

MANAGEMENT OF THE DEAD FROM THE PERSPECTIVES OF ISLAMIC LAW AND INTERNATIONAL HUMANITARIAN LAW



International humanitarian law (IHL) and Islamic law contain complementary rules to ensure the protection of the dignity and respect of the deceased in specific Muslim contexts. Forensic specialists are nonetheless faced with a number of issues and challenges in the management of the dead in contemporary armed conflicts and other situations of violence. Among these are collective burial, quick burial of dead bodies, exhumation of human remains, autopsy, burial at sea and handling of the bodies by the opposite sex.*

* This should be read together with the International Committee of the Red Cross (ICRC) Factsheets “Humanity after life: respect for and protection of the dead”, available at <https://www.icrc.org/en/document/humanity-after-life-respect-and-protection-dead>; “Islamic Law and International Humanitarian Law”, available at <https://www.icrc.org/en/document/islamic-law-and-international-humanitarian-law>; and “Missing persons and their families”, available at <https://www.icrc.org/en/document/missing-persons-and-their-families-factsheet>.

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Many civilizations and religions regard death as a transitional period, a bridge between one stage of life and another. Burying the dead properly is a necessity for them, as it protects the dignity of the dead and shows respect for the feelings of loved ones who are still alive.

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SEARCHING FOR AND COLLECTING DEAD BODIES

Early Islamic sources describe a longstanding practice among warring parties of accounting for dead bodies. *Ḥadīth* (the reported sayings, deeds and tacit approvals of the Prophet Muhammed)

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and *Sīrah* (biographies of the Prophet) contain accounts of the repatriation of the dead and of the documentation of fatalities in every military engagement. Respecting and protecting the dignity of the dead has always been one of the precepts of Islam, and by extension, so were searching for and collecting dead bodies. Mortal remains were to be shown the same regard; this meant that they, too, were to be given proper burials – to protect them, as early Islamic sources indicate, from the depredations of wild animals and to enable the families and loved ones concerned to visit the graves holding these remains.

The following provisions of IHL – taken from the four Geneva Conventions of 1949 (GC I–IV) and their Additional Protocols of 8 June 1977 (AP I and AP II) – also stipulate that parties to armed conflict must search for and collect dead bodies in order to prevent their despoilment: Article 15(1), GC I; Article 18(1), GC II; Article 16(2), GC IV; Article 33, AP I; and Article 8, AP II.

REPATRIATION OF MORTAL REMAINS AND THE PERSONAL EFFECTS OF THE DEAD

It is recorded in early Islamic sources that Muslims conveyed the dead bodies of Muslim soldiers to their families for burial.

Provisions of Islamic law governing international armed conflict (IAC) are in agreement with Article 17(3), GC I; Article 130(2), GC IV; and Article 34(2), AP I; and with Rule 114 of the ICRC's study on customary IHL (ICRC Study), which states that "[p]arties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin". Islamic law also echoes Rule 105 of the ICRC Study, which states that "[f]amily life must be respected as far as possible".

IHL also requires parties to IAC to return the personal effects of the dead to the party to which they belong (Rule 114 of the ICRC Study). "Personal effects" usually means wills and other documents of importance to the next of kin, money, and "all articles of an intrinsic or sentimental value" (Article 16, GC I); weapons and other items or materials of use in military operations may be retained as war booty. Classical Islamic law regarded the property of a defeated non-Muslim enemy as war booty. It was up to the ruler of the victorious party to redistribute or return the booty (Qur'an 8:41). Looting – taking booty before it had been redistributed – was prohibited (Qur'an 3:161).

Under classical Islamic law, in armed conflicts between Muslims, money and weapons confiscated from people who qualified as "armed rebels" must be returned after the cessation of hostilities.

DISPOSAL OF DEAD BODIES

Modern IHL principles require the decent burial of dead bodies, as evident, for example, in Article 17(3), GC I; Article 120(4), GC III; and Article 130, GC IV; all these Articles also require that dead bodies be buried “if possible according to the rites of the religion to which they belonged”.

Mortal remains of Muslims

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Islamic law contains a separate body of rules for disposing of the body of a martyr (*shahīd*, plural *shuhadā*): someone who is killed while fighting non-Muslim enemy belligerents. However, most jurists agree that the rules concerning martyrs apply also to those killed while fighting Muslim forces.

Nevertheless, most Muslim jurists agree that the following three rules are applicable only to martyrs:

- There should be no ritual washing of the body.
- The body should not be shrouded and should be buried in the same clothes in which the martyr died.
- No funeral prayer should be offered over the body.

These rules remain common practice.

Mortal remains of non-Muslims

After a military engagement, if an adverse party does not collect and bury its own dead, it becomes the Muslims' obligation to do so – to protect the dignity of the dead and show respect for their families. Failure to do so would be tantamount to mutilation, which is prohibited under Islamic law.

Some classical Muslim jurists also argue that burying dead bodies belonging to the adverse party serves the public interest (*maṣlahah*) of Muslims, as it protects public health.

Islamic law is thus in agreement with the modern IHL principles set out in Article 17, GC I; Article 120, GC III; Article 130, GC IV; and Rule 115 of the ICRC Study, which states that “[t]he dead must be disposed of in a respectful manner and their graves respected and properly maintained”.

Collective graves

The general rule in Islamic law is that every dead body should be buried in a separate grave.

During armed conflicts or natural disasters – or in other circumstances when it might be impossible to have separate graves – Muslim jurists permit the use of collective graves (for two or three bodies at a time).

The dead bodies of men and women should be buried separately; if necessity dictates otherwise, classical Muslim jurists say that the bodies should be separated by a barrier of dust. Collective graves for dead bodies, usually from the same family, are now common in many Muslim countries because of a lack of space and/or the costs of digging individual graves.

Classical Muslim jurists agree that Muslims and non-Muslims should be buried in separate graves; this is still the practice in some countries.

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Decent burial without adverse distinction

In Islam, all people are born in a state of nature (*fiṭrah*). When people die, there is no longer any justification for enmity or hostility towards them.

This implies decent burial of mortal remains without distinction. Islamic law therefore prohibits discriminating between Muslims and non-Muslims, and between those who have taken part in hostilities and those who have not.

Under Islamic law, respect for human dignity requires that severed limbs be buried, regardless of whether the person in question is dead or alive. *Hanbalī* jurists add that they should be buried next to the grave of the dead person in question, or in the same grave but without uncovering the dead body to reassemble it. In Islam, disposing of severed limbs by cremating (*ḥarq*) them, or through any other means besides burial, is an offence against human dignity.

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Quick burial

Islamic law and Muslim societies regard burial in the ground as the proper way to show the necessary regard for dead bodies; cremation is prohibited because it is thought to violate the dignity of the human body.

Islamic law expresses a general preference for quick burial, but does not expressly regard it as compulsory (*fard/wājib*). However, the primary Islamic sources do not state a time frame for burial. Where foul play is suspected, the burial should be postponed until the body can be examined. Where a person's death is in doubt – for example, when someone is comatose – some jurists are in favour of waiting for a day and a night (*yaūm wa laylah*), to confirm the fact of death. Some jurists take the position that burial can be postponed until the arrival of the dead person's relatives.

These considerations do not change when a dead body is unclaimed or unidentified; the requirement of respect still applies. Therefore, out of respect for dead bodies, Muslims are likely to bury unclaimed or unidentified bodies quickly.

Prohibition against mutilation

Mutilating the dead bodies of an enemy is strictly prohibited (Qur'an 16:126–127), after the cessation of hostilities and at all other times. Failure to discharge the obligation to bury the bodies of enemy soldiers or return them to the adverse party is, the jurist Ibn Ḥazm (d. 1064) says, tantamount to mutilation.

Similar rules apply under IHL, which requires parties to armed conflict to take all possible measures to prevent the despoilment of the dead and prohibits the mutilation of dead bodies (Article 15, GC I; Article 18, GC II; Article 16, GC IV; Article 34(1), AP I; Article 8, AP II; and Rule 113 of the ICRC Study).

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BURIAL AT SEA

For deaths that take place at sea, classical Muslim jurists envisaged three possibilities. First, if a ship can reach harbour before the body is in a state of advanced decomposition, then burial should be postponed. If that cannot be guaranteed, the body should be tied to pieces of wood and lowered into the sea; the hope here is that the waves will take the body to the nearest shore inhabited by Muslims, who will give it a respectful and dignified burial on land. If, however, the body is likely to reach shores inhabited by enemies – who might desecrate it – it should be attached to or enclosed in some heavy material and lowered into the sea, preferably with protection against predatory marine life.

EXHUMATION OF HUMAN REMAINS

In classical Islamic legal texts, the term *nabsh al-qubūr* is used broadly to describe the exhumation of graves: no distinction is made between exhumation for legitimate and illegitimate purposes (grave robbery, for instance). Arabic words for the exhumation of graves have a negative connotation in many Arabic-speaking societies because they are associated with crime; for example, the word *nabbāsh* is understood to mean “grave robber”. Additionally, the principle of respecting the dead militates against exhumation. Accordingly, classical Muslim jurists agree that exhuming graves is prohibited except when absolutely necessary.

Precedent suggests that it is acceptable to exhume bodies in order to transfer them from collective to individual graves. It can also be argued that precedent indicates that Islamic law permits the exhumation of dead bodies to transfer them to their places of origin, and/or to establish the identity of the person in a grave.

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Classical Muslim jurists also considered the exhumation of graves for the following purposes:

1. Religious purposes (i.e. the rights of God): jurists tend to accept exhumation for the purpose of performing the ritual washing of the body (but not for shrouding it), for offering the funeral prayer over the body, or for turning the body to face the *Qibla* (i.e. Mecca).
2. Civil liability cases (rights of humans): all valuable items on a dead body must be legally transferred to that dead person's heirs, in the proportions prescribed by Islamic law. There have been cases of graves being exhumed to recover personal belongings and valuables (such as gold or money) that were buried with the body and to transfer them to the dead person's next of kin. Likewise, the rights of the living with regard to ownership of land prevail over dead people's right to respect: so, a landowner can require that a body buried in usurped land be exhumed and removed from that land.
3. Considerations of public interest: these are often legitimate grounds for exhuming graves, for example to build public roads or if the graves have been flooded.

AUTOPSIES

An autopsy, or post-mortem examination, is the dissection of dead bodies for educational or legal purposes. This practice was not unknown in Islamic history. Some jurists found the use of autopsies for educational purposes acceptable, but others considered it impermissible in Islamic law. The Arabic word *tashrīḥ* (“anatomy” or “autopsy”) itself evokes lurid images of callous vivisection. Moreover, those who reject autopsy do so also because it delays burial of the dead (see above). Significant numbers of people in Muslim societies still reject autopsy because it disfigures, and hence desecrates, the body. Where autopsies are completely rejected, exceptions are made – pursuant to a court order – when foul play is suspected and the person’s relatives want to know the cause of death.

Discussions among Islamic legal scholars about the permissibility of autopsies reflect a tension between the principle of respecting dead bodies and the legal imperative of identifying the cause of death or the demands of science or education. Based on the principle of *maṣlahah* (public interest) and the Islamic legal maxims *al-ḍarūrāt tubīḥ al-maḥẓūrāt* (“necessity overrides the prohibition”) and *ikhtiyār akhaf al-ḍararayn* (“choice of the lesser of two evils”), most legal authorities in Muslim countries permit autopsies both for criminal investigations and for scientific and educational purposes. In Muslim countries, autopsies are usually conducted by specialists in forensics departments that are attached to either the ministry of justice or the ministry of health.

HANDLING OF DEAD BODIES BY MEMBERS OF THE OPPOSITE SEX

The handling of dead bodies by forensic specialists of the opposite sex should, in principle, follow the same Islamic principles that guide the examination of patients by medical professionals of the opposite sex.

Muslim women should be examined by female Muslim medical professionals, and if they are unavailable, then by trusted female non-Muslim medical professionals. If no female medical professionals are available, then male Muslim medical professionals may carry out the examination; and if no male Muslim medical professionals are available, then male non-Muslim medical professionals may, as a last resort, examine female Muslims. When a Muslim woman is being examined by a male medical professional, her husband or a *maḥram* (a relative with whom marriage is prohibited) should be present, in order to avoid *khalwah* (seclusion of a non-*maḥram* man with a woman), which is prohibited.

However, these rules yield to necessity, based on the Islamic legal maxim *al-ḍarūrāt tubīḥ al-maḥẓūrāt* (“necessity overrides the prohibition”). Hence, examination by medical professionals of the opposite sex may be acceptable when professionals of the same sex lack the necessary expertise or when there is a lack of trust in their abilities. For instance, it would be appropriate for female health personnel to treat wounded and sick men during an armed conflict when male personnel are not available in sufficient numbers. Similarly, the requirement that the spouse or a *maḥram* be present during an examination does not apply to accidents and other medical emergencies.

In Islam, the pursuit of medical knowledge and the provision of medical services are a collective obligation (*farḍ kifāyah*) on all Muslims. Therefore, based on this obligation and on the Islamic requirements regarding treatment by specialists of the same sex, the Islamic Law and Jurisprudence Council – which is affiliated to the Muslim World League – issued Decree No. 85/12/d8, which recommends that health authorities in predominantly Muslim countries encourage women to join the medical profession.

CONCLUSION

A comparison of the provisions of IHL and Islamic law on the management of the dead in contemporary conflicts leads to the following conclusions: despite their different sources, they both attempt to ensure respect for the dead and to protect the dignity of dead bodies; and they can work together to realize these objectives in the context of armed conflict and other violence.

The provisions of Islamic law – and the cultural and traditional norms and practices of Muslims – should be kept in mind and shown due regard when carrying out forensic work in these contexts. When this is not possible – because of time constraints, public-health considerations, the exigencies of humanitarian assistance or other technical reasons – local and international Islamic legal institutions, and individual Islamic legal experts, should be approached and requested to look into the matter, with a view to finding solutions that are consistent with Islamic law. Forensic specialists should also engage with community and religious leaders to address such issues.

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MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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