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IDENTIFICATION OF THE DEAD UNDER ISLAMIC LAW AND INTERNATIONAL HUMANITARIAN LAW: A MINI REVIEW

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ABSTRACT

The Islamic world has been confronted with many challenges in recent history such as situations of violence, armed conflict, global pandemic and natural disasters. One of the many catastrophic consequences of such events are the findings of numerous unidentified bodies. Is the identification of dead bodies a legal obligation under both Islamic law and International Humanitarian Law (IHL) or is it merely a moral duty to help grieving family members? The purpose of this research is first, to give an overview of the Islamic law principles governing the identification of the dead. Second, to illustrate those principles with current examples of humanitarian challenges in the Islamic world. Third, to compare those Islamic law principles to IHL rules applicable in armed conflicts and demonstrate that both IHL and Islamic Law aim to end the suffering of families of missing persons. This research demonstrates that both Islamic law and IHL have rules which aim to protect the dignity and respect of dead bodies and they complement each other in contexts of armed conflicts or other situations of violence. By identifying the similarities and complementarities of both bodies of law this research paper contributes to expanding the legal framework which can be promoted and used by humanitarians to protect families of the dead and end their suffering by obtaining information on the fate and whereabouts of their loved ones. In cases of mismanagement of the dead, in Muslim contexts, resulting in the burial of unidentified bodies, humanitarians should discuss with religious authorities and raise the various principles of Islamic law described in this paper such as the prohibition of collective graves and cremation and the exceptions made in practice for the exhumation of dead bodies. International scholars should also underscore the importance of storing information on the deceased before burying them and of participating in the development of forensic science in Islamic countries.

Keywords: *International Humanitarian Law, Islamic Law, Missing persons, Natural Disasters, Armed conflicts, identification of the dead.*

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Introduction

Under Islamic law, persons are considered missing (*mafqud*) when they are absent without a trace, when all form of communication with their loved ones has been lost or when a considerable period occurred since their disappearance (al-Dawoody, 2018). Under International Humanitarian law (IHL) persons are considered missing if their relatives or the power on which they depend have no information on their fate (M. Sassòli, 2019). Identification is defined as the ‘*individualization by attribution of birth name or other appropriate name to human remains*’ (International Committee of the Red Cross (ICRC), 2009). This definition does not grasp the humanitarian purpose of identifying the dead which is ending the anguish and suffering of families due to the unknown proof of death of their loved ones. In fact, families of the missing can only start the mourning process once the hope that their loved one is still alive has disappeared, even though learning that their loved one has passed away is painful, this information relieves them from the ongoing torture of uncertainty (M. Sassòli, 2019).

This paper will first analyze the obligation to protect the dignity of the dead and search for the missing, then discuss the identification of the dead through forensic work, and finally analyze the principles and practices surrounding burial, exhumation and repatriation which can be useful when identifying the dead.

The Obligations to Protect the Dignity of The Dead and Search for The Missing

In Islam, human dignity is a right given by God to all people even after their death (al-Dawoody, 2018). Many rules of Islamic law explain that mortal remains should be handled with respect in order to protect the dignity of the dead and to show respect for the feelings of loved ones who are still alive (International Committee of the Red Cross, 2020). The Sunnah (*tradition*) composed of the Prophet’s sayings, actions and tacit approvals, show that searching, identifying and collecting dead bodies among the Muslim army is an obligation for Muslims (al-Dawoody, 2018).

Under IHL, parties to an armed conflict have an obligation to search for persons who have been reported missing by the adverse party (Additional Protocol I to the Geneva Conventions, June 8 1977, article 32; J-M.Henckaerts and L. Doswald-Beck, 2005), and to “take all possible measures to search for the dead” whether the conflict is international (Geneva convention I, August 12, 1949, article 15.1) or non-international (Additional Protocol II to the Geneva Conventions), June 8, 1977, article 8).

In international armed conflicts, the parties are also required to attempt to collect and record information which can assist in the identification of the deceased (Geneva Convention I, August 12, 1949, Article 16; Additional Protocol I to the Geneva conventions, June 8, 1977, article 33.2.), and they have an obligation to facilitate the steps taken to search for those killed, as far as military considerations allow (Geneva Convention IV, August 12, 1949, article 16.2). Families have an explicit right to know the fate and whereabouts of their relatives reported missing as a result of the armed conflict (Additional Protocol I to the Geneva conventions, June 8, 1977, article 32), this “right to know” also exist in International Human Rights Law (Convention on the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 24.2; UN Human Rights Council (UNHRC), 2010) and applies both in times of peace and in times of war.

The search, identification and collection of dead bodies often depends greatly on the collaboration of state authorities because they often know where the bodies are buried, have control over the remains and access to the families which are looking for their loved ones. Thus, if one of the parties does not adhere to international humanitarian law but rather to Islamic law it is of the utmost importance to keep in mind the Islamic law principles surrounding the management of dead bodies in order to open a dialogue and uncover the fate of a maximum of missing persons.

The Identification of The Dead Through Forensic Work

Identifying dead bodies can be done by different means. First, the dead person can be in possession of identity documentation, combatant tags or easily identifiable belongings. Second, the family or community members can recognize the person and identify the body directly. This visual means of identification can be efficient but, in some cases, they can also be unreliable (ICRC, 2009). In fact, eyewitnesses can wrongly report events because they occurred a long time ago during a traumatic period due to violence, pandemics, or natural disasters or because persons looking for their loved ones either deny the reality or want desperately to have answers and mistake one person for their loved ones. Therefore, in most cases humanitarians and medical personnel rely, solely or as a complement, on forensic work for the identification of the dead. Forensic sciences include anthropology, archeology, pathology, fingerprint analysis, dentistry, and genetics analysis. Those sciences help ensure the professional and dignified management and documentation of the dead and provide objective answers about the identity and fate of missing persons (Morris Tidball-Binz, 2018).

Some Islamic law principles such as: concealing and non-exposing the dead, the handling of dead bodies by member of the same sex, and the prohibition of mutilation of dead bodies, can interfere with the work of forensic workers (Baharuddin, A. S., Bidin, H., Dagang, W. I. W., Ruskam, A., & Yacob, A. R., 2015). However, legal exceptions exist, and some Islamic countries have developed their practice of forensic sciences while preserving the main objective which is to protect the dignity of Muslims dead or alive.

a) Concealment and non-exposure of the dead

Taking photographs of the dead bodies is instrumental in recovering their identity (Morgan, O., Tidball-Binz, M., and Van Alphen, D., 2006). Pictures can be used to match information collected regarding missing persons or shown to families searching for their loved ones.

In Islamic tradition, respect for the dead requires concealing the corpse and not exposing it, therefore it prohibits in principle that such photographs be taken and publicized (Al-Shaibani and Oran Finegan, 2018). However, practical examples exist in Islamic countries of forensic specialists taking pictures of the dead for the purpose of identification: in Iraq the mass grave directorate charged with identifying mortal remains keeps photographs of the graves (Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI) and Office of the United Nations High Commissioner for Human Rights (OHCHR), 2018).

Under IHL, the management of such photographs is given to the authorities which may decide to release the information to journalists in a managed way to help with the identification process (Cordner, S. M., Coninx, R., Kim, H. J., Van Alphen, D., and Tidball-Binz, M., 2016).

b) Handling of the dead by members of the same sex

Hadith collections and Sirah literature indicate that during the Prophet's lifetime, women handled the bodies of men combatants as they "repatriated the injured and dead bodies back to al-Madinah (the city)" (Al-Dawoody, 2018, pp. 762-763).¹ Nowadays, under Islamic law, forensic specialists in charge of identifying the dead bodies should be of the same sex as the deceased (Al-Dawoody, 2018).² On this matter the Islamic law and jurisprudence Council established, in 1993, the following authoritative reasoning: if there are no Muslim medical professionals of the same sex then a non-Muslim medical professional of the same sex can do the examination. If there are no medical professional of the same

¹ citing Hadith 1812 in Sahih Muslim (1991), Hadith 1065 in Musnad al-Imām Aḥmad ibn Ḥanbal, (n.d.) and Hadith 33650 in 'Abd Allah ibn Muḥammad ibn Abī Shaybah (1938).

² citing Hadith 5355 in Sahih al-Bukhārī (1987).

sex available, the Muslim medical professional of the opposite sex can do the examination. In last resort, if non-Muslim medical professional of the opposite sex are the only ones available, they can do the examination (Majma' al-Fiqh al-Islami, 1993).

In addition, in cases of necessity such as a lack of specialization of the medical professionals present, a lack of trust in the proficiency of the medical professionals involved, or during armed conflicts where male Muslims are fighting and female health-care personnel are needed to treat the injured and wounded, those rules no longer apply (Al-Dawoody, 2018, p. 781; Majma' al-Fiqh al-Islami, 1994).

Such distinction based on gender does not exist in IHL.

c) Prohibition of mutilation of the dead

For the purpose of identification, the process will mostly consist of comparing forensic data obtained from the corpses, such as dental forensics, fingerprints, DNA or other unique identifiers such as unique physical or medical traits (skeletal radiographs, surgical implants or prostheses, tattoos), with data collected by the families when the person was alive (International Committee of the Red Cross, 2009). Some of these techniques require autopsy, meaning the dissection of dead bodies.

Islamic law prohibits the mutilation of the dead, including non-Muslims (K. Aramesh, 2009). A significant number of people in Muslim societies still reject autopsy because it disfigures, and hence desecrates, the body (International Committee of the Red Cross, 2020). This prohibition also exists under customary IHL in Rule 113, but it is accepted that autopsy is an exception to this prohibition.

As alternatives to the traditional autopsy methods computed tomography, magnetic resonance imaging (MRI) or ultrasound can be used to identify the remains in a less invasive and often quicker way which can be more easily accepted by Muslims (M. Ben Taher, J. Pearson, M. Cohen, and A.C. Offiah, 2018). This was done in the United-Kingdom. However, these methods are expensive and in the context of armed conflict, natural disasters, or global pandemics, using them would require funds that countries going through such crises often do not have (Al-Dawoody, 2018).

d) Evolution of the practice of forensic work in Islamic countries

Considering the principles of Islamic law mentioned above, the evolution of medical science and the evolution of public opinion, states governed by Islamic law have progressively developed comprehensive rules allowing for the practice of forensic work and more precisely autopsies.

In Qatar, medical doctors at the Hamad General Hospital conduct forensic identification of skeletal remains using various methods including DNA profiling identification (B.L. Bhootra, 2005), based on the laws on autopsy of human bodies and human corpses published in 2003 and 2012 (State of Qatar, 2003).

In Saudi Arabia, families of victims can object to autopsies due to their religious beliefs, but prosecutors can order autopsies without the family's consent in suspicious cases (Madadin Mohammed and Magdy A. Kharoshah, 2014). Furthermore, some universities teach medical students forensic medicine and autopsy up to the postgraduate level.

In Egypt, the forensic medicine department was created in 1890 and forensic medicine is taught in all universities at undergraduate and postgraduate levels while in Tunisia, forensic medicine has been practiced since the 1960s under the authority of the Ministry of Public Health.

In conclusion, Islamic law principles can interfere with the work of forensic experts however legal exceptions and practical development of forensic science in the Islamic world prove that this practice is not contrary to Islamic law. To further develop the knowledge and practice of forensic medicine in

Muslim communities it is important to correct misconceptions about autopsies, to publish more information regarding the number of autopsies and the way they are done and to implement non-invasive substitute of autopsy such as imaging which as of today as never been done in Muslim countries.

Islamic Law Principles Surrounding the Burial of The Dead

Under Islamic law the dead are to be buried (Qur'an 95:4 and other Qur'anic verses 20:55, 77:25–26), both during armed conflict and in times of peace (Al-Dawoody, 2018). The burial of the deceased is a collective obligation (*farḍ kifāyah*), if a body is not buried the entire Muslim community will be guilty (Grand Mufti of Egypt, 2021). During and after armed conflicts, Muslims have an obligation to bury the dead of the enemy if the latter does not do it himself.

This is justified differently by Islamic jurists. Ibn Hazm argues that if the bodies are not buried, they will decompose or will be eaten by animals which will be tantamount to mutilation, a practice strictly prohibited under Islamic law (Al-Dawoody, 2018, p. 768; Ibn Hazm, n.d.). Other jurists believe that burying the dead of the enemy protects the human dignity of the dead which leads to respecting the feelings of their families. Furthermore, some jurists, such as W. Al-Zuhayli (2010), argue that these burials serve the public interests of Muslims because it protects public health.

In International Humanitarian law, the dead must be disposed of in a respectful manner and their graves respected and properly maintained (Geneva Convention I, III, IV, 1949; Additional Protocol I to the Geneva Conventions, 1977).

In addition, Islamic law provides Muslims with principles regarding the burials which can help or on the contrary be obstacles to the search for the missing through the identification of the dead.

a) Principles surrounding burial which can help for the search of the missing

i. The prohibition of collective graves: Under Islamic law every dead body should be buried in an individual grave (Grand Mufti of Egypt, 2018). This principle is in conformity with IHL and the practice of forensics during armed conflicts and global pandemics which require that graves be marked and maintained to ensure that they can always be located (UN Human Rights Council (UNHRC), 2010)

Although, in cases of necessity such as armed conflicts and other situations of violence or natural disasters, Islamic law allows for the burial of multiple people in the same grave if they are at least separated by a barrier of dust (al-Dawoody, 2018; al-Saḥaybañi, 2005; Ibn al-Ikhwah, n.d.). This separation should also be done to separate men and women, and Muslims and non-Muslims. This religious and gender-based separation can facilitate the work of investigation teams looking for specific missing individuals as their gender and religion would most likely be known by them.

In certain contexts, collective or mass graves make identification impossible. Either because it was the goal of the persons burying the bodies to make them disappear (in cases of armed conflict or enforced disappearances), because the graves were created in a panic or because of necessity due to global pandemics or natural disasters.

Mass graves of Muslim war victims have been a common practice in armed conflicts. The 1974 invasion of Cyprus by Turkey led to the mass burial of Turkish and Greek Cypriots which are currently still being identified by the Committee on Missing persons in Cyprus (G. Tarihi, 2014; D. Abate, C. Sturdy Colls, N. Moyssi, D. Karsili, M. Faka, A. Anilir and S. Manolis, 2019).

In 2018, the United Nations reported that thousands of victims of the crimes perpetrated by the 'Islamic State of Iraq and the Levant' (ISIL) were found in over two hundred mass graves and most of them may never be identified (UNAMI and OHCHR, 2018). In Srebrenica, in July 1995, thousands of Muslims men were murdered and buried in mass graves by the Bosnian Serb Army of Republika Srpska. Thousands of victims remain unidentified today and another mass grave related to this massacre was discovered on December 8, 2021 (International Commission on Missing Persons, 2018). This year, more than 120 victims of the second Libyan civil war were found in mass graves (Sudarsan Raghavan, 2021).

After natural disasters or global pandemics, the need to quickly dispose of the bodies, the important number of deceased, the lack of organization, the fear that dead bodies will cause epidemics, misinformation by the media and political pressure can result in unnecessary measures such as rapid and disrespectful mass burials (S. Cordner, *et al.*, 2016). In Indonesia, after the south-Asian tsunami of December 2004, fourteen mass graves were found around the city of Banda, one of them contained sixty to seventy thousand victims, including Muslims, making it difficult for authorities to identify and count the dead (O. W. Morgan, P. Sribanditmongkol, C. Perera, Y. Sulasmi, D. Van Alphen, and E. Sondorp, 2006).

In the Philippines, in 2013, after the typhoon HaiYan, thousands of unidentified corpses were buried in mass graves, specifically in Tacloban City where six percent of the population is Muslim (Integrated Regional Information Networks News, 2014). The COVID-19 pandemic also led to some cases of mass burials in India where ten percent of the population is Muslim (Sunil Kashyap, 2021).

Such rapid mass burials of victims on public health grounds are not justified and can further traumatize families and communities. Communal graves should only be used in exceptional circumstances as a form of temporary traceable storage of dead bodies if the relevant information for their identification have been collected prior to the burials (S. Cordner *et al.*, 2016). The ICRC confirmed that in the case of the COVID-19 pandemic mass graves are highly discouraged because they often show disregard for the wishes, cultural and religious rites of families and communities (O. Finegan, S. Fonseca, P. Guymarc'h, M.D. Morcillo Mendez, J.Rodriguez Gonzalez, M.Tidball-Binz, and K.Winter, 2020).

ii. The prohibition of cremation: Under IHL, bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased, and if the cremation occurs it should be preceded by a medical examination in order to establish the identity of the deceased (Geneva Convention I, August 12, 1949, Article 17.2; Geneva Convention III, August 12, 1949, Article 120.5; Geneva Convention IV, August 12, 1949, Article 130.2).

Islamic law on the other hand prohibits the cremation of the dead because it is considered a violation of the dignity of the human body (Dar al-Ifta of Egypt, 2001; General Presidency of Scholarly Research and Ifta in the Kingdom of Saudi Arabia, 2021; Islamic High Council of Australia, 2008). Under Islamic law, an exception can only be made for medical requirements (al-Shaibani, 2016). This was done for the cremation of the bodies of Ebola victims in 2015 (Grand Mufti of Egypt, 2015), because highly infectious diseases such as Ebola, Cholera or Lassa fever can pose a health risk and cremation can therefore be justified by medical necessity (S. Cordner, *et al.*, 2016). This principle is in conformity with the practice of forensics and the guiding principles of the ICRC regarding the management of the dead which recommend avoiding the cremation of unidentified bodies (ICRC, 2021).

In the case of the COVID-19 pandemic the World Health Organization reaffirmed in September 2020 that there is no evidence supporting any assumption that cremating a COVID-19 victim would prevent the spread of the disease (World Health Organization, 2020). This opinion was shared by the ICRC. Islamic jurists reaffirmed the need for the bodies to be buried in accordance

with Islamic law principles and the strict prohibition of cremation (Organization of Islamic Cooperation (OIC), 2020).

Nevertheless, during the pandemic bodies were cremated in some countries without the consent of the families and Muslims objected to this practice. In Sri-Lanka, the government practiced forced cremation of COVID-19 victims (Harris Mahmud, 2020; Amnesty International United Kingdom, 2020) from the beginning of the pandemic until March 2021 (PTI, 2021). In addition, at the beginning of 2020 the British government allowed for local authorities to cremate bodies against the wishes of the families before over-ruling the law following objections from the Muslim community (Harris Mahmud, 2020; Amnesty International United Kingdom, 2020).

In those cases, cremation could only be avoided after a long fight by family members for the respect of their faith and beliefs. However, unidentified bodies which cannot be claimed by any family member will in this situation most likely be cremated. It is the case in India, where ten percent of the population is Muslim, as per the government's guidelines on dead body management, unidentified bodies of COVID-19 victims are cremated (Indian Ministry of Health and Family Welfare, 2021).

Principles surrounding burial which complicate the search for the missing

i. Quick burials: Under Islamic law it is preferable to bury dead bodies quickly, even if the body is unclaimed or unidentified out of respect for the human body. Quick burials are motivated by the will to shorten the pain of family members and loved ones who might be afraid and anxious that the body might decay (Al-Dawoody, 2018). A significant number of Muslims object to the practice of autopsy or forensic work because it delays the burial of the dead (ICRC, 2020).

Those quick burials can be an obstacle for the identification of the dead because forensic specialists might not be given enough time to undertake their job and an immediate identification after death is often easier than at a later stage. For example, in Indonesia after the south-Asian tsunami in December 2004, Muslim communities buried the deceased within the first 24 hours making it difficult for authorities to identify and count the dead (O. W. Morgan, P. Sribanditmongkol, C. Perera, Y. Sulasmi, D. Van Alphen, and E. Sondorp, 2006).

In such cases, forensic specialists should provide fridges to protect dead bodies and engage community and religious leaders and local authorities to convince the public and relatives of the dead that giving forensic specialists enough time to examine the bodies is important for establishing their identity.

The conservation of the bodies in cold temperature is very important to slow the decomposition process, protect and respect the remains but also because within 12 to 48 hours in hot climate the decomposition may be too advanced to allow for facial recognition. Another solution can be to bury the remains in a clearly marked and recorded grave for future exhumation (S. Cordner, R. Coninx, H.-J. Kim, D. V. Alpen, and M. Tidball-Binz, 2016).

In fact, the ICRC Missing person project recommends that dead persons who cannot be identified should be documented, safely stored, or buried temporarily in a manner that facilitates their traceability and future identification (ICRC, 2021).

ii. The prohibition of exhumation: In many cases, the identification of the dead requires exhumation: the removal of a dead body from the ground after it has been buried. Exhuming graves is prohibited in Islamic law as it is historically linked to the crime of grave robbery, relating to digging up the grave in order to steal the shrouds or ornaments from the dead bodies (Al-Dawoody, 2018).

In addition, the respect for dead bodies includes not exhuming their graves. However, under Islamic law exhumation can be made when absolutely necessary (Al-Mawsū‘ah al-Fiqhiyyah al-Kuwaytiyyah, 2001), through a balance between the general rule to ensure respect for the dead and for the family’s feelings and the need to identify the dead person to inform the family in exceptional circumstances (M. Sassòli, 2019).

For example, in Bosnia-Herzegovina, Islamic religious authorities issued fatwas agreeing to the exhumation and storage of the remains of victims of the Srebrenica massacres (Al-Shaibani and Oran Finegan, 2018).

In Libya in 2011, the ICRC obtained the authorization of Islamic jurists to recover the remains of 35 buried mountain community members (Al-Shaibani and Oran Finegan, 2018).

In 2006, the Iraqi government enacted *Law No. 5 on the protection of mass graves 2006*³ which aimed to identify bodies found in mass graves. As of 2018, the Iraqi mass graves directorate exhumed the remains of 1,258 bodies, found in 28 mass graves, for the purpose of identifying the victims of ISIL through DNA analysis (UNAMI and OHCHR, 2018).

Under IHL the choice to exhume bodies in order to identify them does not take into consideration the feelings of the families who object to such practices. However, the management of dead bodies must always be done carefully and ethically in order to respect and protect the feelings of the family members (Additional Protocol I to the Geneva Conventions, 1977, June 8, 1977, article 34.2.c; ICRC CIHL Database, rules 105 and 114).

iii. Repatriation of the dead: Once a body is identified, family members often wish that their remains be returned to them. Under IHL, upon agreement of the parties to an international armed conflict, the bodies should be returned to their families for burial (Additional Protocol I to the Geneva Conventions, June 8, 1977, article 34.2.c; ICRC CIHL Database, rules 105 and 114). In Islamic law, this obligation is absolute, and the bodies of Muslim soldiers and enemy combatants should always be repatriated.

According to the jurist Ibn Hazm (d.1064) (n.d.), a failure to discharge the obligation to return the bodies of enemy soldiers is tantamount to mutilation which is strictly prohibited by the Qur’an (16:126-127) at all times, in addition repatriation of the dead as been a long-standing practice reported in Hadith and Sirah literature. During natural disasters and pandemic, the same logic applies. However, during the COVID-19 pandemic the bodies of many African Muslims leaving abroad were not repatriated because international air traffic was paralyzed, leaving their families in the impossibility to bury their loved ones at home under the customs of Islamic law (Michel Lachkar, 2020).

Conclusion

Islamic law and IHL both have rules which aim to protect the dignity and respect of dead bodies and they complement each other in contexts of armed conflicts or other situations of violence. IHL rules are aimed to compel the parties to a conflict to prevent the burial of unidentified bodies. Islamic law requires a quick burial of all Muslims identified or not. However, this paper demonstrates that exceptions can be made when the aim is to protect the families of the victims and end their suffering by obtaining information on the fate and whereabouts of their loved ones.

In case of mismanagement of the dead, in Muslim contexts, which could result in the burial of multiple unidentified bodies, professionals should discuss with religious authorities and raise the various principles of Islamic law described in this paper such as the prohibition of collective graves and

³ Law No. 5 on the Protection of Mass Graves published in 2006 and amended by Law No. 13 Affairs and Protection of Mass Graves published in 2015 by the government of Iraq.

cremation and the exceptions made in practice for the exhumation of dead bodies. They should also raise awareness on the importance of storing information on the deceased before burying them and rely on the developing practice of forensic science in Islamic countries.

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