.1	Post-WWII: enforced disappearance as a war crime	27
5.1.2	The 'human rights revolution: enforced disappearance as a human rights violation	28
5.1.3	Through human rights more attention for the need to search for and identify the missing	29
5.2	Legal framework of human rights based handling of war dead and applicability of IHL dead body management rules	30
5.2.1	Local legal arrangements and applicability of IHL	30
5.2.2	Compatibility of human rights exhumations with IHL dead body management	30
5.3	Conclusions	31
6	DO THE DEAD HAVE RIGHTS? ETHICS AND MORALS IN DEAD BODY MANAGEMENT	33
6.1	The status of the dead	33
6.1.1	Do the dead have value?	33
6.1.2	Do the dead have humanity?	34
6.1.3	Do the dead have personality?	34
6.2	Rights & duties towards the dead	35
6.2.1	Do the dead have human rights?	35
6.2.2	Why are there duties towards the dead?	35
6.3	Repairing wrongs to the dead through dead body management	36
6.3.1	Reconnecting the dead to the living	36
6.3.2	Instrumentalising the dead	36
6.3.3	'Too late for human rights'	37
6.4	Conclusions	37
7	CONCLUSIONS AND FUTURE PERSPECTIVES	39
	BIBLIOGRAPHY	43

1 | Introduction

The handling, treatment and return of the bodies of those who died in armed conflict is regularly front-page news. The initial non-release of the remains of the victims of flight MH17, shot down flying over a conflict-region in Eastern Ukraine, caused international upheaval in late 2014; the ICRC publicly called on the parties to the conflict to respect international humanitarian law in dealing with the bodies, requiring 'all possible measures be taken to search for the dead, prevent the theft of their personal effects and hand them over to their relatives for burial.'¹ Israel and the Palestinian authorities regularly conclude agreements for the exchange of dead bodies of fighters killed on either side.² Evidence obtained through exhumation of the dead of armed conflict is used to enforce accountability for human rights violations and war crimes through international criminal tribunals. In addition, exhumation of the dead is used as a tool in the search for the missing after armed conflict. In the field of humanitarian action growing emphasis is placed on casualty tracking and casualty recording as a mechanism to map the gravity of conflicts and to put political pressure on parties in conflict.³ These examples illustrate the level of importance and potential impact of the treatment of the dead of armed conflict on international politics, conflict dynamics, and recovery and reconciliation. Despite this, the issue of the treatment of the dead in armed conflict is an often overlooked area in the study of international law. Research on the subject generally focuses on partial aspects only, such as forensic exhumation of war dead or identification of the missing.

In an attempt to provide a more holistic overview and bridge this research gap, this paper is an analysis of the development of, the current approaches to, and the future of dead body management in armed conflict in international law. In this paper, the term 'dead body management' refers to the total of rules and obligations, processes and activities related to dealing with (mass) death, including for example search, retrieval and burial, but also identification,

1 ICRC, *Ukraine: ICRC calls on all sides to respect international humanitarian law*, press release 23 July 2014.

2 See section 4.1.2, nt. 81.

3 See *Reports on the Protection of Civilians in Armed Conflict* (2012, 2013) and *Casualty Recording* (2014).

exhumation and registration of dead bodies.⁴ While deaths in natural disasters can also involve interesting legal aspects such as the search for missing persons and responsibility for the circumstances that led to the disaster, it is inherently distinct from deaths in armed conflict which is, contrary to natural disasters, entirely and directly man-made, deliberate, and unavoidably linked to social and political context. This paper focuses only on the treatment of the dead during (non-)international armed conflict.

The first section explores the development of the concept of dead body management and its underlying principles in conventional and customary international humanitarian law since the late 19th century. Moving from theory to practice, section two discusses the application of this concept and these principles through the examination of three leading field manuals setting professional standards for the handling of war dead and to what extent they follow the IHL dead body management framework. Developments in the last two decades include the use of forensic research on victims of armed conflict for evidentiary fact-finding as part of criminal investigations, and exhumation for the purpose of identification and restoring family links as part of human rights oriented response after armed conflict. These issues are discussed in sections three and four. As a last point section five looks at ethical dilemmas behind the legal rules on dead body management: what is the value or meaning of dead bodies, and are legal obligations on handling the dead of armed conflict derived from a concept of *rights* of the dead?

Dead body management as a set of rules under international law seems to slowly be shifting from being pure IHL to international criminal law and international human rights. On the one hand, this widened scope reinforces the legal and moral idea of the existence of a general duty of care for war dead. However, unresolved conceptual paradoxes inherent in the merging of these systems, lead to reduced applicability and lack of clarity on responsibility and accountability for managing the dead in armed conflict. Addressing these issues and refocusing the management of the dead of war around the dead body management rules of IHL, would help to create a more widely acceptable understanding and application of the general duty of care for the dead of armed conflict as part of the international legal framework.

4 'Dead bodies' is used as it is the most emotionally neutral and clearest term to use in international contexts (Morgan et al, p. 1). De Baets explores and then rejects terms like 'ex-humans' and 'former persons' (p. 117).

2 | Obligations on dead body management under international humanitarian law

2.1 PRE-WWII: THE DEVELOPMENT OF BASIC PRINCIPLES ON THE TREATMENT OF THE DEAD IN WARTIME

2.1.1 Early morality on the dead

How to handle dead bodies in armed conflict has been the subject of normative frameworks and moral codes since ancient history in many cultures.⁵ The rules varied depending on society and cultural beliefs, but the existence of a certain reverence for the dead human body and burial rituals are common in most moral systems. An early example of the morality surrounding war dead is Homer's ancient Greek epic *Iliad* of around 800BC, where the gods express decent burial of slain warriors as 'the due of the dead', and condemn mutilation of the body of a fallen opponent and the refusal to return the body from his family, as immoral.⁶

With the development of the norms on limiting suffering in warfare into international legal instruments on *ius in bello* from the mid-nineteenth century onwards, moral rules on the treatment of the dead in armed conflict became codified legal obligations. The earliest documents – the Paris Declaration (1856), the Lieber Code (1863), the Geneva Resolutions, Conventions and Additional Articles (1863, 1864 and 1868), the St Petersburg and Brussels Declarations (1868 and 1874) – demonstrated a growing consensus on the need to bind warfare to certain rules.⁷ Regulations specific to the treatment of the dead were introduced by the Oxford Manual on *The Laws of War on Land* (1880):

'Art. 19. It is forbidden to rob or mutilate the dead lying on the field of battle.
Art. 20. The dead should never be buried until all articles on them which may serve to fix their identity, such as pocket-books, numbers, etc., shall have been

5 Cf. John Gagné, 'Counting the Dead' on the upcoming practice of body counts in medieval times. Cf. Phyllis Palgi on cross-cultural perspectives of death. Cf. Capdevila and Voldman on the subject of war dead in the 19th and 20th century. See also Pan American Health Organisation, *Management of Dead Bodies*, chapter 4: 'Sociocultural aspects', p. 85-107. Cf also O'Brien (2012), p. 116, nt 9.

6 Homer, *Iliad*, book XXIV, 1-76 and XVI, 569-683.

7 For all these instruments cf. Schindler and Toman.

collected. The articles thus collected from the dead of the enemy are transmitted to its army or government.⁸

These articles lay the foundation for the regulation of dead body management by setting the standard in three basic principles close to what Homer described: the principle of *integrity of the dead human body*, the principle of *identification of the dead*, and related to this *information sharing on the identity of the dead*. Whether these principles can be called *legal* principles requires further study; but in any case they constitute a firm fundamental doctrine behind subsequent development of rules related to the treatment of the dead, guiding conduct and practice.

2.1.2 The principle of Integrity of the dead human body

The importance of the *integrity of the dead human body* is reflected in almost all historical and current instruments of humanitarian law that have articles on the dead and is usually framed as the positive obligation to protect the dead from robbery, mutilation, pillage and maltreatment of the dead.⁹ It is further reinforced by the Rome Statute, which defines mutilation of the dead as a war crime under international law.¹⁰

2.1.3 The principles of Identification and Information sharing on identity

These are the basis of the requirement in the early *ius in bello* instruments to establish 'Information Bureaus' or 'Inquiry Bureaus', whose function is to keep detailed information on the wounded, PoWs, and also on the dead, collect their personal belongings and items that may be used for identification such as military papers or marks of rank.¹¹ The obligation to identify the dead gains importance as legal instruments progressively require 'careful examina-

8 *Oxford Manual*, A (d), art. 19-20. Available at <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=40371257507EBB71C12563CD002D6676&action=openDocument>.

9 Geneva Convention on the Wounded and Sick (1906), art. 3-4; The Hague Convention on Maritime Warfare (1907), art. 16-17; Oxford Manual on Naval War (1913), art. 85-86; Geneva Convention on the Wounded and the Sick (1929), art. 3-4.

10 See nt. 157.

11 The Hague Conventions on the Laws and Customs of War on Land (1899 and 1907), art. 14; Geneva Convention on the Wounded and Sick (1906), art. 3-4; The Hague Convention on Maritime Warfare (1907), art. 16-17; Oxford Manual on Naval War (1913), art. 85-86; Geneva Convention on the Wounded and the Sick (1929), art. 3-4; Geneva Convention on Prisoners of War (1929), art. 76-77.

tion of the corpse' to establish identity and the issue of official death certificates.¹²

A significant leap in the development of the principle of identification is the express instruction in the 1929 Geneva Convention on Wounded and Sick to leave one half of the military identity disc¹³ on the body, thus making the *continuous* identification of bodies possible – not only the one-time identification for the drafting of a list of the fallen, but the potential to identify the individual body also in the future. It is in this same instrument that exhumation is first mentioned.¹⁴

It is important to distinguish *information sharing* as a related, but separate principle from *(continuous) identification*. Information on identity of dead persons may be known, but deliberately withheld to create insecurity and fear in a strategy of enforced disappearance.¹⁵

2.1.4 The principle of Respectful disposal

Even though most instruments mention carrying out burial or cremation as part of the obligations, the 1929 Convention on Wounded and Sick along with its twin on Prisoners of War are the first instruments to use the word *honourable* in this context. This is operationalized through specific obligations: individually mark each grave, respect and maintain grave sites, and organize a grave registration service.¹⁶ *Respectful* or *honourable burial* thus develops into a fourth basic principle of dead body management. 'Burial' should be taken here to include any form of dead body disposal; burial at land, at sea and cremation are explicitly mentioned and were at that time still allowed.¹⁷ This changes

12 The Hague Convention on Maritime Warfare (1907), art. 16-17; Oxford Manual on Naval War (1913), art. 85-86; Geneva Convention on the Wounded and the Sick (1929), art. 3-4; Geneva Convention on Prisoners of War (1929), art. 76-77. The Geneva Convention of 1906 also mentions 'examination' but does not state to which purpose.

13 Identity discs or 'dog tags' had been introduced in various military regimes from the end of the 19th century onwards. At first as single tags, which were collected to make casualty lists. The use of the double tag became standardized in military handbooks during WWI with the express purpose of leaving one disc on the dead body to enable identification at exhumation for reburial. The introduction of the double tag represents a significant step in the appreciation and application of dead body management in armed conflict, even though it is limited to the dead amongst the armed forces. Cf. O'Mara and Stansbury Haydon.

14 Geneva Convention on the Wounded and the Sick (1929), art. 3-4.

15 See section 5.1.2.

16 Geneva Convention on the Wounded and the Sick (1929), art. 4; Geneva Convention on Prisoners of War (1929), art. 76.

17 E.g. Geneva Convention on the Wounded and the Sick (1906), art 3; Hague Convention on Maritime Warfare (1907), art. 16.

in the 1949 Geneva Conventions, which set burial as the standard method in order to satisfy the principle of continued identification.¹⁸

2.1.5 Definitions and dilemmas

Even though these early instruments of IHL set the standards on the treatment of the dead in wartime, they are also the first demonstrations of ethical questions related to the handling of the dead. First of all, the instruments do not classify the dead in a clear category. What to do with the dead is not described in separate articles, but covered in articles about the wounded, sick and shipwrecked, or about PoWs, and the obligations that apply to those categories of persons *hors de combat*, apply in analogy to the dead in as far as that is practically possible, for example search and collection. Art. 76 of the Geneva Convention on Prisoners of War (1929) is exclusively about the dead, but only deceased PoWs. The only real exception is the *Oxford Manual* as quoted above. The overall lack of clarity on the categorization of the dead shows an ethical struggle within IHL on the status of the dead: is a dead person a person, or not, and what is the ethical value of the dead?¹⁹

A second, related problem is the lack of definition of 'honourable' or 'respectful'. These notions reflect the existence of a certain reverence towards the dead, such as referenced already by Homer,²⁰ but they are not well-defined in positive legal vocabulary. The notion is linked to the level of importance awarded to the dead, which varies in each culture and is an undecided point in these early IHL instruments. The absence of a definition renders it unclear what the actual *obligation* is, making application and accountability a challenge.

Lastly, the scope of these early IHL rules on dead body management is limited to *military* dead only. No reference is made to obligations regarding dead amongst the general population or non-military professionals such as humanitarian workers. Armed conflict was in those days primarily an affair of army versus army and considerations on dealing with the dead aimed in basis at keeping the war machine going: clearing the battlefield, knowing the losses, restoring confidence and morale within the ranks and with the population by providing closure through burials and ceremonies.

The early rules for managing the dead struggle with the status of the dead and the intrinsic meaning of caring for the dead, and still have a mostly functional objective aimed only at *military* dead. The achievement of pre-WWII codifications of dead body management is standard-setting on basic principles which remain normative in modern IHL, but at the same time these unresolved

¹⁸ GC I, art. 17; GC II, art. 120; GC IV, art. 130.

¹⁹ See for further discussion section 6.

²⁰ See 2.1.

struggles with ethics, meaning and functionality confine dead body management to the margins of international humanitarian law in its early years.

2.2 POST-WWII: DEAD BODY MANAGEMENT RULES IN THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

2.2.1 A general duty of care for the dead in conventional IHL

Further developments arose after WWII with adoption of the four Geneva Conventions (GC I-IV) in 1949 and the adoption of the Additional Protocols (AP I-II) in 1977, which remain to date the main sources on dead body management in armed conflict in conventional IHL.²¹ As conflicts grew in number and size from the early twentieth century onwards, as civilians were increasingly involved or directly targeted, and as humanitarian law concurrently matured,²² there was a wider recognition of the need to set clearer rules on managing the bodies of the fallen in situations of violent conflict. Compared to earlier instruments, these Conventions contain more provisions relevant to managing the dead and include more articles that are exclusively or almost exclusively about the dead. They discuss the following topics on the handling of the dead:

- Duty of care for the wounded, the sick, and PoWs and the dead²³
- Search for & collection of the dead²⁴
- Detailed instructions regarding the information to be recorded on the identity of the dead and on their belongings²⁵
- Detailed instructions regarding burial, maintenance of grave sites and grave registration²⁶

21 More recent instruments of international humanitarian law do not cover dead body management. Some human rights instruments contain references to some of the dead body management principles, but since they do not *directly* deal with dead body management they are not discussed here.

22 For a short overview of the development of IHL, cf. Schindler and Toman, Introduction.

23 GC I, art. 12; GC II, art. 12 and GC III, art. 16 have paragraphs on the duty of care for persons *hors de combat*, without mentioning the dead explicitly, but since the dead are included with persons hors de combat in other articles, by analogy it applies to them here too. GC IV, art. 16 explicitly includes the dead.

24 GC I, art. 16; GC II, art. 18; GC IV, art. 16; AP I, art. 33 (4); AP II, art. 8. See also Yves Sandoz, *Commentary to the Additional Protocols*, p. 362-363.

25 GC I, art. 16; GC II, art. 19-20; GC III, art. 120 and 122; GC IV, art. 129, 136 and 139; AP I, art. 33 (2).

26 GC I, art. 17; GC II, art. 20; GC III, art. 122; GC IV, art. 130; AP I, art. 34 (1)-(3) and 61; AP II, art. 8.

- Obligations related to the return of the dead and their belongings to their families²⁷
- Involvement and role of third parties in the management of the dead²⁸
- Reference to future investigations²⁹
- Provisions on non-combatant dead³⁰

The four basic principles set in the pre-WWII period – *integrity of the dead body, continuous identification, information sharing on identities, and respectful burial* – remain the guiding line behind these regulations. More detail is provided than in previous instruments and the overall the attention for dead body management has increased to such an extent that one could speak of a ‘duty of care’ extended to the dead in analogy of the duty of care reserved for persons *hors de combat*.³¹ Some of the articles on the duty of care for the wounded, sick, etc., explicitly mention the dead as co-beneficiaries of these obligations.³² This general duty of care is detailed as protection, respect and humane treatment, which we see reflected for the dead in the instructions on registration, burial, and the overall attention to detail.

2.2.2 The ‘humanization’ of dead body management in conventional IHL

The general provision in AP I labels this care for the dead as a *humanitarian duty*, linking it to the search for missing persons.³³ This issue of missing persons is not mentioned in earlier codifications and its consideration here illustrates the growing insight into the *human needs* for dead body management, moving away from treating it as a mostly *technical* problem as in the earlier phase. Recognition of a society’s need to mourn, of emotional and social consequences of war, but also of practical issues related to death like settling inheritance matters, are part of the growing attention for human rights and social contexts of violent conflict, a phase often referred to as the ‘humanization of humanitarian law’.³⁴ The level of detail provided by the GCs and APs on grave registration, maintenance and management is example of this trend, as is the attention for the return of dead bodies to their next of kin. These instruments also show a step towards the interpretation of dead body manage-

27 GC I, art. 16; GC II, art. 19; GC III, art. 122; GC IV, art. 130 and 139 (the latter deals with collection and transfer of valuables of ex-internees ‘to those concerned’, presumably, in case of the dead, next of kin); AP I, art. 34 (2)-(3).

28 GC I, art. 4 and 18; GC II, art. 5 and 21; AP I, art. 61.

29 AP I, art. 34 (4) b.

30 Resp. GC IV, art 16, art. 129-131, and art. 136; AP I, section III.

31 GC IV, art. 16, AP I, art. 32.

32 Cf. nt. 21 above.

33 AP I, art. 32. Cf. Sandoz, *Commentary to the Additional Protocols*, p. 350 sqq.

34 See Meron for a discussion of the phenomenon.

ment as instrumental to the achievement of justice; a development which is based on the principle of *continuous identification* of the body.³⁵

A further significant shift is the inclusion of provisions pertaining to groups of people not belonging to the fighting parties. Not only do the regulations now include some categories of civilian dead,³⁶ but groups not belonging to the parties in conflict³⁷ may be involved in dead body management as partners in search, collection and handling of the dead, and protection should be provided to these parties while engaged in this task.

2.3 CUSTOMARY IHL: NEW PRIORITIES IN DEAD BODY MANAGEMENT

2.3.1 A general duty of care for the dead in customary IHL

Through state practice and *opinio iuris*, the rules on how to treat the dead in armed conflict have found their way into customary IHL. As such, they are recognized to be binding on all states and reflect widespread application. The comprehensive study *Customary International Humanitarian Law* by Henckaerts and Doswald-beck commissioned by the ICRC (first issued 2005 and continuously updated, hereafter *Customary Law study*), even though not entirely uncriticised, retains a virtually unchallenged position as the dominant authority in this field.³⁸ It outlines the provisions that reflect the *minimum legal standards* for dead body management in armed conflict, covering the following topics:³⁹

- Search and collection (rule 112)
- Respectful treatment of dead bodies (rule 113)
- Return of dead bodies and their effects to next of kin (rule 114)
- Respectful disposal of the dead, including grave maintenance (rule 115)
- Accounting for the dead, including detailed identification and grave registration (rule 116)

The rules reflect the same main topics as codified law on dead body management and are based on the same core principles. The customary dead body management rules propagate the same general duty of care towards the dead mentioned in the GCs and APs; however, where the GCs and APs had a quite

³⁵ See sections 4 and 5.

³⁶ GC IV, art. 4 defines the 'protected persons' of art. 129-131.

³⁷ Such as neutral powers, relief societies, commercial ventures, the local inhabitants, and 'civil defence organisations', cf n. 26.

³⁸ Henckaerts and Doswald-Beck (2009), *Customary International Humanitarian Law* and Henckaerts (2005). For some critical notes on the *Customary Law Study* see Nicholls, Cryer, and Henckaerts (2010).

³⁹ *Customary Law Study*, vol I: Rules, p. 406-420, and vol. II: Practice, p. 2655-2741. For a discussion of each rule, cf. O'Brien (2012), pp 122-126.

technical approach and contained many operational instructions, the customary law rules reflect new, humanized, priorities in dead body management.

2.3.2 The 'humanization' of dead body management in customary IHL

Overall, customary law reflects a more *humanitarian* view of dead body management than previous instruments. This trend had cautiously started with art. 32 in AP I⁴⁰ and customary law shows its application in case law. The *Jenin* or *Mortal Remains* case before the Israeli High Court of Justice is a landmark case on the humanitarian character of dead body management and the basic need to respect the dead in all circumstances.⁴¹ 'Humanitarian' in this context means: to fulfill basic human needs to reduce suffering. This shift in thinking of dead body management as a humanitarian issue illustrates the advance of the notion of *humanity* in the application of laws of war, in line with the previously mentioned trend of 'humanization'. At the same time the use of the word 'humanitarian' clouds the perception of the responsibility for dead body management, which states and militarily organized bodies may take to have become the domain of humanitarian actors.⁴²

The 'humanization' leads to new priorities not of an operational, but substantive nature. The fate of the missing was a relatively small issue in the comments to the APs in 1977; the Customary Law Study however makes frequent referral in the section on the dead to rules pertaining to the missing and the right to family life (rule 117 and 105), which in turn are strongly linked to the prohibition on enforced disappearance (rule 98).⁴³ Exhumation also takes a more prominent place than before; it becomes state practice for investigative purposes, most notably in relation to the war in former Yugoslavia.⁴⁴ The additional attention for missing persons place dead body management in a somewhat different light. Whereas it was previously a matter for military on the battlefield, it now becomes the domain of human rights and criminal investigations through case law and the practice of international organizations.⁴⁵

⁴⁰ See also section 2.2.2.

⁴¹ *Jenin case (Mortal Remains case)*, Israel HCJ 3114/02, 3115/02 and 3116/02, Ruling, 14 April 2002, cf. par. 9-10 on the humanitarian character of dead body management; par. 4,7-10, and 12 on the issue of respect for the dead. Other cases are for example *Physicians for Human Rights v. the Commander of the IDF Forces on the West Bank case*, Israel HCJ 2936/02 and 2941/02, Ruling, 8 April 2002, and the *Rafah case*, Israel HCJ 4764/04, Ruling, 30 May 2004, par. 24-27 and 34.

⁴² On the humanitarian nature of dead body management, cf. also ch. 5.

⁴³ *Customary Law study*, p. 412, 414, 417-419, 421, 426.

⁴⁴ *Ibid.*, p. 2732-2734.

⁴⁵ See also sections 4 and 5.

2.3.3 Dead body management in IAC and NIAC

Another important landmark set by the *Customary Law Study* is the acknowledgement that all dead body management rules of customary IHL, save one, are applicable in both international and non-international armed conflict. This includes related rules 98 (enforced disappearance), 105 (right to family life) and 117 (missing persons). The only exception is rule 114 (return of remains to family) which cannot officially claim application in non-international armed conflicts, but there nevertheless seems to be 'growing consensus on its recognition in non-international conflict' as an application of rule 105 (right to family life), which is a universally recognized obligation.⁴⁶

2.4 RECENT DEVELOPMENTS

Interpretation and application of dead body management in armed conflict have continued to evolve in recent decades. Two developments have been the most significant driving forces in this change. The first is the practice of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, which led to a leap forward in forensic research on bodies and techniques for locating clandestine graves.⁴⁷ The second event is the tsunami in South-East Asia of 26 December 2004 which left an estimated 220.000 dead within a few hours.⁴⁸ Both developments forced the international community to deal with dead bodies on an unprecedented scale, and the progress of scientific techniques for DNA identification and locating clandestine graves, provided possibilities that did not exist before.⁴⁹ As a result, new interpretations and practice of dead body management developed.

First of all, mainly as a result of the tsunami disaster, the need was felt to develop practical tools as the translation into practice of the legal rules. Guidelines and manuals were drafted to provide direction to the non-professional in the field to responsibly and efficiently deal with large amounts of dead bodies. Secondly, the use of forensic science on dead bodies for evidence gathering in international criminal trials became a major form of dead body management. This, in turn, led to increased attention for the identification of the dead as a tool to address the problem of the missing persons, which developed into a key human rights issue. These issues will be discussed in the next sections.

⁴⁶ *Customary Law study*, p. 411-414.

⁴⁷ Klinkner, p. 334-335; Gupta, p. 109-110; O'Brien (2012), p. 114-116. For discussion on exhumation and dead body management, see sections 4 and 5.

⁴⁸ On the tsunami death toll, see e.g. http://news.bbc.co.uk/onthisday/hi/dates/stories/december/26/newsid_4631000/4631713.stm. Cf. Tidball-Binz, p. 422-433.

⁴⁹ O'Brien (2012), p. 128.

2.5 CONCLUSIONS

From the start of the codification of international humanitarian law until the present time, obligations on dead body management have developed significantly. Initially restricted to military personnel in battlefield situations and mostly operational in nature, the rules pertaining to handling the dead were limited in scope; nevertheless, the basic principles that still govern dead body management today, were coined in this first phase. With the Geneva Conventions and Additional Protocols the concept of dead body management began to shift from an operational-technical approach towards giving priority to considerations of humanity and human needs. This led to a notion of a general duty of care towards the dead, to more consideration of the needs of family, and it underlined the importance of respect for the dead body, even though this notion was not clearly defined. Dead body management was no longer exclusively a military affair, but started to take civilians and other non-combatants into account. This wider scope developed further through customary IHL into a more humanitarian perception of dead body management, with a more rights-based and justice-focused approach and practice. The development of DNA-methodologies and other techniques for locating and identifying bodies, have caused the practice of exhumations of war dead to amplify rapidly in the last two decades. In addition, disasters causing mass death led to the drafting of practical manuals for managing the dead which lean to a large extent on IHL dead body management.

3 | Dead body management in practice: burying the dead

The combination of the development of a wider scope of IHL dead body management beyond *military* dead, and the occurrence of large-scale disasters leaving thousands of civilians dead, spurred international attention for the issue of handling of the dead in situations of mass fatality, and the need for proper and practical guidance in such cases. Three manuals were produced 2004-2006 aiming to provide practical guidelines for the non-specialist for (mass) dead body handling in emergency situations: *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* (ICRC 2004, hereafter *Best Practices*); *Management of Dead Bodies in Disaster Situations* (Pan American Health Organisation (PAHO) and World Health Organisation (WHO) 2004, hereafter *Disaster Management Manual*); and *Management of Dead Bodies after Disasters: A Field Manual for First Responders* (ICRC, PAHO and WHO 2006, updated in 2009, hereafter *Field Manual*). Even though originated in IHL dead body management, and leaning heavily on its rules and principles, these manuals retain only a distant relationship with IHL on the subject of the dead.

3.1 PROVIDING PRACTICAL GUIDANCE FOR DEAD BODY HANDLING

The manuals, even though aiming at all situations of mass death including natural disaster, generally reflect the IHL principles on dead body management: individual identification, respectful treatment of the dead, restoration of family links, all emanating a duty of care for the dead in the spirit of human dignity. The overall objective of the documents is to provide 'guidelines for helping to ensure the proper and dignified management of their dead, including taking all necessary steps to aid future efforts by forensic specialists and investigators to identify them and clarify the fate of the missing.'⁵⁰

The documents provide mainly practical advice on methods and procedures, technical specifications for proper storage and burial, team organization and coordination. These are complemented by tools such as standardized

50 Tidball-Binz, p. 423.

registration forms, inventory sheets, and check lists. For practical use, the documents fulfill their aim of providing concrete, hands-on guidance.⁵¹

3.2 THE MANUALS' RELATIONS WITH INTERNATIONAL LAW

Their complementarity on a practical level is however not reflected in each document's relationship with international law. The *Field Manual* ignores international law entirely and explains its reason of existence with the necessity to prevent psychological and traumatic impact on survivors, and it relates the need to identify the dead to a legal context of inheritance and insurance issues.⁵² The *Disaster Management Manual* references international humanitarian law and a broad spectrum of human rights law as relevant to dead body management in 'human-induced'⁵³ disasters – meaning: armed conflict – , highlighting *inter alia* the right to integrity of the body, right to be buried according to religion, and the right to identification.⁵⁴ *Best Practices*, part of the ICRC's *missing persons* campaign,⁵⁵ places dead body management in the context of the right of people to know the fate of their loved ones; responsible dead body management is in this document a *sine qua non* in addressing the issue of missing persons in a context of human rights.⁵⁶ Even though the manuals were drafted in a linear development and in a collaborative initiative, they are not as coherent and complementary as they are argued to be⁵⁷ with regard to which legal framework they assign the handling of the dead.

In addition, despite this inconsistency, the manuals employ legalistic terms from IHL dead body management and its principles, such as *respectful burial*, clouding the question on the applicable legal framework further.

Lastly, the *Field Manual* claims applicability in armed conflict and natural disaster, but does not explain the make a distinction of the particularities of dealing with the dead in armed conflict, despite critical political, social and legal distinctions between the two situations and the fact that different legal regimes apply to handling the dead in each case.

51 The UN peacekeeping mission in South Sudan used the *Field Manual* to draft its own procedures for dead body management in the conflict that broke out on 15 December 2013: UNMISS Upper Nile State, *Guidelines on management of dead bodies of IDPs and combatants in and near UNMISS bases*, March 2014 (internal document).

52 *Field Manual*, p.v.

53 *Disaster Management Manual*, p. 175.

54 *Disaster Management Manual*, p. 129-152.

55 *Best Practices*, preface. Cf. also 'The Missing: Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence and to assist their families', a campaign of the ICRC since 2003. More information available at <https://www.icrc.org/en/war-and-law/protected-persons/missing-persons>.

56 *Best Practices*, p. 3-4.

57 Tidball-Binz, p. 423.

3.3 THE MANUALS' STATUS IN INTERNATIONAL LAW

The manuals respond to an existing need for guidance for the field, and the lack of coherence between the manuals' interpretations of their relation to international law does not create many practical challenges. The problem is on the *conceptual* level. These manuals are not legal instruments, yet they are applied in contexts of armed conflict where a certain legal vacuum or system collapse is not uncommon and in those situations the manuals *de facto* set the standards. They 'help to evoke and inscribe generalized, surrounding circumstances which are understood to afford international institutions conditions for their action (or inaction) in the aftermath of disaster.'⁵⁸ In this sense, the manuals are 'infra-legalities': they use legal or legalistic vocabulary, but are in fact not based on, or part of, clear law, and are in that capacity normative and standard-setting instruments 'at the edges of conventional legal sight-lines'.⁵⁹ The non-uniform interpretation by each manual of its relation with international law, the lack of clear terminology on certain key issues and the omission of the particularities of handling the dead in armed conflict (as different from natural disaster), and all this in a situation where these manuals function as standard-setting instruments, cloud perception of the fact that dead body management in armed conflict is governed by IHL.⁶⁰ And this blurred vision, in turn, negatively influences the perceived *responsibility* for dead body management, which legally rests with the parties in conflict as per the IHL obligations laid out in the previous chapter, but in practice is carried out by humanitarian organizations.

This is reinforced by another conceptual inconsistency in the manuals. Even though they make certain claims to being rights-based, they focus in fact more on *needs*: the needs of the living to reduce their trauma by managing the dead in some way.⁶¹ Whereas a rights-based approach through recognition of IHL as governing system identifies duty-bearers, a needs-based approach does not, again clouding responsibility. As a consequence, accountability becomes extremely difficult.

3.4 CONCLUSIONS

The three manuals drafted to provide operational guidance to non-specialists for managing (mass) death, are useful documents in the field. They are however unclear on their relation with international law, while at the same time, they operate as standard-setting documents in a phase of legal vacuum, and

⁵⁸ Johns, p. 187.

⁵⁹ Johns, p. 187-188.

⁶⁰ See also Johns, nt 9.

⁶¹ Johns, p. 202.

are as such operating at an infra-legal level. These conceptual inconsistencies contribute to clouding of the understanding that dead body management in armed conflict is legally governed by IHL, the *lex specialis* for such situations. As a result, designation of duties and responsibilities remain an issue in the margin; and therefore so does the discussion on accountability for violations of dead body management obligations.

4 | International criminal law and dead body management: investigating the dead

The legal rules and infra-legal manuals on *burying* the war dead having been discussed on the previous pages, this section focuses on the opposite activity: the *unburying* of the dead of armed conflict, specifically for the purpose of international criminal investigation, and how this relates to IHL rules on dead body management. The systematic application of forensic science on war dead gained widespread international attention from the mid-1990s onwards, mostly through the exhumation programmes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR).⁶² It had been a growing field of legal interest on national levels since the Argentine Forensic Anthropology Team (EAAF) in 1984, but the ICTY and ICTR were the first international tribunals since the Nuremberg trials⁶³ to use forensic investigation on war victims as a systematic methodology, which has since developed into a specific field of expertise.⁶⁴ This section examines whether such investigation on war dead is permissible under IHL, and whether the framework of IHL dead body management could be used to structure exhumations for international criminal investigation.

4.1 EXHUMATION IN IHL DEAD BODY MANAGEMENT RULES

4.1.1 Exhumation in conventional IHL

The conventional instruments of IHL contain a few points on exhumation. GC I states that one of the duties of the Graves Registration Service is ‘to allow for subsequent exhumations, and to ensure the identification of bodies (...) and the possible transportation to the home country’.⁶⁵ GC II, which deals with armed forces at sea, logically does not cover exhumations, unless dead persons are landed, in which case the regulations of GC I apply.⁶⁶ GC III speaks of the recording of ‘subsequent moves’ of bodies after burial as part of the

⁶² Klinkner, p. 334-335; Gupta, p. 109-110; O’Brien (2012), p. 114-116.

⁶³ O’Brien (2011), p. 30.

⁶⁴ Stover, p. 849; *ICTY Manual*, Introduction, p. 3-4. Cf. also Ferrlini.

⁶⁵ GC I, art. 17.

⁶⁶ GC II, art. 20.

duties of the Graves Registration Service,⁶⁷ referring to the moving of bodies from an initial to a final burial site, and to the return of bodies to family, which logically implies exhumation in most cases. GC IV emphasizes the importance of individual burial and the proper recording of identification data and of the exact location of graves.⁶⁸ This is reiterated by AP I, which mentions as one of the duties of the Parties 'to facilitate the return of the remains of the deceased (...) to the home country'.⁶⁹ The same article adds that exhumation is also permitted 'where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity (...)'.⁷⁰ AP II makes no references to exhumation.

These rules demonstrate the existence of two conflicting basic principles: the respect for and, non-disturbance of, gravesites, and a duty to exhume under certain circumstances.⁷¹ To reconcile these two principles, the first one of which is considered the general rule, exhumation is 'the subject of closer control'⁷² and is strictly limited to specific purposes as listed in the GCs: to enable identification, to return a body to his home country or next of kin, or to provide reburial in a final resting place after initial emergency burial on a temporary site. To this list, AP I adds one more reason: an 'overriding public necessity, including cases of medical and investigative necessity (...)',⁷³ which according to the *Commentary on the Additional Protocols* might include 'enquiries on war crimes and mutilations'.⁷⁴ However, the articles on exhumation as cited above focus to a much larger extent on identification, respect for gravesites and return to family. In addition, the *Commentary* also underlines that an 'overriding public necessity' to exhume, does not preclude the requirement of respect for the deceased and their graves.⁷⁵

4.1.2 Exhumation in customary IHL

Customary IHL on dead body management underscores the importance of these principles in the three rules relevant to exhumation: rules 114, 115 and 116. Rule 114⁷⁶ contains the requirement to support and facilitate the return of

⁶⁷ GC III, art. 120.

⁶⁸ GC IV, art. 130.

⁶⁹ AP I, art. 34 (2) (c).

⁷⁰ AP I, art. 34 (4) (b).

⁷¹ Sandoz, para. 1355.

⁷² Sandoz, para. 1355.

⁷³ AP I, art. 34 (4) (b); Sandoz, para. 1355.

⁷⁴ Sandoz, para. 1358.

⁷⁵ Sandoz, para. 1354-1362.

⁷⁶ This is the only rule of dead body management that cannot yet claim full customary status in non-international armed conflict, see section 2.3.3.

human remains to the home country or next of kin,⁷⁷ an obligation of means supported by rule 105 on the respect for family life. The return of bodies and the organization thereof requires time and relative peace, and is therefore most often organized some time after the events. During this phase bodies are in most cases buried,⁷⁸ the standard disposal method as per the Geneva Conventions.⁷⁹ Rule 115 on proper burial procedures and grave maintenance confirms that any other disposal method than burial should be only exceptionally applied, making disinterment an unavoidable part of the return of remains. Rule 115 confirms the 'general principle of law requiring respect for the dead and their graves'.⁸⁰

Rule 116 on accounting for the dead, through links with rule 105 on respect for family life and rule 117 on the right of families to know the fate of their loved ones,⁸¹ underscores the importance of identification of the dead, as the interpretation of the rule explains: 'one of the main purposes of this rule is to prevent the enforced disappearance of persons (see rule 98) and to ensure that they do not otherwise go missing (see rule 117)'.⁸² Identification is ideally done prior to burial; but it can be done afterward through exhumation. In congruency with conventional IHL, customary IHL rules related to exhumation emphasize the duty to identify the dead and to respect burial sites.

4.1.3 IHL dead body management and the search for missing persons

The reference in customary IHL rule 116 to the prevention of enforced disappearance and missing persons is key for the interpretation of dead body management rules on exhumation in IHL. As discussed earlier, in the Interbellum the principle of identification developed into a principle of *continuous* identification.⁸³ This became even more important in the wave of 'humanization' of international law after WWII,⁸⁴ during which the attention for the problem of missing persons grew. From the 1970s a number of landmark

77 An early example demonstrating historic morale behind this rule, is the return to Athens of the bones of fallen warriors from the Peloponnesian war in the 5th century BC (Thucydides, II.34). More recent examples are the return of the bodies Hamas fighters to their families in 2012 and 2013 by Israel (*BBC*, 2012 and *Associated Press*, 2014), and the return of the remains of 20.000 WWII soldiers from Indonesia to Japan (*Jakarta Post*, 2014). See also *Customary Law Study*, national practice to rule 114.

78 Exceptions to interim burial do occur: the first bodies of victims of the MH17 crash of 17 July 2014 arrived in the Netherlands on 23 July 2014, without interim burial having taken place. See e.g. *The Guardian*, 2014. See also *Customary Law Study*, state practice to rule 114.

79 GC I, art. 17; GC II, art. 20; GC III, art. 120; GC IV, art. 130.

80 *Customary Law Study*, p. 416. See also section 2.2.2 *supra*.

81 *Customary Law Study*, p. 417-420.

82 *Customary Law Study*, p. 419.

83 The 1929 Geneva Convention mentions exhumation in this context (see section 2.1.3).

84 See section 2.2.1.

conferences, initiatives and documents have increasingly drawn international attention to this issue. The 22nd International Conference of the Red Cross of 1973 underlined that accounting for the dead is 'a humanitarian mission';⁸⁵ in 1974, the UN General Assembly adopted a resolution calling upon parties to armed conflicts 'to cooperate in providing information on the missing and the dead';⁸⁶ Both documents refer to 'disinterment and the return of remains' of the dead of armed conflicts in the context of this identification. In 1978, the UN General Assembly requested the UN Commission on Human Rights to look into the problem of missing persons and enforced disappearance, which led to the establishment of a special working group.⁸⁷ In 1996 the International Commission on Missing Persons was established at the initiative of US President Clinton to address the problem of the missing; identification through DNA-testing of the dead is one of their main focus areas.⁸⁸ In 1992 the UN General Assembly adopted the *Declaration on the Protection of All Persons from Enforced Disappearance*.⁸⁹ A regional example is the 1994 *Inter-American Convention on Forced Disappearance of Persons*.⁹⁰ The ICRC launched a large campaign on the missing in 2003 which is still ongoing.⁹¹ In 2006, the UN General Assembly adopted the *International Convention for the Protection of All Persons from Enforced Disappearance*.⁹²

It is along these lines of a growing global consensus on the importance of the prevention of missing persons and the tracing of the disappeared, that exhumation should be interpreted in the dead body management rules in IHL: exhumation is seen as a technical instrument in the process of identification and return of the dead.⁹³ This explains why IHL dead body management only minimally provides for the possibility of criminal investigation on war dead; accountability for war crimes was not the main focus during the drafting of these rules.

85 *International Review of the Red Cross* 1974, no. 154, p. 22.

86 UNGA Res. 3220 (XXIX) 1974.

87 UN Commission on Human Rights Res. 20 (XXXVI) 1980 established the *Working Group on Enforced or Involuntary Disappearances*. See also UNGA Res. 33/173 1978.

88 See <http://www.icmp.int/what-we-do/technical-assistance/>.

89 UNGA Res. 47/133 1992.

90 OAS, 1994.

91 See <https://www.icrc.org/en/war-and-law/protected-persons/missing-persons>.

92 UN Doc A/61/488.

93 Cf. e.g. Human Rights Council Res. 10/26 2009.

4.2 EXHUMATION AS AN INSTRUMENT FOR INTERNATIONAL CRIMINAL JUSTICE

4.2.1 Legal framework of ICL exhumations

The exhumations programmes conducted by the ICTY (roughly 1996-2001) and ICTR (mainly 1995-1996)⁹⁴ were very successful. The findings were used in various trials to support evidence and helped secure many key convictions.⁹⁵ Executed under the Office of the Prosecutor (OTP) they aimed at obtaining evidence of identity of persons killed, establishing cause of death, linking primary and secondary mass graves, and revealing attempts to cover up crimes.⁹⁶ The exhumations were part of the larger investigative strategies of the OTPs and were at first carried out by non-governmental organizations, and later on by the OTPs' own specialists.

The legality of all investigations conducted in the territories, including exhumations, was established by the Tribunals' Statutes, adopted by the United Nations Security Council under Chapter VII, stipulating the primacy of the Tribunals over national courts for investigation and prosecution.⁹⁷ The ICTY's legal action radius was further reinforced by the Dayton Accord's obligation to the Parties 'to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law'⁹⁸, by 'facilitating free and unimpeded access and movement' to the investigators.⁹⁹ The 1996 Annual Report of the ICTY specifies this to include the possibility to locate and access mass grave sites and to obtain evidence from exhumations.¹⁰⁰ The International Criminal Court, not an ad hoc but a standing body, is not created under UN Chapter VII and is based on complementarity with national courts, not primacy.¹⁰¹ Like in the Tribunals, the OTP can initiate collection of evidence on the territory of a party, but in ICC the OTP must first seek authorization of the Pre-Trial Chamber.¹⁰²

⁹⁴ ICTY, *History*, available at <http://www.icty.org/sid/95>; Jessee, p. 11-13.

⁹⁵ E.g. in the *Kayishema/Ruzindana* case (ICTR) and in the *Kristić, Popović et al., Milutinović et al., Dordević, Tolimir, and Karadžić* cases.

⁹⁶ ICTY *Manual*, D (3), p. 17-18; Jessee, p. 11-13.

⁹⁷ ICTY Statute, art. 9 (2); ICTR Statute, art. 8 (2).

⁹⁸ *General Framework Agreement* ('Dayton Accord'), art. IX.

⁹⁹ *General Framework Agreement*, Annex 1A, art. II (4). Cf. also ICTY Annual Report 1996, summary.

¹⁰⁰ ICTY Annual Report 1996, par. 78-79.

¹⁰¹ Rome Statute, art. 1.

¹⁰² *Rules of Procedure and Evidence* to the Rome Statute, Rule 115 (1-3).

4.2.2 Professional standards for ICL exhumations

As such large and systematic exhumation programmes under international criminal law, the ICTY and ICTR exhumations were literally ground-breaking, including for the development of professional standards for such exhumations. However, the *Rules of Procedure and Evidence* of the Tribunals did not provide guidelines beyond general rules for investigation and evidence gathering. Guidance on handling the dead was as a result derived from practice, on the one hand stemming from evidentiary needs of the exhumation, and on the other dictated by the professional standards of the various involved technical specialists: archeologists or anthropologists oversaw the unearthing, pathologists did the analysis and police specialists ensured collection of evidence. It is therefore not surprising that the only professional standard-setting document by the Tribunals on the exhumations and handling of the dead in the framework of ICL, the *Manual of Developed Practices* (2009, hereafter the *ICTY Manual*, developed post-facto by the ICTY and UNICRI as a handbook to preserve the legacy of the ICTY for future tribunals and international criminal investigations), focusses on practical and operational challenges and only briefly touches on guiding principles of a more conceptual nature.¹⁰³ Logistics, the type of body-bags to use, cost-effectiveness, command and control structures, the need for standardized protocols for evidence handling, and clearing the exhumation area of mines and booby-traps are discussed in detail. Issues like the importance of identification, the problem of missing persons, and the return of bodies to family, are at most briefly mentioned but not operationalised.

4.3 COMPATIBILITY OF IHL DEAD BODY MANAGEMENT AND ICL EXHUMATIONS

4.3.1 Applicability of IHL dead body management rules

Firstly, as medico-legal investigative exhumations are generally carried out under Tribunals or Courts whose jurisdiction is to investigate IHL violations, the general applicability of IHL during the occurrence of the alleged violations may be assumed or is even explicitly confirmed.¹⁰⁴ Therefore the IHL dead body management rules, especially the obligations that continue beyond the end of the hostilities, apply to graves and bodies created during this conflict.

¹⁰³ *ICTY Manual*, ch D (3) 26-30, p. 17-18, and Annex 2, p. 33.

¹⁰⁴ In the ICTY's *Tadić* trial the Defense Council challenged the jurisdiction of the Tribunal to prosecute IHL violations claiming that IHL did not apply in the territory. The Appeals Chamber decided that 'an armed conflict existed at all relevant times' (2 October 1995). See ICTY Annual Report 1996, par. 30-34.

Whether it was international or non-international is irrelevant, as almost all IHL dead body management rules apply to both.¹⁰⁵

Secondly, the legal framework of investigative exhumations determines only the jurisdiction of the court to exhume and the obligation of the territory to comply.¹⁰⁶ Even if this is not in itself contradictory to IHL dead body management, which provides for the possibility to exhume for investigatory purposes, ICL could be considered the *lex specialis* in this case. However, the handling of dead bodies after evidentiary requirements are fulfilled, rules for burials, registration, underlying principles and application of the general duty of care for the dead, are not covered by the legal framework of international criminal law. IHL dead body management therefore applies as *lex specialis* in this particular area.

In the last place, professional standards and principles for handling the dead are lacking in investigative exhumation. The *ICTY Manual* does not fill this gap. It is not a legal document, but a collection of solutions found for practical challenges that arose in one specific environment. In this sense, it could be regarded as an 'infra-legal' document in the same vein as the manuals discussed in section 3: it functions as standard-setting in a legal realm, without being a legal document itself. However, IHL dead body management rules are proper legal instruments providing more of the necessary standards. Also for this reason, IHL dead body management rules are applicable to investigative exhumation of war dead.

4.3.2 Diverging objectives

At first glance, identification seems a shared objective between IHL dead body management and investigative exhumations. However, identification in ICL does not have the restoration of family links as its primary objective, but aims at establishing evidence of a connection between the deceased and the accused. In other words, 'tribunals do not exhume mass graves for humanitarian reasons but rather the purpose of exhuming the bodies of the war dead is driven by a necessity to locate evidence to forensically prove a crime.'¹⁰⁷ This may involve individual identification, but for example in cases of genocide charges, only evidence of the deceased having belonged to a specific group satisfies the identification requirements of the investigation.¹⁰⁸ Similarly, the concept of 'bringing closure' for the family as a 'humanitarian aim' of forensic exhumation¹⁰⁹ refers to a *general* sense of closure through restoration of justice, not

¹⁰⁵ See section 2.3.3.

¹⁰⁶ See section 4.2.1.

¹⁰⁷ O'Brien (2012), p. 130.

¹⁰⁸ O'Brien (2012), p. 128-129.

¹⁰⁹ Gupta, 117-118, Klinkner, p. 340-341.

individual restoration of families by returning the remains of a lost relative to them. Klinkner calls this the ‘names vs. numbers dilemma’,¹¹⁰ which correctly expresses the divergence in objectives between ICL and IHL, but inaccurately places the two legal systems in opposition: ICL’s search for factual evidence and IHL’s quest for individual identification and respect for family links can be both practically and legally complementary.

4.3.3 Practical challenges

Coordination between the various technical experts (e.g. anthropologists, dentists, botanists, pathologists), legal specialists, and police investigators is a big challenge in medico-legal investigative exhumations.¹¹¹ Confusion on the exact objectives of each specialist, lack of clarity on how the findings are given cohesion across disciplines and insufficient activity coordination is some of the criticism voiced.¹¹² As investigative exhumations aim only at evidence gathering, other organisms work on individual identification, family tracing and restoration of family links, adding to the burden of the already complex coordination structure, especially since it is the trial schedule that determines timing: ‘problems will be created if the agencies that are charged with arranging the return of bodies to families do not have sufficient resources to keep pace with mortuary work.’¹¹³

Because of this focus on evidentiary results, investigative exhumations can in addition overlook the importance of connecting with local communities where exhumations take place.¹¹⁴ The communities’ relation with bodies exhumed is a personal one, and exhumation for them may mean the start of an important process of mourning. At the start of excavations in Rwanda the investigative objectives of the forensic teams were at odds with the needs of the community, who insisted on prioritizing reburial of the bodies as part of the communities’ process to come to terms with the traumatic events, over evidentiary investigation for justice.¹¹⁵ Local people could provide valuable information for better understanding of the burial event, which can be essential for the judicial process.¹¹⁶

Complementing the international criminal law framework of investigative exhumations with IHL dead body management rules, would mitigate the above challenges. As discussed, those rules are an inclusive approach allowing for

110 Klinkner, p. 341.

111 Klinkner, p. 334, 336; Gupta, p. 110-111; O’Brien (2012), p. 127.

112 Gupta, p. 111. Cf. also *ICTY Manual*, par. 29.

113 *ICTY Manual*, par. 28. Cf. par. 26; cf. also Klinkner, p. 337, 351.

114 Gupta, p. 112; O’Brien (2012), p. 134.

115 Personal interview with Cees Verhaeren, former ICTR Substitute Director of Investigations; O’Brien (2011), p. 126-127.

116 Gupta, p. 120.

investigative exhumations, while retaining restoration of family links, individual identification and connection with the community as key values.

4.4 CONCLUSIONS

Dead body management as defined in IHL aims at individual identification, restoration of family links, and respect for the deceased and their graves. Exhumation of war dead is in conventional and customary IHL viewed as a tool or method to achieve these objectives, relating exhumation especially to the search for missing persons. Criminal justice on the other hand aims at obtaining evidence of crimes and identification to enable connecting a victim to an alleged perpetrator on trial. Even though international criminal exhumation programmes very directly and physically handle dead bodies of victims of armed conflict, and IHL was applicable during the time of creation of the graves and bodies, in general, such exhumations are not perceived as part of dead body management as standardized by IHL and the legal framework under which they are carried out, is purely based on international criminal law. The gaps this leaves are filled up by other organisations and by the use of infra-legal documents for practical guidance, leading to coordination problems and insufficient inclusion of the local communities in the excavation areas.

Closing this conceptual and practical gap between international criminal investigation exhumations and IHL dead body management on a proper *legal* level – not only through infra-legal instruments and collections of best practices –, would increase responsibility and accountability for proper coordination across the board for dealing with bodies of victims of armed conflict and for an approach more inclusive of the needs of families and the interests of local communities.¹¹⁷ And this, in turn, would be closer to achieving the core objectives of IHL dead body management.

117 Cf. also Klinkner, p. 344.

5 | International human rights and dead body management: identifying the missing

Not only international criminal law provides a framework for exhumation of war dead; disinterment and handling of war victims may also be carried out under the umbrella of human rights investigations. Such exhumations aim for identification of the dead and the restoration of family links under the human rights obligation to search for missing and forcibly disappeared. The relationship between this obligation, human rights based handling of bodies of war victims and IHL dead body management is discussed in this section.

5.1 MISSING AND DISAPPEARED PERSONS IN WARTIME: FROM IHL TO HUMAN RIGHTS

5.1.1 Post-WWII: enforced disappearance as a war crime

In any war people go missing. IHL lays down firm obligations for parties to conflict on making information available regarding the imprisoned, wounded and dead in order to mitigate this problem.¹¹⁸ The worst form of violation of this obligation is the practice of enforced disappearance: the *deliberate creation* of missing persons by withholding information on the whereabouts and fate of individuals, usually those that have been (illegally) arrested and/or executed.¹¹⁹ The 1946 Nuremberg Trials were the first international criminal tribunal to classify enforced disappearance a war crime,¹²⁰ convicting *General-feldmarshall* Keitel and eight others¹²¹ for their leading roles in the Nazi regime's state programme of enforced disappearance: the *Nacht und Nebel Erlass* (*Night and Fog Decree*).¹²² The judgments stated that enforced disappearance,

118 GC III, art. 122; GC IV, art. 26, 136; AP I, art. 33; *Customary Law Study*, rule 117.

119 For a full definition, see *International Convention for the Protection of All Persons from Enforced Disappearance*, art. 2.

120 Finucane, p. 171-172.

121 For Keitel, see International Military Tribunal Nuremberg, judgement, p. 232-233. For Schlegelberger, Rothenberger, Lautz, Mettgenberg, Von Ammon, Joel, Altstoetter and Klemm, see Nuernberg Military Tribunals, judgments, p. 1081-1178.

122 Finucane, p. 175-181. Its objective was 'efficient and enduring intimidation (...) by measures by which the relatives of the criminal and the population do not know the fate of the criminal'. International Military Tribunal Nuremberg, judgment, p. 233. Cf. also Nuernberg Military Tribunals, judgement, p. 1031-1032.

qua disappearance, was a war crime and a crime against humanity, because of its intent 'to deliberately create constant fear and anxiety among the families, friends, and relatives as to the fate of the deportees. Thus, cruel punishment was meted out to the families and friends.'¹²³ The emphasis on the harm to families indicates that the Tribunals saw enforced disappearance also as a violation of 'family rights', a tried and tested concept in the laws of war aiming to protect family units from the atrocities of war and occupation.¹²⁴

5.1.2 The 'human rights revolution: enforced disappearance as a human rights violation

This link with 'family rights' is one of the factors which in the next decades during the 'human rights revolution'¹²⁵ contributed to a gradual shift of focus of the issue of the missing and forcibly disappeared towards the human rights field. During this period, the infringements by states upon the rights of families became increasingly seen as a violation of state obligations vis-à-vis the individual and therefore a human rights problem, applicable in war and peace alike. Instruments on missing persons and enforced disappearance refer only minimally to armed conflict and place the issue almost entirely in a human rights framework.

A second influence in this process was the absence of competent international courts to judge such cases of state responsibility for missing and disappeared persons. As a result, national courts tried cases of enforced disappearance during violent conflict, but as these were not specialized war tribunals, they did so for the human rights violation of murder or kidnapping and not for IHL violations,¹²⁶ further stimulating the shift towards human rights. In the late 1980s, three cases before the Inter-American Court of Human Rights became landmarks for the development of the concept of enforced disappearance as a human rights issue. In the first one, the *Velasquez-Rodriguez case* on the disappearance of a political activist in Honduras,¹²⁷ did the court not only judge enforced disappearance *qua* disappearance a violation of the right to life, but also underlined the obligation of the state to investigate disappearances, including locating the remains of the disappeared if dead.¹²⁸ an important step to human rights based exhumations.

123 Nuernberg Military Tribunals, judgment, p. 1058.

124 Finucane, p. 178.

125 Meron, p. 44-46.

126 Finucane, p. 186-188.

127 Inter-American Court of Human Rights, *Velasquez-Rodriguez v. Honduras* (1988). The other cases were *Godínez Cruz v. Honduras* (1989) and *Fairén Garbí and Solís Corralis v. Honduras* (1989).

128 *Velasquez-Rodriguez*, para. 153-158 and 177-181.

5.1.3 Through human rights more attention for the need to search for and identify the missing

The shift of the search for missing and disappeared persons from IHL towards human rights was not necessarily a negative development. On the contrary: the contribution of human-rights-focused discourse on the missing and of instruments such as conventions, declarations and resolutions on disappearance¹²⁹ is that 'they criminalize those disappearances which do not amount to war crimes or crimes against humanity'.¹³⁰ Thanks to this, accountability for enforced disappearance is now also sought beyond wartime. This widened scope puts additional pressure on states and organizations to address enforced disappearance and to actively search for the missing. This was further reinforced in recent years by judgments of disappearance cases before human rights courts that underlined the latter obligation. For example the Inter-American Court of Human Rights judged in *González Medina v. Dominican Republic* (2012) that the lack of efforts of the state to properly investigate cases of disappearance, were a violation of the victim's family's human right to personal integrity, and ordered the state to remedy this by actively undertaking to locate the missing person or his remains, identify remains thoroughly, and return them to the family.¹³¹ Both this case and the Velasquez judgment (above) are a direct call for investigation through exhumation if needed.

This increasing sense of obligation and international pressure brought about by human rights to investigate the location of bodies of the disappeared and the missing and to ensure their identification, has led to many such exhumations both by states and by non-state organizations, sometimes carried out jointly with criminal investigations.¹³² However, while this is an important contribution to the global understanding of the importance of identification of the dead, including the war dead, the fact that its legal origin is IHL dead body management disappeared largely from view. This is for example illustrated in *Janowiec et al. vs Russia* (2013) before the European Court of Human Rights. The case deals with the obligation of Russia to investigate a case of mass death during World War II in Poland and identify remains of the victims after exhumations in 1942-1943 and in 1991, but no reference is made to IHL dead body management rules on the handling and identification of the remains.¹³³

¹²⁹ See section 4.1.3.

¹³⁰ Finucane, p. 172.

¹³¹ *González Medina case*, para. 270-278 and 287-291.

¹³² For example in Peru, Georgia, Guatemala, Afghanistan, Bosnia-Herzegovina, Iraq. See www.icrc.org; www.icmp.int; www.physiciansforhumanrights.org.

¹³³ European Court of Human Rights, *Janowiec et al. vs Russia*.

5.2 LEGAL FRAMEWORK OF HUMAN RIGHTS BASED HANDLING OF WAR DEAD AND APPLICABILITY OF IHL DEAD BODY MANAGEMENT RULES

5.2.1 Local legal arrangements and applicability of IHL

Exhumations or handling of war dead with the human rights approach of identification¹³⁴ are carried out on the basis of individual agreements for technical support between the organisation and the host country.¹³⁵ When they take place in conjunction with exhumations for international criminal investigations, the legal arrangements made by the latter¹³⁶ often already provide for the opening of the ground and unearthing of bodies. However, such arrangements only determine the jurisdiction of the court or authorisation of the human rights organization to exhume; they do not determine the prevalence of one legal regime over another with regard to the treatment of these war dead. As concluded in the previous section, the IHL rules on handling dead bodies and the basic principles behind these rules, stretch beyond the end of hostilities. If IHL was as a whole applicable during the conflict that the dead are victims of, then the graves and bodies should be governed by the IHL dead body management regime and principles.¹³⁷

5.2.2 Compatibility of human rights exhumations with IHL dead body management

As discussed, exhumation for investigative purposes is acceptable under IHL dead body management rules, including for the purpose of identification and return of remains to family,¹³⁸ which is the main objective of human rights based investigations on war dead. Human rights exhumations and IHL dead body management are therefore a much easier marriage than the latter and exhumations for international criminal law, which have, as discussed, very different purposes.¹³⁹

At the same time, the human rights regime does not provide rules for burials, registration, underlying principles and application of the general duty of care for the dead. Professional standards are set through the infra-legal

134 Exhumation for human rights is sometimes referred to as 'humanitarian exhumation' to distinguish it from exhumation for criminal proceedings (O'Brien (2012), p. 131. *Jenin* case, judgement). The word 'humanitarian' in this case does not indicate a relation to the laws of war, but should be understood as 'aiming at the fulfilment of basic needs to alleviate suffering'.

135 For examples, see <http://www.icmp.int/resources/category/documents/>.

136 See section 4.2.1.

137 See section 4.3.

138 See section 4.1.

139 See section 4.2.2.

manuals, most notably the ICRC's *Best Practices* manual, which cites the Geneva Conventions on the practical directives of how to handle the dead of armed conflict, but uses them in a dominant framework of human rights. The United Nations Office for the High Commissioner for Human Rights, also recognizing the need for further development in this area, issued a number of resolutions on forensics and human rights underlining 'the importance of dignified handling of human remains, including their proper management and disposal, as well as of respect for the needs of families'¹⁴⁰ in the process of forensic activities. Using IHL dead body management as a governing regime would fill this gap.

5.3 CONCLUSIONS

Despite the substantive overlap in purpose between dead body management under IHL and exhumations to locate and return the bodies of the missing, the practice of human rights investigations into dead bodies of armed conflict and case law do not demonstrate understanding of this close relationship. This is a similar conceptual gap as is visible in the process of exhumations under criminal law: lack of acknowledgement of the relevance and necessity to apply IHL dead body management rules to enable responding in full to the requirements set therein. Again, this leads to problems on the ground in terms of priorities and standard setting. The current application of exhumations for human rights purposes risk operationalizing the principles on the rights and needs of family, but with insufficient respect for the principles that directly pertain to the dead. Especially where human rights investigations to identify war dead are carried out jointly with or in parallel to criminal investigations on war dead, the explicit recognition and application of IHL dead body management as a framework would mitigate coordination and compatibility issues mentioned earlier. IHL dead body management provides for the possibility of criminal investigation on war dead and has identification and return to family amongst its main objectives and underlying principles. In addition, the guidelines from IHL dead body management would fill a gap on both sides and contribute to the harmonization on a practical level. Such an inclusive approach through IHL would be the best application of the principle of respect for the dead of armed conflict.

140 OHCHR Res. 2005/26 and 2003/33.

6 | Do the dead have rights? Ethics and morals in dead body management

Behind the conceptual issues in the interpretation of the applicability of dead body management as discussed in the previous sections, lies a problem of ethics and morals: what is the value of the dead in the land of the living? It is due to unresolved ethical paradoxes that the practice of dead body management for whatever purpose – criminal investigation, human rights, or simply clearing terrain after disaster or war – is not able to represent a uniform and unified interpretation of the rules.

6.1 THE STATUS OF THE DEAD

6.1.1 Do the dead have value?

Do dead human bodies possess a form of value or meaning, and what is the *nature* of this value? The very fact that rules and a sense of morality on dealing with the dead exist, indicates that the answer to the first question is: yes, the dead have value through their relationship with the living.¹⁴¹ The second question, on *nature* of that value or relationship, is less easy to answer. The underlying dilemma is whether the value of the dead is *intrinsic*, or whether it is defined by the needs of the living. If the value is intrinsic, this might imply that the dead could have rights, possibly even human rights, and a claim to the restoration of justice towards them.

IHL dead body management rules mirror this ethical struggle. The rules on return of bodies and personal possessions of the dead to family (*Customary Law Study* rule 114), the obligation to record and share information on grave sites (116), and restoration of family links (116 and 117), aim to achieve something for the home country, family or next of kin of the deceased: they fulfill needs of the living. In contrast, the rules on search & collection (112), respectful treatment of bodies (113) and respectful burial (115) concern the dead directly without reference to the living; the dead are, in a sense, the direct recipients of the duties expressed in these rules.

141 De Baets, p. 114.

6.1.2 Do the dead have humanity?

By virtue of being deceased, the dead are instruments of human action by the living which they themselves have no capacity to influence. Despite being beneficiaries of certain obligations, the dead have themselves no 'agency', no ability to shape events and move into the future.¹⁴² They lack consciousness, ratio, morality, and free will.¹⁴³ These are characteristics unique to *living* human beings. However, there are many categories of living people who also do not possess ratio or morality, such as infants, and it could be argued that the dead do in fact shape the future because of their past existence as living persons and their presence as dead bodies.¹⁴⁴ For example, the presence aboveground of scattered dead bodies after an armed confrontation between parties in conflict can constrain the living in their movements and actions, giving some form of 'agency' to the dead.¹⁴⁵ But this is a *passive* agency as it is dependent on the interpretations, opinions and responses of the living, and therefore not enough to satisfy the criterion 'agency' as argument towards possession of sufficient degree of humanity.¹⁴⁶

6.1.3 Do the dead have personality?

Even though not human, the dead are not definable as 'things' either, for it is not possible to legally or morally *own* a dead body, purchase or sell one.¹⁴⁷ In addition, the dead seem to have a lingering aspect of personality. This personality stems partly from the actions they performed and the shaping of the future they engaged in prior to death occurring; partly it is an echo from the individuality of living human beings which is considered of such fundamentality, that it is not immediately erased by death.¹⁴⁸ The search for and reaffirmation of individuality in death through individual identification is illustrative thereof, as made visible in the global concern for the missing and the customary IHL rule on accounting for the dead (116), and even in the the phenomenon of the 'tomb of the Unknown Soldier', 'a way to cope with the anonymity of death during war'.¹⁴⁹ The prior individual personalities of the dead continue to exist metaphorically through residual humanity, and therefore one might conclude that the dead 'are less than human beings, but

142 Rosenblatt, p. 930.

143 De Baets, p. 115-116.

144 Rosenblatt, p. 930; De Baets, p. 115-116.

145 Rosenblatt, p. 933.

146 Ibid.

147 De Baets, p. 115-116.

148 Ibid., p. 114, 118.

149 Ibid., p. 129.

more than bodies.¹⁵⁰ The IHL rules on dead body management underline this interpretation. The GCs place the dead in one list with the sick, wounded and shipwrecked,¹⁵¹ and the *Customary Law Study* places civilians and persons *hors de combat* under the same heading.¹⁵² Thus categorizing the dead as persons, IHL assigns to the dead a form of intrinsic individual value.

6.2 RIGHTS & DUTIES TOWARDS THE DEAD

6.2.1 Do the dead have human rights?

This intrinsic value through the possession of residual individual human personality does not mean the dead are bearers of human rights. They cannot be, because they are not human beings; they are *past* human beings. In addition, if the dead did have human rights, there would be a philosophical paradox of the dead not being able to enjoy restoration of violated human rights, since they are no more. In addition, bodies physically disappear over time, and *how much* of a dead body would have to still exist to enable a legitimate claim to human rights?¹⁵³ Therefore, the dead *are not* bearers of human rights in the sense of universal and inalienable rights; but because of their residual human personality, the dead *are* beneficiaries of duties that the living have towards them. Those duties in situations of armed conflict are expressed in codified and customary international humanitarian law on dead body management.

6.2.2 Why are there duties towards the dead?

These duties to the dead are extensions of rights enjoyed by the living, transferred onto the dead in the form of obligations of the living vis-à-vis the dead as part of their remaining humanity and the need for individuality. Examples of human rights that translate into duties towards the dead, are the inviolability of the body and the protection of individual identity. The overarching principle is that of *dignity*, which is considered an inherent and inalienable human right of the living,¹⁵⁴ foundational to human beings to such an extent that it continues to apply posthumously, as 'an appeal to respect the past humanity of the dead.'¹⁵⁵ It is easily recognized when absent¹⁵⁶; mutilation

150 Ibid., p. 118.

151 E.g. GC I, art. 15-16; GC II, art. 18-19; GC IV, art. 16.

152 *Customary Law Study*, subchapter to part V.

153 Rosenblatt, p. 942; De Baets, p. 947.

154 Universal Declaration of Human Rights, preamble.

155 Rosenblatt, p. 938.

156 Ibid., p. 935, 947-948.

of bodies or leaving bodies to be despoiled is easily identified as violated dignity. Humiliation, degrading treatment or other violations of the dignity of persons, including dead persons, can amount to the war crime of outrages upon personal dignity.¹⁵⁷ This principle of dignity is behind many of the dead body management duties, which serve to protect it.

6.3 REPAIRING WRONGS TO THE DEAD THROUGH DEAD BODY MANAGEMENT

6.3.1 Reconnecting the dead to the living

Respect for this individuality and the dignity of the dead of armed conflict, in reverence of their past as living persons and based on the foundation of residual humanity, is the main ethical principle underlying dead body management rules in IHL. Dead body management is a way of giving meaning or value to mass death – especially in situations of violence – by ‘futurising’ those who had lost claims to the future, through re-establishment of a connection with the living, expressed in the duties and responsibilities of the living to the dead.¹⁵⁸ Repairing the violations committed upon the dead against their individuality and residual humanity restores them into their ‘rights’ as past human beings.

6.3.2 Instrumentalising the dead

That the practice of dead body management in many instances fails in this, is mainly due to the partial rather than inclusive approach taken in dealings with dead bodies. The dead body management manuals take a technical view towards the presence and handling of dead bodies. Criminal investigations on the dead treat bodies as *corpus delicti*.¹⁵⁹ Human rights exhumations and identifications ultimately aim to restore individuality and dignity, but the process is technical and focuses on the rights of family more than on the dignity of the deceased. In all these approaches of dead body management, the bodies of dead human beings are given an instrumentalised functionality that is close to what one would assign objects, rather than an expression of a full appreciation of their past humanity. These processes ‘de-humanize the dead, setting them aside from the living’.¹⁶⁰ This is a paradox deeply rooted

¹⁵⁷ *Elements of Crimes of the Rome Statute*, Articles 8 (2) (b) (xxi) on IAC and 8 (2) (c) (ii) on NIAC, and *ibid.* nt 49 resp. 57: ‘For this crime, “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation.’

¹⁵⁸ Johns, p. 208-209.

¹⁵⁹ Gupta, p. 118.

¹⁶⁰ Johns, p. 200.

in dead body management practice as outlined in the previous chapters: the mechanisms that seek to address violations of dead body management rules and repair the relationship between the living and the dead, through their methodologies achieve the opposite and enlarge the distance they seek to shrink.

6.3.3 'Too late for human rights'

In addition, it could be argued that especially physical investigation of the dead for criminal law or for human rights turns the body into a vessel for restoration of justice to the *living* – not to the dead themselves. The bodies become generators of information to satisfy a need of the living: the need to know.¹⁶¹ After all, restoring justice to the dead would entail repairing the violations that were done to them. But is this even possible? Once at the grave exhuming a victim's body, it is 'too late for human rights':¹⁶² the violation has already occurred, and cannot ever be undone. And in any case, how would a dead person benefit from re-burial or identification, or suffer from looting or mutilation? The only ones who can truly still benefit from acknowledgement of the violation and from restoration of rights, are the living. The same is true of the responsible disposal of bodies as promoted by the manuals discussed under section 3. These are not framed in a language of rights of the dead or moral or ethical *obligations* of the living, but in a discourse revolving around the *needs* of the living: 'the living are equipped for survival in part by their expertly supported acquisition of knowledge of the dead.'¹⁶³ Whom, then, are the ultimate beneficiaries of dead body management? The duality in the rules and practice of IHL dead body management reflects this unresolved paradox: in seeking to provide justice for the dead, we continue to focus on the living.

6.4 CONCLUSIONS

The dead, for being past human beings, possess a residual form of human personality. This is expressed through individuality and dignity of the dead, two things of which the dead in armed conflict are often robbed. Even though at first glance dead body management rules and the various activities aimed at implementing those seem to aim at restoring these rights, this is impossible: the dead can by their nature not be rights-bearers. They are however recipients of duties or obligations that the living have accepted vis-à-vis the dead to

161 Johns, p. 197.

162 Rosenblatt, p. 926.

163 Johns, p. 202.

restore the latter's link with humanity and rebuild the human continuity interrupted by violent death. Dead body management rules are the expression of the acceptance of this responsibility by the living. Implementation, on the other hand, proves a harder task. Proper methodology reduces the dead to tools, information sources, and as such further away from humanity instead of reinstating aspects of human personality; in addition, it is not clear whether the acceptance of the responsibilities towards the dead, is an expression of the *rights* of the dead, or the *needs* of the living to find meaning in mass death making it an 'acceptable feature' and part of rebuilding the land of the living.¹⁶⁴ As long as these paradoxes remain unrecognized and unattended, any handling of bodies is bound to do justice to only part of the full spectrum of the principles behind dead body management rules.

164 Johns, p. 198.

Wider scope, narrower view

The development of dead body management in wartime as a concept in international law shows a steady trend of ever increasing humanization. From a technical task to clear battlefields and calculate remaining troop strength, it has evolved towards considerations of humanity, family rights, and dignity. The rules of international humanitarian law on handling the dead of armed conflict demonstrate the presence of a general duty of care for the dead of war, whether they are civilians or combatants. Through growing human rights attention for the missing and disappeared persons, through the international criminalization of certain violations of international human rights and humanitarian law, and due to scientific and technical advances, the attention for the dead of armed conflict has continued to evolve in the last decades. Manuals were written to translate the key principles into practical applicability of handling the dead. While this development is valuable because of its wider scope and continued humanization of the issue of handling war dead, it has at the same time started cloud the view on the fact that the handling of the dead of armed conflict is an issue of international humanitarian law.

Dehumanising the dead by striving for humanity

The most dominant feature in the current practice of handling the war dead is the exhumation of bodies, either for the purpose of identification with reference to human rights, or for criminal investigation in a framework of criminal law. In IHL dead body management regulations, identification and investigation are both valid reasons for exhumation. However, due to this widened scope, the approach to exhumation of war dead is instead of more inclusive, generally more fragmented, into either a human rights approach or one mainly driven by international criminal processes. The manuals and handbooks for dead body management, while practical in times of crisis, fill a legal void with rules that are non-legal, nor clearly based on international law. This fragmentation leads to the opposite result of what is desired: while striving to apply the principles of humanity and dignity by attaining justice or reestablishing family connections for the dead, the process reduces the dead to mere objects, to *corpus delicti*, to stages in a technical procedure.

This internal paradox could be solved or at the very least mitigated by using IHL as an overall framework for exhumations, since IHL provides for all the possibilities of exhumation required in the current day and age, as well as offers clear basic principles of humanity, dignity, and family rights. This would be legally possible, as IHL as *lex specialis* applies to situations of armed conflict; in case of the dead of armed conflict, these obligations stretch beyond the end of hostilities.

Clarifying responsibility, improving accountability

Concentrating the handling of war dead around the IHL rules of dead body management will also clarify responsibilities on several levels. The current situation is one of a responsibility vacuum, in which the discussed infra-legal manuals inscribe 'generalised, surrounding circumstances' affording international institutions conditions for their action or inaction.¹⁶⁵ The system currently floats on unclear assumed and unassumed responsibilities between state institutions, international institutions, and non-governmental organisations,¹⁶⁶ working to establish accountability using the dead, but they themselves 'are not the target of institutional inquiry or concern.'¹⁶⁷ Accountability and enforcement of IHL dead body management obligations are therefore extremely difficult.

Examples of breaches of IHL dead body management obligations range from the booby-trapping of dead bodies, unauthorized exhumations or destruction of gravesites, and deliberately frustrating identification by putting clothes and articles on bodies that do not match their identities, to leaving bodies to be despoiled, failure to record information on the dead, or not sharing information on the whereabouts of the dead.¹⁶⁸ But only violations of the prohibition of mutilation of bodies are officially a war crime in the Rome Statute as 'outrages upon personal dignity'.¹⁶⁹ Other positive violations such as deliberate attempts to confuse identities or the hiding of grave locations may be part of the contributory evidence in international criminal tribunals or courts, but are not war crimes in themselves and any accountability achieved is therefore not for the violation of dead body management *qua* dead body management. If a violation can be considered a breach of the family's right to know the fate of loved ones, accountability may to a certain extent be achieved through

¹⁶⁵ Johns, p. 187.

¹⁶⁶ Gupta, p. 111.

¹⁶⁷ Ibid.

¹⁶⁸ Williams, p. 254-255; *Conflict in South Sudan*, para. 143, 159, 174, 283.

¹⁶⁹ See nt. 157.

human rights mechanisms.¹⁷⁰ Overall, however, accountability and enforcement of IHL dead body management are not very actively pursued, despite this wider scope of the last decades and despite institutionalization of exhumation of war dead for identification and investigation.

Unresolved ethical questions

Behind all this lies a series of ethical and moral questions, again riddled with paradoxes. Is it possible to do justice to the dead? Or is this justice dependent on the perception of the living on justice? Is it then true that 'the value of the dead is in the relationship with the living'?¹⁷¹ Even this whole paper is part of that paradox: again the dead have been reduced to objects, points of discussion, and academic debate in an attempt to do them justice and to restore some dignity and humanity.

170 For example, the Human Rights Chamber of Bosnia-Herzegovina (HRC-BiH) ruled on 7 March 2003: 'the Republika Srpska's failure to make accessible and disclose information requested by the applicants about their missing loved ones (...), constitutes a violation of its positive obligations to secure respect for the rights to private and family life.' Williams, p. 254.

171 De Baets, p. 114.

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