UPDATE ON DISCUSSION PAPER:
THE LEGAL OBLIGATION TO RECORD CIVILIAN
CASUALTIES OF ARMED CONFLICT

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Introduction

In 2011, the Oxford Research Group’s Recording of Casualties of Armed Conflict Programme concluded a research project on identifying international legal obligations with respect to recording civilian casualties in armed conflict. In the course of extensive research into international customary humanitarian law and the treaties that embody obligations for states in International Humanitarian Law and International Human Rights Law, the research team identified a number of international obligations that result when civilians are killed in armed conflict.¹ This report was followed with a specific report on the use of drones that applied the same methodology.² Since the original report was published, the Recording of Casualties of Armed Conflict Programme at the Oxford Research Group has evolved into the independent non-governmental organisation, Every Casualty Counts. The organisation’s mission statement states that each life lost to armed violence must be promptly recorded, correctly identified and publicly acknowledged.³

This updated report compiles the critical elements of state and international practice and further clarifies the legal obligations related to casualty recording in light of the author’s continued research in the field and the work of Every Casualty Counts.

In the intervening decade, a body of international and state practice emerged that further supports and clarifies the various international legal obligations. The British Red Cross and Laval University in Canada maintain a customary humanitarian law database,⁴ which charts the

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¹ The research report was co-authored by Dr Rachel Seoighe, University of Kent, whose work is cited here.
² The research report was co-authored with Dr Marie Aronsson-Storrier, University College Cork, whose work is cited here. Her work is also cited with respect to missing migrants.
³ Every Casualty Counts, https://everycasualty.org/
⁴ Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha, accessed many times
development of state practice supporting the rules of customary humanitarian law identified in a study by the International Committee of the Red Cross (hereinafter, ‘ICRC’).\(^5\)

Another area of international humanitarian and human rights law to develop in the past decade is the extensive body of law and practice to do with Missing Persons. This report will introduce a new section on the missing that further supports the legal standards developed in the original report. This will include the developing body of jurisprudence in the Inter-American Court of Human Rights and the United Nations Human Rights Committee on the ‘disappeared’. The author also participated in the work of the Last Rights Project, which released a report cited here on identification of deceased migrants in the Mediterranean that influenced the global compact on migration.\(^6\) It is the hope of the author that this updated research might assist the ongoing work by the ICRC on the missing and on the updated commentary on Geneva Convention IV.\(^7\)

The vast number of deaths occasioned by the Covid-19 pandemic has also promoted debate over the treatment of the dead. While these deaths do not result from conflict, the demand to record and memorialise these deaths emphasises the importance of acknowledging the dead in national catastrophes. The work of the international disaster law community, including the International Federation of Red Cross and Red Crescent Societies, emphasises the importance of dignity and respect for the dead.\(^8\)


\(^8\) The author is a member of IDEAL Net, a group of international disaster law academics working in this field, [https://www.disasterlaw.net/](https://www.disasterlaw.net/).
It remains the position of this author that placed in the context of ensuring that every casualty of conflict counts, the principles spread among these various sources come together naturally to form a series of binding obligations on states. The findings of this report indicate that systematic recording of all casualties, including civilians, in all theatres of armed conflict, is necessary and required by law.

The original proposed legal standards

The original report identified a number of legal standards relevant to recording casualties of armed conflict. These were:

THE CONTENT OF THE INTERNATIONAL LEGAL OBLIGATION TO RECORD EVERY CIVILIAN CASUALTY OF ARMED CONFLICT

1. There are binding international legal obligations upon parties of armed conflict to:
   a) search for all missing civilians as a result of hostilities, occupation or detention;
   b) collect all of the casualties of armed conflict from the area of hostilities as soon as circumstances permit;
   c) if at all possible, the remains of those killed are to be returned to their relatives;
   d) the remains of the dead are not to be despoiled;
   e) any property found with the bodies of the dead is to be returned to the relatives of the deceased;
   f) the dead are to be buried with dignity and in accordance with their religious or cultural beliefs;
   g) the dead are to be buried individually and not in mass graves;
h) the graves are to be maintained and protected;

i) exhumation of dead bodies is only to be permitted in circumstances of public necessity, which will include identifying cause of death;

j) the location of the place of burial is to be recorded by the party to the conflict in control of that territory;

k) there should be established in the case of civilian casualties an official graves registration service.

2. These international legal obligations taken together constitute a binding international legal obligation upon every party to an armed conflict to record every civilian casualty of armed conflict whether in an International or Non-International Armed Conflict.

These rules will be revised and reframed in light of the updated review below, in the conclusion to this report. It is also essential that these legal standards conform as much as possible to the wording of the customary humanitarian law rules and they have been amended from the original paper in order to do so.
Methodology

As with the original study, this report is the result of a full literature review on the responsibilities of states in armed conflict to protect civilians. It rests on a comprehensive analysis of the relevant conventions and treaties within international humanitarian and international human rights law, and academic analysis of the law. It has considered the resolutions and recommendations of United Nations bodies. An additional source not used in the original report is the annual report of the Secretary-General on the protection of civilians in armed conflict and the growing list of resolutions of United Nations bodies on the missing in armed conflict. In this updated report, there is also reference to the extensive European Court of Human Rights case law identified initially in the report from the Last Rights project.\(^9\) Also newly included is analysis of another body of case law developed in the Inter-American Court of Human Rights and the United Nations Human Rights Committee on the disappeared. Existing customary international law, as codified in the ICRC’s Study on Customary International Humanitarian Law, and updated by the Customary Humanitarian Law database, is reviewed in the effort to clarify the legal standing of states.\(^{10}\)

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\(^{10}\) Customary IHL Database, [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/home](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/home).
Updated Practice in the Customary Humanitarian Law Database

As this report is primarily dealing with civilian casualties in armed conflict, whether international or non-international, the most important body of law, the *lex specialis*, is international humanitarian law. International humanitarian law is codified in the Geneva Conventions and their additional protocols. In the 21st century, there is another important source for international humanitarian law – the Customary Humanitarian Law Study by Jean-Marie Henckaerts and Louise Doswald-Beck, conducted under the auspices of the ICRC. ¹¹

It is important to note again that the treaty provisions with respect to the *civilian* missing and dead in an international armed conflict are limited in the original (and universally ratified) Geneva Conventions. Those provisions are:

Geneva Convention IV relative to the Protection of Civilian Persons in Time of War

Article 16

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect. As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment. ¹²

The development of the legal obligations concerning civilian casualties takes place in Additional Protocol I to the Geneva Conventions of 1977. Its provisions begin with a general statement of the right of families to know the fate of their relatives, followed by specific

¹¹ Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*.
provisions on searching for the missing and the recording of deaths:

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977

Article 33

Missing Persons:

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches (…)

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out the missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

Article 34

Remains of deceased:

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of Geneva Convention IV, where their remains or gravesites
would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

a) To facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;

b) To protect and maintain such gravesites permanently;

c) To facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin (...)

4. (...)

b) Where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinternment.13

The relevant treaty provision for non-international armed conflict is Article 8 in Additional Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), signed 8 June 1977, entered into force 7 December 1978, 1125 UNTS 3.
Protocol II, which regrettably only contains a limited provision:

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 1977

Whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.¹⁴

Therefore, it is essential that there be an analysis of customary humanitarian law to see what binds all nations in either type of conflict, including those which are not party to the Additional Protocols, and to review the customary status of the provisions in Additional Protocol I, which would ensure those countries that are not party to the Additional Protocols are bound by these legal standards.

The Customary Humanitarian Law study led to the establishment of the Customary Humanitarian Law Database, which originated at the Faculty of Law, Cambridge University. The purpose of the database was to update the practice identified in the original Customary Humanitarian Law Study initiated by lawyers at the ICRC. The British National Society of the Red Cross and Laval University in Quebec, Canada, now host the database jointly. A careful review of the database reveals that it has not been updated in the past few years and the practice may not be entirely up to date. However, it is still an important source for military manuals, and

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 609.
national and international practice. It contains critical material to analyse for this updated report.

In 2012-2013, this author conducted a research project carefully analysing the customary humanitarian law database in light of the rules identified with respect to the dead in the original ICRC customary humanitarian law study. The results were mixed. The practice was overwhelmingly geared towards military and not civilian casualties, although there were some examples of practice towards civilian casualties that supported the customary nature of most, but not all, of the obligations on casualty recording identified in the original Oxford Research Group report. As the rules in the ICRC Study are almost identical to the standards proposed by both our original legal report and this update, it is worthwhile examining current state practice updated as far as possible.¹⁵

This section will review the proposed customary rule identified in the ICRC customary humanitarian law study, the state and international practice updated as far as possible, and match this practice to the proposed legal standards on casualty recording from the original Oxford Research Group legal report (highlighted in bold). It will then amend the standard as relevant, according to the updated practice and the wording contained in the customary humanitarian law rules.

¹⁵ This material was first discussed in S. Breau, ‘State Practice, Customary Humanitarian Law and Civilian Casualties of Armed Conflict’, State Practice & International Law Journal (SPIJ), 1, 1 (2014).
The Dead

The first relevant chapter in the customary humanitarian law study is Chapter 35, entitled ‘The Dead’.

ICRC Study: Rule 112

Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.\textsuperscript{16}

Original casualty recording legal report: Standard 1

There are binding international legal obligations upon parties of armed conflict to:

(a) search for all missing civilians as a result of hostilities, occupation or detention;
(b) collect all of the casualties of armed conflict from the area of hostilities as soon as circumstances permit.

Rule 112 is proposed in the ICRC Study to be applicable both in international and non-international armed conflict. The commentary indicates that the rule applies to all the dead, without adverse distinction. This means the rule applies to the military dead and to civilians, from both sides of the conflict.

The obligation to search for and collect the dead is an obligation of means. Each party to the conflict must take all possible measures to search for and collect the dead. This would include permitting humanitarian organisations or civilian populations to assume this task; permission to conduct such an activity must not be denied arbitrarily. Permission could be reasonably denied if military operations were still being conducted in the area and there were further risks to

life. 17

The ICRC Study commentary to this rule proposes that, as with the collection of the wounded, there should be an arrangement between the parties to suspend hostilities and to remove the dead from the battlefield. However, these specific details are not included in the rule proper. The commentary highlights the second and third paragraph of Article 15 of Geneva Convention I regarding arranging for armistice or suspension of fire, and agreeing on local arrangements to collect the dead. 18 This provision is limited to military casualties. With respect to civilians, it was not until Additional Protocol I that parties were mandated to ‘endeavour to agree on arrangements for teams to search for and recover the dead from the battlefield areas’. 19 The ICRC study supports this practice as customary, arguing that states, which are not party to Additional Protocol I, have expressed support for this type of arrangement. 20

Rule 112, together with Rule 113, contains all of the obligations in Article 15 of Geneva Convention I with respect to military casualties. It eliminates the reservation of ‘as far as military considerations allow’ that was previously set out in Article 16 of Geneva Convention IV, applicable to the collection of civilian casualties. This alteration means that this rule is a new

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18 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), 12 August 1949, 75 UNTS 31.
19 Additional Protocol I of 1977, Article 34(2).
21 Geneva Convention I, Art. 15. ‘At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled. Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield. Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.’
proposal for customary law as it deviates from the original treaty provision with respect to civilians. Therefore, this rule must be tested against the actual practice of states and *opinio juris*. The practice and *opinio juris* must be virtually uniform to conclude that proposed Rule 112 can be considered customary international law.\(^\text{22}\)

The ICRC customary IHL database for this, and all the subsequent rules examined here, contains a large amount of information to support the customary status of the rules. The data supporting the rules are divided into various sections: (i) treaties that contain formulations of the proposed rule; (ii) other international instruments including peace agreements; (iii) military manuals; (iv) national legislation; (v) national case-law; (vi) other national practice; (vii) United Nations materials; (viii) other international organisations; (ix) international conferences; (x) international and mixed judicial and quasi-judicial bodies; (xi) International Red Cross and Red Crescent movement and (xii) any other practice. None of these sections separate actual practice from *opinio juris*. It is up to the analyst to review the volume of material to determine whether both virtually uniform and extensive practice and *opinio juris* exists.

A major portion of the data supporting this customary law Rule 112 is to be found in the section on military manuals, which contains several examples of statements supporting the rule without the reservation from Geneva Convention IV. This includes examples located in the military manuals of such countries as Argentina, Benin, Cameroon, Croatia, Germany, Italy, Kenya, Madagascar, the Netherlands, New Zealand, Nigeria, Philippines, Spain and Togo.\(^\text{23}\) Given the quantity of these statements in diverse military manuals, it is possible to use the


\(^{23}\) Henckaerts and Doswald-Beck, *Volume II of Practice*, 2656-60.
deductive approach to conclude that *opinio juris* is clearly evident in the various statements of obligations towards all of the dead. This indicates a rule of customary international law.\(^2^4\) These military manuals are also sources of practice, as they mandate how military operations are to be conducted. It is therefore reasonable to assume that the practice of the nation issuing the manual will be in accordance with the instructions given.

It has to be acknowledged that there are statements at variance with the majority of military manuals. For example, the US Naval Handbook states:

> As far as military exigencies permit, after each engagement all possible measures should be taken without delay to search for and collect the shipwrecked, wounded, and sick and to recover the dead.\(^2^5\)

The clause ‘as far as military exigencies permit’ is almost identical to the ‘as far as military considerations allow’ reservation of Geneva Convention IV. There is a similar statement in the Canadian Law of Armed Conflict Manual (2001) with respect to civilian dead in the hands of a party to the conflict. It states:

> As far as military considerations permit, the belligerents must facilitate any steps to search for killed and wounded, to assist shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.\(^2^6\)

These statements are at odds with the bulk of the military manuals and, as argued above,

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\(^{2^5}\) Henckaerts and Doswald-Beck, *Volume II of Practice*, 2656-60.

\(^{2^6}\) Henckaerts and Doswald-Beck, *Volume II of Practice*, 2656-60.
contrary practice from a couple of states is not decisive, as all nations have an interest in the rules of armed conflict.

The other important source of support for this rule is found in the sections on national legislation, national case-law and other national practice. Indonesia, Rwanda and the Philippines all have legislation providing for searching for the dead in situations of non-international armed conflict, without any reservation. This supports the customary status of the rule in situations of non-international armed conflict.\(^{27}\) The legislation is also particularly important evidence of *opinio juris*, as it brings domestic law into conformity with international legal obligations.

The national case law section gives an example from the Israel High Court of Justice Judgment in the *Jenin (Mortal Remains)* case.\(^{28}\) The court stated that the obligation to search for and collect the dead derives from ‘respect for every dead’.\(^{29}\) The Court also held that locating the dead is a ‘highly important humanitarian deed’.\(^{30}\)

In 2009 the Israeli Ministry of Foreign Affairs issued a report which stated that ‘a special medical coordination centre was set up in the Gaza District CLA (Coordination and Liaison Administration), which dealt with evacuation of the dead from areas of hostilities’\(^{31}\) in Israeli operations in Gaza between 27 December 2008 and 18 January 2009 known as Operation Cast Lead. As Israel is not a party to either of the Additional Protocols, these are particularly important examples of *opinio juris* and state practice confirming customary international law.

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\(^{27}\) Henckaerts and Doswald-Beck, *Volume II of Practice*, 2656-60.
\(^{28}\) Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling 14 April 2002.
\(^{29}\) Israel, *Jenin case*.
\(^{30}\) Israel, *Jenin case*.
Indonesia reported to the ICRC Study authors that, whenever circumstances permit, its regulations required all possible measures to be taken to search for the dead. The Philippines reported that in an armed conflict where guerrilla warfare is used, distinguishing between civilians and combatants is very difficult. As a result, the Philippines applies the same rules to search for both civilians and combatants. The USA reported that its *opinio juris* considers that each party to a conflict must permit teams to search for and recover the dead from the battlefield, and that all possible measures must be taken to search for the dead.\(^32\) Sierra Leone’s Instructor Manual (2007) states that search for and collection of dead bodies applies ‘to all dead persons, whether civilian or military’.\(^33\)

Virtually uniform and extensive practice and *opinio juris* (as expressed in numerous military manuals) has been identified to support the applicability of customary law Rule 112 to civilians. This applies to all states, including those not party to Additional Protocols I and II. Consequently, we confirm that Legal Standard 1 (a) and (b) identified in our original report on casualty recording obligations remain customary international law, applicable to all casualties of armed conflict.

**ICRC Study: Customary Law Rule 113**

> Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited.\(^34\)

**Original casualty recording legal report: Standard 1 (d)**

1 (d) the remains of the dead are not to be despoiled.

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\(^32\) Customary Humanitarian Law Database, [http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule112.](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule112.)

\(^33\) Customary Humanitarian Law Database, [http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule112.](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule112.)

\(^34\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 409.
The ICRC study again supports the application of this rule in international and non-international armed conflict. The two parts of the rule contain separate elements of state practice and *opinio juris*.

The first part is the practice supporting respect for the dead. This rule is relatively uncontroversial as this provision is included in Article 16 of Geneva Convention IV, now universally ratified. Notwithstanding that fact, the Customary Humanitarian Law database is replete with practice and *opinio juris*, although the practice is far more detailed with respect to military casualties. The ICRC Study commentary indicates that the obligation to prevent despoilation of the dead was first codified in the 1907 Hague Convention (X). The most recent treaty included in the commentary is the Statute of the International Criminal Court, which has set out a war crime in Article 8 (2) (b) (xxi) and (c) (ii) of ‘committing outrages upon personal dignity’. This is applicable in international and non-international armed conflict and, according to the Elements of Crimes, also applies to dead persons. This branch of international criminal law reflects the long-standing prohibition against pillage, defined as looting or plundering of enemy property by individuals for private ends. Support for this provision applying to non-international armed conflict is found in many military manuals and a large sampling of domestic criminal legislation.

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35 1907 Hague Convention X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Art. 16: ‘After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment. They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.’


The second part of the rule, the prohibition against mutilation of the dead, is a long-standing obligation in armed conflict included in the universally ratified Geneva Conventions I and II with respect to the military dead.\textsuperscript{38} There were several trials after the Second World War in reference to charges of mutilating the dead. In the \textit{Pohl case} (1947), the US Military Tribunal at Nuremberg stated that robbing the dead ‘is and always has been a crime’.\textsuperscript{39} In a non-international armed conflict, the Prosecutor before Colombia’s Council of State argued that the obligation to respect the dead is inherent in Common Article 3 to all four Geneva Conventions.\textsuperscript{40} Criminalisation of violation of this rule by national jurisdictions is important evidence of \textit{opinio juris} but also of state practice as prosecution for violation of these rules represents actual practice.

There are statements in support of this part of the rule in several military manuals. For example, state practice mentioned in the customary law database includes Australia’s Law of Armed Conflict Manual (2006), which states:

\begin{quote}
The remains of the dead, regardless of whether they are combatants, non-combatants, protected persons or civilians are to be respected, in particular their honour, family rights, religious convictions and practices and manners and customs. At all times they shall be humanely treated.\textsuperscript{41}
\end{quote}

Sierra Leone’s Instructors Manual (2007) also states that the prohibition of mutilation of dead bodies applies to all dead persons, ‘whether civilian or military’.\textsuperscript{42} South Africa’s Law of

\begin{flushright}
\textsuperscript{38} Article 18 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85.  \\
\textsuperscript{39} Henckaerts and Doswald-Beck, \textit{Customary International Humanitarian Law}, 409.  \\
\textsuperscript{40} Henckaerts and Doswald-Beck, \textit{Customary International Humanitarian Law}, 411.  \\
\textsuperscript{41} Henckaerts and Doswald-Beck, Volume II of Practice, 2663.  \\
\textsuperscript{42} Customary Humanitarian Law Database, \url{http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule113}.
\end{flushright}
Armed Conflict Teaching Manual (2008) states that Article 34 of Additional Protocol I applies to the remains of persons who have died for reasons related to occupation, in detention resulting from occupation, or in hostilities and who are not nationals of the country in which they have died as a result of hostilities. It states that the remains of all such persons shall be respected. The Manual also states in Handling of War Victims that the dead ‘must be protected and cared for’.43

The Jenin Mortal Remains case in 2002 dealt with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in the Jenin refugee camp should be identified and buried. The High Court of Israel stated: ‘Needless to say, the burial will be made in an appropriate and respectful manner, maintaining the respect for the dead.’ Crucially the court also held: ‘In this matter, no distinction will be made between bodies of armed combatants and the bodies of civilians.’44

In practice that applies to both parts of this rule, the US Manual for Military Commissions (2010), Part IV, Crimes and Elements, includes ‘Intentionally Mistreating a Dead Body’ (if not justified by military necessity) in the list of crimes triable by military commissions. Mistreatment is defined as ‘dismemberment, sexual or other defilement, or mutilation’, punishable by a sentence of up to 20 years.45

In conclusion, the practice for both parts of Rule 113 appears to be applicable to both military and civilian casualties. There does not seem to be contrary practice identified, and the criminalisation of the mutilation and despoiling of bodies both domestically and internationally

44 Henckaerts and Doswald-Beck, Volume II of Practice, 2667.
supports the customary nature of this rule. This rule appears to be customary based on extensive evidence of *opinio juris* and of uniform practice.

Recognition of Rule 113 as customary law supports the customary nature of Standard 1(d) proposed in our original report. However, the latter should be amended to match the exact wording of Rule 113, including the prohibition of mutilation of dead bodies, as the bulk of state practice and *opinio juris* supports both provisions.

**ICRC Study: Customary Rule 114**

Parties 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. They must return their personal effects to them.\(^{46}\)

**Original casualty recording legal report: Standard 1(c) and 1(e)**

1 (c) if at all possible, the remains of those killed are to be returned to their relatives;

1 (e) any property found with the bodies of the dead is to be returned to the relatives of the deceased.

This rule is to be distinguished from the other rules examined here, as it is argued in the ICRC Study commentary to be customary only in international armed conflict.\(^{47}\) To determine the applicability of this rule in non-international armed conflict it is necessary to consider the

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\(^{46}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 411.

\(^{47}\) See Jean-Marie Henckaerts, ‘Customary International Humanitarian Law: A Response to US Comments’ (2007) 89 IRRC 473, p.478. ‘For example, when it could not be concluded that Rule 114 was part of customary law in non-international armed conflicts, resolutions in support of such a conclusion did not tip the balance because practice outside them was not consistent.’
human rights law analysis below.

The practice supporting Rule 114 is divided into two sections, the first with regard to the return of remains and the second concerning the return of personal effects.

There is a large volume of practice recorded for the first obligation. Again, prior to the adoption of Additional Protocol I, there were no specific treaty provisions with respect to civilian remains, except for the second paragraph of Article 130 of Geneva Convention IV concerning internees. This provides that: ‘The ashes shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.’\(^{48}\) The obligation to facilitate the return of military remains is located in a number of military manuals. This includes the USA, not a party to Additional Protocol I.\(^{49}\)

Examples of practice include agreements to return the remains of both military and civilian dead in the conflict between Egypt and Israel in 1975-76, and the handing over by Indonesia of the ashes of 3,500 Japanese soldiers killed during the Second World War in Irian Jaya. Finally, in the *Abu-Rijwa* case before Israel’s High Court in 2000, the Israel Defence Forces carried out DNA identification tests when asked by family members to repatriate remains.\(^{50}\)

More recent material in the customary law database includes Peru’s IHL and Human Rights Manual (2010) which states ‘Efforts must be made to facilitate the return of bodily remains or ashes of the deceased ...to their country of origin’. South Africa’s Law of Armed Conflict Teaching Manual (2008) also states that as soon as circumstances permit agreements shall be

\(^{48}\) *Geneva Convention IV relative to the Protection of Civilian Persons In Time of War, Article 130.*
\(^{49}\) Henckaerts and Doswald-Beck, *Volume II of Practice*, 2683-84.
\(^{50}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 412-14.
concluded to ‘facilitate the return of the remains of the deceased and his personal effects to the home country upon that country’s request or that of the next of kin’. 51

The ICRC study gives examples of practice in non-international armed conflict, as there are no treaty provisions with respect to return of remains or property of deceased persons. In 1974, the UN General Assembly called upon parties to armed conflicts, regardless of their character, ‘to take such action as may be within their power... to facilitate the disinterment and the return of remains, if requested by their families’. In 1985, Colombia’s Administrative Court in Cundinamarca held that families must not be denied their legitimate rights to claim the bodies of their relatives, transfer them to wherever they see fit, and bury them. It was agreed under ICRC auspices that the mortal remains of more than 1,000 soldiers and LTTE fighters in Sri Lanka in 1999 be exchanged. The Plan of Action for the Years 2000-2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, requires that all parties to an armed conflict take effective measures to ensure that ‘every effort is made... to identify dead persons, inform their families and return their bodies to them’. 52

Other reported practice in the ICRC study includes the Philippines Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains. In Proposal 1.2 this provides: ‘At the request of the party on which the deceased depended, the parties to the conflict shall organize the hand-over of the mortal remains.’ In Part IV, Article 3(4), the Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines expressly prohibits the ‘breach of duty to tender immediately such remains [of those who have died in the course of the armed conflict] to their families or to give them decent burial’, in relation to civilians and

52 Henckaerts and Doswald-Beck, Customary International Humanitarian Law, 412-14.
military personnel who have surrendered or are *hors de combat*.\(^{53}\)

Even though there is some significant practice that supports Rule 114 for civilians in non-international armed conflict, the vast number of military manuals cited in the ICRC study only include this obligation with respect to military personnel, in international armed conflict. Therefore, the original ICRC study does not state that this rule is established as customary in international humanitarian law for civilians in non-international armed conflict. However, the present report argues below that the legal obligation to return human remains, as set out in our original report, is supported in international human rights law for all conflicts. For this reason it is cited in our legal standards. Detailed discussion of the human rights legal obligations follows later in this report.

The obligation to return personal effects of dead military personnel is codified in the Geneva Conventions, which state that they should be returned to victims’ families by way of the Information Bureaux.\(^{54}\) However, with respect to civilians, Geneva Convention IV only covers civilians who have been interned. Examination of state practice is necessary to see if there is a customary obligation in international armed conflict to return personal effects of non-interned dead civilians.

Regrettably, the reported practice with respect to the property of civilians seems to be almost non-existent in both the ICRC study and the customary law database. Although countries party to Additional Protocol I have this obligation with respect to civilians, the compilation of the practice thus far does not support the same obligation for those states not party to the

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\(^{54}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 413.
Protocol. It cannot be argued that there is a trend towards customary status unless further work is done with respect to identifying practice with respect to civilians. Henckaerts would argue that the lack of contrary practice would support this rule, but on a deductive approach one fails to find statements of *opinio juris* leading to a supposition that the rule exists.\(^{55}\)

To conclude this section our original legal standard 1(c), return of remains to the family, is customary humanitarian law in international armed conflict. However, our legal standard 1(e) does not find support in customary humanitarian law. Our original legal standards must be amended to delete legal standard 1 (e) and, for consistency, amended to replicate the exact wording of the first sentence of Rule 114 of the ICRC study.

**ICRC Study: Customary Rule 115**

The dead must be disposed of in a respectful manner and their graves respected and properly maintained.\(^{56}\)

**Original casualty recording legal report: Standard 1(f), 1(g) and 1(h)**

1(f) the dead are to be buried with dignity and in accordance with their religious or cultural beliefs;
1(g) the dead are to be buried individually and not in mass graves;
1(h) the graves are to be maintained and protected.

The ICRC study asserts that state practice establishes Rule 115 as a norm of customary international law applicable in both international and non-international armed conflict. In spite

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of the short length of the rule, the ICRC study divided the practice into several sections. The authors of our original report decided to divide the rule into its sections for clarity and ease of reference.

Section A: The general obligation of disposal of the dead

For civilians, this obligation is only codified in Article 130 of Geneva Convention IV for internees. An important piece of practice supporting the customary status of this rule for civilians is that of the Philippines, which was not party to Additional Protocol I until May 2012 (although it was a party to Additional Protocol II from 1986). The Philippine Army Soldier’s Handbook on Human Rights and International Humanitarian Law (2006) provides:

After an engagement:

6. Bring the bodies to the police, if possible and demand receipt. If possible, bring the dead to proper authorities. If not, bury them and mark their graves so they can be retrieved later. This will dispel any doubts of foul play.

7. Inform immediately the bereaved families of the dead. Inform immediately the families of the dead. This includes the dead enemies and crossfire victims. Crossfire victims are entitled of burial assistance from the government. Provide whatever assistance to the families of the dead, to include financial help, if possible.57

In its Manual on the Rules of Warfare (2006), Israel states: ‘The bodies of the fallen must not be desecrated and they must be given suitable burial.’ The manual further states:

Following barbaric acts committed by soldiers, such as scalping, cutting off the ears

and “collecting” fingers, the Geneva Convention was required to provide for the orderly and honourable burial of the enemy’s fallen. The pressure for this actually came from the combatants who wanted to give the last honours to their enemies and ensure that the same treatment would be accorded to their own fallen.\(^{58}\)

In addition, the manual states:

> The IDF [Israel Defense Forces] maintains a cemetery where the bodies are laid to rest of terrorists killed in skirmishes with the IDF. In exchange for the return of the bodies of IDF soldiers who fell, the bodies of Hezbollah fighters were returned to it.\(^{59}\)

Additional practice supporting this general obligation includes a statement by Zimbabwe’s Deputy Minister of Home Affairs, who in 2013 stated that the remains of people who died during the war of liberation were exhumed and reburied in ‘a decent way’.\(^{60}\)

There is one case of contrary practice reported, a case of the disrespectful disposal of dead civilians in Papua New Guinea. This incident was condemned by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.\(^{61}\)

The practice here is not extensive but there are several statements of *opinio juris* supporting the rule from states which are not party to Additional Protocol I. The lack of contrary practice,


\(^{60}\) New practice added to the Customary Humanitarian Law Database, [http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule115](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule115).

except for the one incident in Papua New Guinea, seems to support Henckaerts’ contention that whatever practice there is, supports the rule.\footnote{Jean-Marie Henckaerts, ‘Customary International Humanitarian Law: A Response to US Comments’ (2007) 89 IRRC 473, p.473.}

Section B: Respect for religious beliefs

Countries party to Additional Protocol I clearly include civilians within this obligation. As an example of a party state’s practice, Australia’s Law of Armed Conflict Manual (2006) states:

9.103 The remains of the dead, regardless of whether they are combatants, non-combatants, protected persons or civilians are to be respected, in particular their honour, family rights, religious convictions and practices and manners and customs. … The minimum respect for the remains of the dead is a decent burial or cremation in accordance with their religious practices.

9.104 The burial or cremation of the dead shall be carried out individually in accordance with the religious rites and practices of the deceased.\footnote{New practice added to the Customary Humanitarian Law Database, \url{http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule115}.}

Once again, practice from non—party state Israel is significant. Israel’s High Court of Justice, in its ruling in the \textit{Barake} case in 2002, stated that the mortal remains of those who died in a battle in Jenin refugee camp should be identified and buried, and ‘[t]he burial will be conducted... conforming to religious laws’.\footnote{New practice added to the Customary Humanitarian Law Database, \url{http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule115}.}

What limited practice there is seems to support the customary nature of Rule 115, particularly
given the large volume of military manuals that confirm that both combatants and detainees should be buried according to their religious traditions.

Section C: Practice regarding cremation of bodies

Geneva Conventions I and II mandate that dead combatants are not to be cremated ‘except for imperative reasons of hygiene or for motives based on the religion of the deceased’. This provision applies to civilians only in the case of internees.

Rule 115 does not specify this obligation in detail except that the deceased should be ‘disposed of in a respectful manner’. The ICRC Study commentary provides further detail.

The reported practice is lacking with respect to civilian casualties, as the military manuals implicitly seem to deal with dead combatants. For example, Israel’s Manual on the Rules of Warfare (2006) states that:

   [A]s a rule, the enemy’s fallen should be buried as per their religious rites as far as possible, and the bodies may only be burned in cases where this is necessary for reasons of hygiene or for religious reasons.\(^{65}\)

It could be assumed that civilians could be part of the ‘enemy’s fallen’ but it seems more likely the manual is addressing obligations for combatants.

An important element of practice that could be very influential in deciding that this part of Rule 115 applies to civilians is the 1994 final report on grave breaches of the Geneva Conventions

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and other violations of IHL committed in the former Yugoslavia. In this report, the UN Commission stated with respect to cremation that ‘Bodies should not be cremated except for hygiene reasons or for the religious reasons of the deceased’. The context of that statement made it clear that they were referring to mass graves of civilians and combatants found in the former Yugoslavia.  

In more recent examples, a report of practice from Malaysia stated that bodies of members of enemy forces and civilians and who are unclaimed are buried according to their religious rites.  

Peru’s IHL and Human Rights Manual (2010) states that ‘Bodies should only be cremated for imperative reasons of hygiene or for reasons connected to the religion of the deceased’.  

The limited practice reported, and statements of opinio juris from states not party to Additional Protocol I, support the customary status of this part of Rule 115.

Section D: Burial in individual or collective graves

The obligation under the Geneva Conventions is to bury dead combatants in individual graves ‘unless unavoidable circumstances require the use of collective graves’. This also applies in Geneva Convention IV to dead civilian internees. The practice with respect to civilians who are not interned is sparse but, in 1995, Colombia’s Council of State held that the deceased must be buried individually, subject to all the requirements of the law, and not in mass

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67 Henckaerts and Doswald-Beck, Volume II of Practice, 2699.
69 Article 120 of the Geneva Convention III states: ‘...Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.’
graves. As Colombia is involved in a non-international armed conflict, some of the deceased will indeed be civilians.

Further practice regarding civilians is found in the former Yugoslavia. In its final report in 1994, the United Nations Commission of Experts on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia noted with respect to mass graves that:

A mass gravesite is a potential repository of evidence of mass killings of civilians and POW’s ... The manner and method by which a mass grave is created may itself be a breach of the Geneva Conventions, as well as a violation of the customary regulations of armed conflict... Parties to a conflict must also ensure that deceased persons are ... buried in individual graves, as far as circumstances permit.

More recently, Australia’s Law of Armed Conflict Manual (2006) states that ‘the burial or cremation of the dead shall be carried out individually’. Burundi’s regulations on International Humanitarian Law (2007) state that ‘after identification, the dead must be buried individually, if the tactical situation and other circumstances (e.g. hygiene) permit’. Importantly, these regulations make no distinction between civilian and combatants on how victims were to be treated.

The customary nature of this rule is considered established in both international and non-international armed conflict.

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70 Henckaerts and Doswald-Beck, Volume II of Practice, 2706.
Section E: Grouping of graves according to nationality

There is nothing in treaty law with respect to civilians requiring that graves be grouped according to nationality, and nor is there evidence of such practice. In contrast, this principle seems to be well established in the practice and treaty law with respect to prisoners of war and dead military personnel.\textsuperscript{73} This might only be of significance for interred civilians, as civilians killed in conflict are likely to be buried in their home territory. This requirement is not established as customary for civilians, and accordingly our original report did not propose this as a legal standard.

Section F: Respect for and maintenance of graves

As discussed above, this provision is included in Article 130 of Geneva Convention IV but only with respect to civilians who are detainees. Article 34 of Additional Protocol I extends this protection to all civilians. Canada, a party to Additional Protocol I, confirms the detail of the obligation in its 1999 Law of Armed Conflict Manual. This states that the grave sites of all persons who have died as a result of hostilities, or while in occupation or detention in relation thereto, shall be ‘properly respected [and] maintained’.\textsuperscript{74} Similarly, the UN report on Yugoslavia referred to in the previous rule also states that the graves were to be maintained.\textsuperscript{75}

The practice of Israel is highlighted again, as a non-party state to the Additional Protocols. Israel’s Manual on the Rules of Warfare (2006) states: ‘The IDF (Israel Defense Forces)\textsuperscript{76}

\textsuperscript{73} The Commonwealth War Graves Commission groups graves into nationalities.
\textsuperscript{74} New practice added to the Customary Humanitarian Law Database, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule116.
maintains a cemetery where the bodies are laid to rest of terrorists killed in skirmishes with the IDF.\textsuperscript{76}

In examining Rule 115 in totality, it is evident that the practice seems very meagre with respect to civilians although the Israeli practice, as a state not party to the Additional Protocols, has to be influential in this regard. The practice in the customary law database emphasised the practice of non-party states.

Although there is extensive reliance on the United States Military Manuals in the ICRC study and database to support the rule, the provisions in these manuals seem to refer only to military casualties. With respect to civilian casualties there is a dearth of practice identified, and further research is required.

The customary law database includes one example of contrary state practice with respect to terrorists that rejects all parts of Rule 115. In 2007, the Constitutional Court of the Russian Federation ruled on the constitutionality of two laws related to the bodies of suspected terrorists, which stated their bodies would not be handed over for burial and the place of their burial would not be revealed.\textsuperscript{77} These measures were upheld in the Russian Constitutional Court based on the interest in fighting terrorism.\textsuperscript{78}

\textsuperscript{76} New practice added to the Customary Humanitarian Law Database, \url{http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule116}.


\textsuperscript{78} See New practice added to the Customary Humanitarian Law Database, \url{http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule115} for extensive quotation of this case.
More recently, Russia has introduced regulations in effect from 1 February 2022 allowing for mass burial for victims of armed conflict. This practice cannot be ignored particularly in light of the ongoing armed conflict in Ukraine. Russia is a party to the four Geneva Conventions (having withdrawn from Additional Protocol I in 2019) and may well be violating those Conventions with these regulations, which were greeted with alarm from the European Union and Ukraine.

The international reaction to the examples of contrary practice in Papua New Guinea and Russia further strengthen the customary nature of Rule 115 and thereby our proposed legal standards on casualty recording, 1 (f), (g) and (h). However, these have been amended to include the exact working of Rule 115, including its components on burial according to religious tradition and the prohibition of mass graves.

**ICRC Study: Customary Rule 116**

With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves.

**Original casualty recording legal report: Standard 1(j) and 1(k)**

1 (j) the location of the place of burial is to be recorded by the party to the conflict in control of that territory;

1(k) there should be established in the case of civilian casualties an official graves registration service.

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79 Radio Free Europe/Radio Liberty, Russia introduces regulations to expedite mass burials of those killed during military conflicts, [https://www.rferl.org/a/russia-mass-burials-regulations/31619324.html](https://www.rferl.org/a/russia-mass-burials-regulations/31619324.html).

80 Radio Free Europe, Russia introduces regulations.

The obligation to identify dead military personnel was first codified in the 1929 Geneva Convention, which once again could be argued to be codification of custom with respect to prisoners of war.\textsuperscript{82} Part of Article 26 stated that:

\begin{quote}
the belligerents shall ensure that prisoners of war who have died in captivity are honourably buried, and that the graves bear the necessary indications and are treated with respect and suitably maintained.\textsuperscript{83}
\end{quote}

Identification is required for all military dead in the 1949 Conventions and expanded to include the obligation to record the dead and transmit the information to the other party and the Central Tracing Agency. This obligation is also set out in numerous military manuals, demonstrating compliance with the universally ratified Geneva Conventions.

Regrettably, the obligation set out in Article 129 of Geneva Convention IV for identification of civilian casualties is only with respect to detainees. Other deceased civilians do not receive the same protection until Article 33 of Additional Protocol I, which mandates the recording of information for persons who died as a result of occupation or hostilities.\textsuperscript{84} Therefore, as with Rule 112, Rule 116 proposes new customary law with respect to civilians and must be tested

\begin{footnotesize}82 International Military Tribunal (Nuremberg) Judgment and Sentence, reprinted in (1947) 41 American Journal of International Law, 172, 232. \\
83 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 118 LNTS 303, Geneva, 26 July 1929. \\
84 Protocol I Additional to the Geneva Conventions of 12 August of 1949, and relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3, Article 33 (2) ‘In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:
(a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
(b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.’\end{footnotesize}
against density of state practice and *opinio juris*. The relevant practice is divided into several sections.

Section A: Identification of the dead prior to disposal

The ICRC study argues that the obligation to identify the dead is an obligation of means, and parties must use their best efforts and all means at their disposal in this respect. According to the practice, identification measures included collecting one half of the double identity disks, conducting and recording autopsies, the establishment of death certificates, the recording of the disposal of the dead, burial in individual graves, prohibition of collective graves without prior identification, and the proper marking of graves. Practice also suggests that exhumation combined with the application of forensic methods, including DNA testing, may be an appropriate method of identifying the dead after burial.\(^{85}\) It is not suggested that this is a mandatory legal obligation.

This obligation requires effective cooperation between all parties concerned. The international community acted to support this obligation in the 1974 General Assembly Resolution which called upon parties to cooperate ‘in providing information on the missing and dead in armed conflicts’.\(^ {86}\) International practice is only relevant as it reflects state agreement to an international legal obligation, and this 1974 Resolution was a consensus resolution reflecting agreement by all member states to the United Nations. More recently, the Plan of Action for the years 2000-2003 adopted by the 27\(^{th}\) Conference of the Red Cross and Red Crescent in 1999, required that all parties to an armed conflict take effective measures to ensure that ‘every effort is made . . . to identify dead persons, inform their families and

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\(^{86}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 414.
return their bodies to them’\(^87\) and that ‘appropriate procedures be put into place at the latest from the beginning of an armed conflict’.\(^88\)

There is consistent practice that supports this rule as applicable in non-international armed conflict and with respect to civilian deaths. Human Rights Special Rapporteurs and other human rights mechanisms have called for these measures in the context of the non-international armed conflicts in Chechnya, El Salvador and the former Yugoslavia. In December 1991, when the conflict in the former Yugoslavia was characterised as non-international, the parties to the conflict reached an agreement with respect to the exchange of information regarding the identification of the deceased.\(^89\)

The practice in this case is extensive with respect to civilian casualties in non-international armed conflicts, including in Colombia, Chechnya, El Salvador and the former Yugoslavia. Practice is identified in the Côte d’Ivoire Teaching Manual of 2\(^{nd}\) Year Trainee Officers (2007), which states that before burial:

[B]odies shall to the greatest extent practicable, be the object of a careful examination, if possible by medical examination, with a view to confirming death, establishing identify and enabling a report to be made.\(^90\)

The Russian Federation’s Regulations on the Application of International Humanitarian Law (2001) provides in section 164 that:

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\(^{87}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 414.

\(^{88}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 420.

\(^{89}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 419.

Search for, collection, identification and burial of the dead members of the enemy armed forces as well as of other victims of armed conflicts shall be organised immediately, as soon as the situation permits and carried out... to establish the identity of the dead.\textsuperscript{91}

Sierra Leone’s Instructors Manual (2007) cites an obligation to identify the dead, whether civilian or military, by checking their identity card or disc. The US Manual on Detainee Operations (2008) includes civilian internees within the obligation to identify the dead, including providing a statement as to the cause of death.\textsuperscript{92}

This part of the rule is unquestionably customary with respect to civilian casualties. The specificity of the practice reveals a gap in our original legal standards as our rules did not specifically contain an obligation to identify the dead. Using the exact wording of the customary rule remedies this defect.

Section B: Recording of the location of graves

The practice identified under this section is largely limited to military casualties, although the manuals of Russia and Sierra Leone mention both civilian and military casualties. There is no practice with respect to civilians except for the human rights case law in the Inter-American Court as discussed below in the section on the missing. Regrettably, one cannot argue that with respect to civilian casualties it is a customary legal obligation to record the location of civilian graves, except for those who die in detention where it is an obligation under the universally

\textsuperscript{91} New practice added to the Customary Humanitarian Law Database, \url{http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule116}.

\textsuperscript{92} New practice added to the Customary Humanitarian Law Database, \url{http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule116}. 
ratified Article 129 of Geneva Convention IV.

In fact, there may well be contrary practice not identified in this study. One only needs to refer to the armed conflict in the former Yugoslavia to identify a widespread practice of concealing civilian graves. The whole phenomenon of ‘the Disappeared’ confirms that in most cases civilians are left undiscovered and unidentified until years after a conflict ends. This is one area of the ICRC study that might well have enumerated examples of concealment of civilian deaths, a practice that was starkly evident during the conflict in Syria. However, the discussion below on the Missing supports the customary nature of this part of the customary rule and our legal standards on casualty recording.

Section C: Marking of the graves and access to gravesites

Once again, the practice is limited, particularly for non-party states of Additional Protocol I. Canada (a party state) confirms that marking of graves is fundamental for civilians as well as for military personnel. Their Law of Armed Conflict Manual (2001) states in its chapter on the treatment of the wounded, sick and shipwrecked:

    The remains of all persons who have died as a result of hostilities or while in occupation or detention in relation thereto shall be respected, and their gravesites properly respected, maintained and marked.

Mass graves are being discovered in many places in the world where people remain unidentified. In 2005 Bosnia and Herzegovina amended its 2003 Criminal Code to state

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94 Henckaerts and Doswald-Beck, Volume II of Practice, 2728.
‘Whoever, having knowledge of the location of a mass grave, fails to inform of its location, shall be punished by imprisonment for a term not exceeding three years’. This is important practice but it seems to be unique. Customary humanitarian law has not developed to the extent that one can argue state practice and opinio juris for this section of Rule 116, or for our casualty recording provisions 1 (j) and (k). However, once again, support for the customary nature of this rule is to be found in the discussion of the Missing and the updated work on human rights with respect to the migrant crisis.

Section D: Identification of the dead after disposal

The bulk of the practice reported under this obligation clearly relates to military dead as the Military Manuals, quoted from several countries, emphasise the practice of retaining one half of the identity discs. However, in the Israeli High Court Abu-Rijwa case, it was reported that the Israel Defense force carried out DNA identification tests on the remains of two ‘terrorists’ buried in Israel. This was in response to the request of the deceased’s Jordanian family members, who had petitioned the Israeli High Court in 1992 for the return of the remains of their son.

One case may not constitute enough evidence to assume the development of a customary rule for civilians. In these circumstances, one could support Henckaerts’ assertion that within the extensive practice identified there was no contrary practice to this proposed rule, meaning this one case constitutes the best practice on how dead civilians should be treated. But support for the customary nature of this provision is only to be found in the human rights case law discussed below.

97 Henckaerts and Doswald-Beck, Volume II of Practice, 2732.
Section E: Sharing information concerning the dead

There is important state practice supporting this portion of the customary obligation as applicable to civilians, namely the sharing of information concerning the dead. The summary of practice in the ICRC study reports:

In proposal 1.1 of the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains, the parties to the conflict in the former Yugoslavia agreed that they shall provide to the adverse party/parties, through the intermediary of the ICRC and National Information Bureaux and, as rapidly as possible, all available information regarding: the identification of deceased persons [and] the gravesites of deceased persons belonging to the adverse parties.98

Once again, Israel’s practice supports this provision, despite not being party to the Additional Protocols. Israel’s Manual on the Rules of Warfare (2006) states:

Each side has the duty to record details of the fallen and details of the death, and to send to the other side half the identity tag worn by the fallen, his personal possessions and the death certificate. The Additional Protocols indicate the right of the families to know the fate of [their relatives] and provide that each side is required to search for the enemy’s missing in action and allow access to search parties.99

In summary of Rule 116, the volume of practice with respect to identification of bodies of civilians in international and non-international armed conflict seems sufficient on the

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98 Henckaerts and Doswald-Beck, Volume II of Practice, 2735.
‘extensive and virtually uniform’ test established in the *North Sea Continental Shelf cases* to argue customary status.

That is not the case with the remainder of the rule. There is a dense practice with respect to recording the location of the graves of military personnel, and notification of that location to relatives. One needs only look to an organisation like the Commonwealth War Graves Commission to see its impact. In contrast, there is very sparse practice relating to the recording of civilian graves. This part of Rule 116 does not seem to be unquestionably customary for civilians, and more density of state practice and declarations representing *opinio juris* are needed.

The proposed legal standards are not fully supported in the customary humanitarian law database section relating to ‘The Dead’ alone. However, the subsequent section, relating to ‘The Missing’ provides further support for the customary nature of the remaining obligations of notification of the location of burial contained in Rule 116 and those of our original report’s legal standards.

**The Missing**

The second relevant chapter of the ICRC study relates to the missing in armed conflict. Customary humanitarian law Rule 117 and the customary humanitarian law database contain important information regarding the search for missing persons. This further supports and enhances the proposed customary law rules and our legal standards including those related to our proposed standards 1(j) and 1 (k) on civilian graves. Furthermore, recent practice with respect to dead and missing migrants is an important development, which in this author’s opinion resolves any doubt on the customary nature of most of our proposed legal standards.
The importance of the analysis contained in the Last Rights project is that the legal obligations are located within international human rights law. Included in that analysis is updated case law from the Inter-American Court of Human Rights and the United Nations Human Rights Committee. There have been a series of expert committee reports and courts of human rights cases that consider situations of armed conflict in light of human rights obligations. In this author’s view, this is also an example of practice and *opinio juris* supporting our legal standards.

**ICRC Study: Customary Rule 117**

Each party to the conflict must take all feasible measures to account for persons reported missing and as a result of armed conflict and must provide their family members with any information it has on their fate. \(^{100}\)

**Original casualty recording legal report: Standard 1(a), 1(c), 1(j), 1(k), 1(l)**

1. (a) search for all missing civilians as a result of hostilities, occupation or detention;
2. (c) if at all possible, the remains of those killed are to be returned to their relatives;
3. (j) the location of the place of burial is to be recorded by the party to the conflict in control of that territory;
4. (k) there should be established in the case of civilian casualties an official graves registration service;
5. (l) exhumation of dead bodies is only to be permitted in circumstances of public necessity, which will include identifying cause of death.

The customary humanitarian law practice is divided into separate sections, replicated here.

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\(^{100}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 421.
Section A: Search for missing persons

There is a large volume of practice and statements of *opinio juris* that support this aspect of Rule 117. In 2006 the United Nations adopted the International Convention for the Protection of All Persons from Enforced Disappearances,\(^\text{101}\) Article 24 of which states:

> Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

To date only 66 of 193 states have ratified the Convention, so one must look at state practice to establish the customary nature of the rule. Fortunately, there are several examples. Australia’s Law of Armed Conflict Manual (2006) states:

\(^{9.99}\) As soon as possible each party to an armed conflict must search for those reported missing by the enemy...

\(^{9.101}\) The search. As soon as circumstances permit, but at the latest once active hostilities have ceased, all protagonists to the conflict shall commence to search to the fullest extent possible for persons reported missing by one of the belligerents ...

\(^{9.102}\) Particulars of missing persons. In order to facilitate the search for missing combatants ... each of the protagonists shall ... record ... information for each person detained, imprisoned or otherwise held in captivity for a period of two weeks, or who has died.\(^\text{102}\)

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Canada’s Law of Armed Conflict Manual (1999) provides: ‘As soon as possible, and certainly immediately upon the end of hostilities, each party to the conflict must search for those reported missing by the adverse party.’ The manual further states: ‘To facilitate the finding of missing personnel, parties to the conflict shall endeavour to reach agreements to allow teams to search for ... the dead from the battlefield areas.’

Croatia’s Law of Armed Conflict Compendium (1991) instructs local commanders to offer their assistance to the civil authorities in the search for missing persons. Indonesia’s Military Manual (1982) provides: ‘The parties to the conflict should search for missing persons, who are reported by the adverse party, soon after the hostilities cease.’ Its Manual on the Rules of Warfare (2006) states that, according to the 1977 Additional Protocols, ‘each side is required to search for the enemy’s missing in action and allow access to search parties’. Peru’s IHL and Human Rights Manual (2010) states that:

Each party to the conflict must endeavour to trace persons reported missing by an adverse party, which must provide all the relevant information on the missing persons in order to facilitate the search.

These are among the many military manuals cited to support this obligation, which is also supported by national legislation in several countries (Azerbaijan, Denmark, Ireland, Norway and Zimbabwe).

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There is practice supporting this rule in the practice of non-party states. Israel’s Manual on the Laws of War (1998) provides that, according to the 1977 Additional Protocols, ‘each party must ... search for missing persons of the enemy and try to reach arrangements for the dispatch of search teams’. In Article XIX of the 1994 Israel-PLO Agreement on the Gaza Strip, the Government of Israel and the Palestine Liberation Organization (PLO) agreed that:

The Palestinian Authority shall cooperate with Israel by providing all necessary assistance in the conduct of searches by Israel within the Gaza Strip and the Jericho Area for missing Israelis ... Israel shall cooperate with the Palestinian Authority in searching for ... missing Palestinians.\textsuperscript{105}

In Article 4 (9) of Part IV, the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, provides: ‘Every possible measure shall be taken, without delay, to search for ... missing persons’.\textsuperscript{106} Critically, none of these agreements limit the search to dead combatants.

The volume of practice with respect to searching for missing persons seems to confirm this aspect of Rule 117 as customary, based on military manuals, national legislation, statements in international organisations and complementary practice in human rights committees and courts. This rule clearly passes the \textit{North Sea Continental Shelf Cases} test of virtually uniform practice.

Section B: Provision of information on missing persons

Once again, there is extensive supporting practice by states not party to the Additional

\textsuperscript{105} Henckaerts and Doswald-Beck, \textit{Volume II of Practice}, 2743.
\textsuperscript{106} Henckaerts and Doswald-Beck, \textit{Volume II of Practice}, 2743.
Protocols, including both Russia and Israel. In addition to the 1994 Israel-PLO agreement cited above, a major agreement supporting this part of the rule is the 1996 Protocol to the Moscow Agreement on a Cease-fire in Chechnya to Locate Missing Persons and to Free Forcibly Detained Persons. The Protocol states:

5. The competence of the joint working group shall extend to the location of persons who have been missing since 11 December 1994 ...
6. By 11 June 1996, the working groups shall exchange lists of forcibly detained persons.107

Further support for this part of the rule is again found in the citation of a large number of military manuals, national legislation and statements in international organisations. It is clearly extensive and uniform practice which extends to all missing persons, not only combatants.

Section C: International cooperation to account for missing persons

Although the practice for international cooperation in accounting for missing persons is not as extensive as the practice above, the variety and length of practice seems to support this aspect of Rule 117 as customary.

The first evidence of practice is the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam. Chapter III of the agreement provided that the parties were to help each other in obtaining information about military personnel and foreign civilians missing in the conflict, and to take any measures as may be required to share information about them. The Four-Party Joint Military Commission was to ensure joint action by the parties in implementing this part of

107 Henckaerts and Doswald-Beck, Volume II of Practice, 2751.
the agreement. In 1984, a joint Australian-Vietnamese operation was launched ‘to search for the remains and resolve the cases’ of six Australian personnel listed as ‘missing in action’ in Viet Nam and ‘to follow up any other case which might subsequently be drawn to its attention’. The ICRC report states that the motive for the operation appears to be based primarily on political considerations (i.e. improvement of bilateral relations with Viet Nam).

A very important element of state practice results from the conflict in the former Yugoslavia, which provided evidence of a joint international commission to trace missing persons and mortal remains. The Agreement on Refugees and Displaced Persons annexed to the Dayton Accords on Yugoslavia provided in Article 5 that ‘The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for’. The 1991 Rules of Procedure of the Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia provides:

Rule 1(2)
... All of the Red Cross organizations concerned ... are designated as permanent advisers to the members of the Joint Commission.

Rule 2(1)
The International Committee of the Red Cross (ICRC), acting as a neutral intermediary, shall put at the Joint Commission’s disposal a delegation which will chair the meetings of the Joint Commission.

Rule 18(1)
The ICRC shall bring to the Joint Commission’s attention, on its own initiative, any

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communication, proposal, plan of work or information which might contribute to the efficiency of the Joint Commission’s work.\textsuperscript{111}

Furthermore, the 1991 Plan of Operation for the Joint Commission states:

2.1.1 Each party is responsible for compiling a list of its reported missing, as well as a file on each missing [person] …
2.2.1 Each opened file shall be sent … to the ICRC which shall arrange for it to be forwarded to the party concerned …
2.2.2 … the adverse party/parties shall take all possible measures (administrative steps and public appeals) to obtain information on the person reported missing …
2.2.3 Once the enquiry has been completed, … the form “official request for missing person” with the accompanying documents shall be returned in duplicate to the ICRC, which shall forward them to the party on which the missing person depends.\textsuperscript{112}

In 2004, the UK Minister of State for Defence told Parliament that:

UK forces inform the International Committee of the Red Cross of all confirmed civilian fatalities [in Iraq] of which they are aware have been caused, or allegedly caused, by UK forces. The ICRC then endeavours to inform the relatives as soon as practicable.\textsuperscript{113}

Section D: Right of the Families to know the fate of their relatives

Article 26 of Geneva Convention IV supports the obligation to help families discover the fate

\begin{footnotes}
\item[111] Henckaerts and Doswald-Beck, \textit{Volume II of Practice}, 2758.
\item[112] Henckaerts and Doswald-Beck, \textit{Volume II of Practice}, 2758.
\item[113] New practice added to the Customary Humanitarian Law Database, \url{http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule117}.
\end{footnotes}
of their relatives:

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

Although this obligation is set out in more detail in the Additional Protocol I, it seems clear that for international armed conflict this is a universally binding obligation. It is supported by a vast variety of practice, as well as Article 26 of Geneva Convention IV. Additionally, the USA – which is not party to Additional Protocol I – states in its Naval Handbook (1997) that: ‘The United States also supports the new principles in [the 1977 Additional Protocol] I, art. 32 & 34, that families have the right to know the fate of their relatives’.

To determine this rule’s applicability in non-international armed conflict, evidence of practice is required. International human rights law, and the case law of the United Nations Human Rights Committee and regional human rights bodies, is also relevant to this rule.114 The right of families to know the fate of their loved ones can be enforced by human rights courts as a free-standing aspect of the right to family life. This aspect is discussed in detail below.

The practice, particularly in the former Yugoslavia, suggests that exhumation may be an appropriate method of establishing the fate of missing persons. Practice also indicates that possible ways of seeking to account for missing persons include the setting up of special commissions or other tracing mechanisms. Croatia’s Commission for Tracing Persons Missing in

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War Activities in the Republic of Croatia is one example. The parties to the conflict have an obligation to cooperate in good faith with each other and with the commission. The UN Secretary-General’s Bulletin on observance by United Nations forces of international humanitarian law provides that the UN force in Yugoslavia shall facilitate the work of the ICRC’s Central Tracing Agency.\(^\text{115}\)

The ICRC study argues that this rule is customary on the basis of practice as set forth in a number of military manuals. It is also contained in some national legislation and supported by official statements. In an official statement in 1987, the USA supported the rule that the search for missing persons should be carried out ‘when circumstances permit, and at the latest from the end of hostilities’. States and international organisations have on many occasions requested that missing persons be accounted for as a result of the conflicts in the former Yugoslavia, Cyprus, East Timor and Guatemala. In the Yugoslav conflict, the specific position of Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia was created.\(^\text{116}\)

International practice includes General Assembly Resolution 3220, which called on parties to armed conflict to provide information about those who are missing in action. The UN Commission on Human Rights in 2002 passed a resolution affirming that each party to an armed conflict ‘shall search for the persons who have been reported missing by an adverse party’.\(^\text{117}\)

There is also newer practice within the United Nations system, including several reports of the Secretary-General on protection of civilians in armed conflict, which further support the customary humanitarian law status of the rule on the missing, and our proposed legal


\(^{116}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 422.

\(^{117}\) Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, 423.
standards. The critical - and arguably conclusive - development is a unanimous Security Council resolution in 2019 quoted in detail below.

In his report on the protection of civilians in armed conflict in 2016, the Secretary-General indicated that the number of persons missing in armed conflict had dramatically increased since 2014, and in some contexts had more than quadrupled. He argued that families had a ‘right to know the fate of their missing relatives, as provided by international humanitarian law’. In the following year’s report, he stated that ‘[a]larming numbers of persons remain missing in armed conflicts’. He asserted that parties to conflict were not taking sufficient action to ‘account[…] for those’ who go missing or ‘to uphold the rights of the families to know the fate and whereabouts of their missing relatives’. In his 2020 report, the Secretary-General introduced a section titled ‘Ongoing tragedy of missing persons’ in which he stated that international humanitarian law and international human rights law prohibit enforced disappearances. He argued that international humanitarian law required the parties to take all feasible measures to account for those reported missing and to uphold the right of families to receive information on the fate and whereabouts of their missing relatives. Importantly, the Secretary-General goes into detail on the specific legal requirements that should be incorporated into relevant laws, policies and institutional frameworks or mechanisms. These include:

...the systematic registration, centralization and timely transmission of information on protected persons to their families, in particular detainees and the dead; the establishment of national information centres; the collection, management and

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118 S/2017/414.
120 S/2020/366.
protection of information on missing persons; the establishment of the necessary forensic processes and capacity for managing human remains; and the provision of psychological, legal and financial support to families of the missing.\textsuperscript{121}

He welcomed the passing of UNSC resolution 2474 (2019), which called on states to take the measures above.

The 2021 report of the Secretary-General reported that following the discovery of mass graves in Tarhunah, Libya, in June 2020, the Libyan Ministry of Justice established a committee of mass graves. The committee was mandated to investigate, identify victims and bring perpetrators of crimes to justice. Lebanon, South Sudan and Ukraine were also reported to have created mechanisms to address cases of missing persons. The Secretary-General called for action to maintain and restore family links, and critically ‘to ensure the adequate and dignified management of the dead’.\textsuperscript{122} This statement is of great importance as it maintains that the standards proposed for the missing must be linked to adequate management of the dead. This linkage was echoed in the recommendations of the Secretary-General’s 2022 report, which explicitly urged states and non-state parties to conflict to:

adopt and share policies and practices to strengthen the protection of civilians … which include … prompt, comprehensive and transparent recording of civilian casualties to help clarify the fate of missing persons, avoid and minimize civilian harm, and ensure accountability, recovery and reconciliation.\textsuperscript{123}

UNSC Resolution 2474 (2019) is a unanimous resolution with action paragraphs that bind all

\textsuperscript{121} S/2020/366.
\textsuperscript{122} S/2021/423.
\textsuperscript{123} S/2022/381.
Member States of the United Nations. Due to their significance, these are quoted here in full:

*The Security Council [...]*

2. **Calls upon** parties to armed conflict to take all appropriate measures, to actively search for persons reported missing, to enable the return of their remains, and to account for persons reported missing without adverse distinction and to put in place appropriate channels enabling response and communication with families on the search process, and to consider the provision of information on available services in relation to administrative, legal, economic and psychosocial difficulties and needs they may face as a result of having a missing relative, including through an interaction with competent national and international organizations and institutions;

4. **Calls upon** parties to armed conflict to pay the utmost attention to cases of children reported missing as a result of armed conflict, and to take appropriate measures to search for and identify those children;

6. **Further calls upon** States, in cases of missing persons as a result of armed conflict, to take measures, as appropriate, in order to ensure thorough, prompt, impartial and effective investigations and the prosecution of offences linked to missing persons as a result of armed conflict, in accordance with national and international law, with a view to full accountability;

8. **Urges** parties to armed conflict to search for and recover the dead as a result of armed conflict, identify them, including by recording all available information and mapping the location of burial sites, to respect the remains of the dead, including by respecting and properly maintaining their graves, and to return them, whenever possible, to their relatives, consistent with applicable obligations under international humanitarian law and human rights law; as it relates to personal data protection, to
refrain from deliberate relocation of remains from mass graves, to avoid excavation and recovery efforts by untrained persons that result in the damage or destruction of human remains, and to ensure that, in any exhumation or recovery effort, data possibly leading to the identification of the deceased person is adequately collected and recorded.

In 2009, the ICRC drafted a model law on the missing for national implementation. Due to the similarity of the draft law’s provisions to the customary rules and our legal standards on casualty recording, various provisions are quoted here in full:

ICRC Guiding principles/model law on the missing

Article 7

1) Everyone has the right to know about the fate of his/her missing relative(s), including their whereabouts or, if dead, the circumstances of their death and place of burial if known, and to receive mortal remains. The authorities must keep relatives informed about the progress and results of investigations.

Article 12

State authoritative body for tracing missing persons

1) Within 60 days from the date the present Law enters into force, an independent and impartial State authority for tracing missing persons and identification of human remains (hereinafter the “[authority]” shall be established.

2) The [authority] shall...

(d) ensure that a proper search for the dead is conducted in collaboration with competent national or local authorities, as soon as practical during and after any event, including an armed conflict, likely to have caused a large number of deaths or disappearances.
Article 13

National Information Bureau

1) The [authority] must ensure that within 60 days from the date the present Law enters into force, a National Information Bureau (hereinafter the “[NIB]”) shall be set up... The NIB must be operational in the event of an armed conflict of an international or non-international character.

Article 19

Obligation for proper search and recovery of the dead

Once the fate of the missing person has been determined to be death, all available means must be undertaken to ensure recovery of the body and any personal effects.

The practice with respect to the missing supports the customary nature of Rule 117 and our proposed legal standard concerning the search for and identification of the missing. It also supports the requirements set out in Rule 116 (above) and in our revised proposed standards, concerning recording the location of civilian graves.

The practice does not support the establishment of a free-standing international organisation mandated to record civilian casualties. There are a number of unofficial existing databases doing this but they do not memorialise or identify the dead. *Legal standard 1 (k) must be deleted as a current legal standard and instead be included as a mechanism to assist in enforcement of the legal standards.*
Human rights obligations

An examination of customary humanitarian law alone supports our proposed legal standards on casualty recording, with various amendments. However, our original study also included an extensive section, written by Rachel Seoighe, analysing states’ obligations under international human rights law. This provided further extensive support for our legal standards, based in particular on the right to life, the right to freedom from torture and the right to family life.

The relevant human rights treaty provisions are as follows:

**The Universal Declaration of Human Rights (UDHR)**

Preamble

Recognition of the inherent dignity and worth of the human person, and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.

Promotion of the development of friendly relations between nations.

Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

**Article 1**

All human beings are born free and equal in dignity and rights.

**Article 2**

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind.

**Article 3**

Everyone has the right to life, liberty and security of person.
Article 5
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6
Everyone has the right to recognition everywhere as a person before the law.

Article 8
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 12
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.

Article 15(1)
Everyone has the right to a nationality.

Article 16(3)
The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17(2)
No one shall be arbitrarily deprived of his property.

Article 19
Everyone has the right [a] to freedom of opinion and expression; including freedom to hold opinions without interference and [b] to seek, receive and impart information and ideas.

International Covenant on Civil and Political Rights 1966 (ICCPR):
Part III, Article 6 Right to Life
Part III, Article 7
Prohibition on Torture

Part III, Article 23
Protection of the Family Unit

**International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR):**

Article 10
Protection of the Family

**UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT):**

In its entirety, but especially:

Article 2
Prevention of Torture

Article 14
Redress and Compensation for Torture

Each family member has the right not to suffer inhumane or torturous treatment in the absence of information about the fate of a loved one, where the state fails to provide a proper investigation or a method of recording relevant data, which would, if in existence, remove the agony of uncertainty.

**European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR):**

Article 2
The Right to Life
Article 3
Prohibition of Torture

Article 8
Right to Respect for Private and Family Life

Article 15
Derogation in Time of Emergency

American Convention on Human Rights 1969:

Article 4
Right to Life

Article 5
Right to Humane Treatment

Article 17
Rights of the Family

African Charter on Human and Peoples Rights 1981;

Article 4
Right to life

Article 5
Right to respect of dignity including prohibition against torture

Article 18
State duty to assist the family

The work in the original report analysing these rights is not repeated here. However, in the intervening years, there has been a second project examining these legal standards within the
lens of human rights law. The London-based Last Rights Project was instituted in response to the many thousands of refugees and migrants who are missing, presumably deceased, having attempted the treacherous crossing of the Mediterranean to reach Europe. The project produced a statement in 2017 on state obligations in relation to ‘The Dead, the Missing and the Bereaved at Europe’s International Borders’.124 This statement has attracted significant international support, including by the former UN Special Rapporteur on extrajudicial, summary or arbitrary executions.125 The original legal report on casualty recording obligations was influential on the Last Rights report as many of the missing refugees and migrants were fleeing armed conflict. It is arguable, therefore, that the treaty and customary provisions on the dead in international humanitarian law applied. Nevertheless, the examination of the rules with respect to these missing persons was located primarily in international human rights law. There was an emphasis on the case law in the European Court of Human Rights but the rules were also located within the International Covenant on Civil and Political Rights, because not all countries in the Mediterranean were/are parties to the European Convention. According to the statement, the core legal obligations126 under International Human Rights Law towards dead and missing migrants are as follows (emphasis added):

1. To search for all missing persons;
2. To collect the bodies of the dead;
3. To respect the bodies of the dead;
4. To preserve any personal effects of the dead, and to restore them to the next of kin;

125 UN Doc A/72/335, 15 August 2017.
126 And cited with approval by the special rapporteur at UN Doc. A/72/335, 15 August 2017.
5. To take all reasonable steps to identify the deceased and to determine the cause of death;
6. To issue a death certificate:
7. To make every effort to locate and notify the relatives of the dead and missing;
8. To facilitate return of the remains of the dead to their relatives if possible;
9. Where the remains are not returned to the next-of-kin, they should be disposed of in a dignified and respectful manner, appropriate to the religious and cultural traditions of the person and bearing in mind the wishes of the next of kin;
10. To record the location of burial and to respect and maintain gravesites;
11. To treat citizens and non-citizens equally in all these actions;
12. To provide special protection for children.

The statement from the Last Rights Project provides extensive case law and treaty support for the various obligations cited.¹²⁷ The content of this list of legal obligations is far more extensive than either the IHL customary rules or the legal standards proposed in our original legal report.

The Last Rights report acknowledged that some of these obligations, such as burying the dead with dignity and respecting their personal effects, were not set out specifically in international human rights law, but rather originated in specific international humanitarian law obligations towards dead combatants. The statement argued that all of these obligations were to be part of a proper human rights regime with respect to the dead and missing and are well supported in International Human Rights Law.

The standards proposed by the Last Rights Project are very close to those proposed here. However, three are novel. These are the obligations to treat citizens and non-citizens alike, to issue a death certificate and to provide special protection for children. As these three rights are not located in humanitarian law they will not be reviewed further in this report, as our focus is on the dead and missing in armed conflict. There is ongoing work on the obligation to issue death certificates, which may well establish that it is a customary international legal obligation.128

The key recommendations of the Last Rights study to identify the dead and missing and notify relatives were taken up in the Global Compact for Safe, Orderly and Regular Migration (2018).129 The Compact contains commitments to:

(e) Collect, centralize and systematize data regarding corpses and ensure traceability after burial, in accordance with internationally accepted forensic standards, and establish coordination channels at the transnational level to facilitate identification and the provision of information to families;
(f) Make all efforts, including through international cooperation, to recover, identify and repatriate to their countries of origin the remains of deceased migrants, respecting the wishes of grieving families, and, in the case of unidentified individuals, facilitate the identification and subsequent recovery of the mortal remains, ensuring that the remains of deceased migrants are treated in a dignified, respectful and proper manner identify those who have died or gone missing, and to facilitate communication with affected families.130

128 Anna Ressler, PHD student University of Reading, research on death certificates ongoing.
Although it is a far cry from the full list of specific obligations outlined in the Last Rights Statement, the Global Compact could be considered as an important first step to acknowledge shared responsibility for people who have died while migrating to Europe.

The research conducted for the Last Rights Project, together with the additional material identified by this author, reveals that there has been a growth in jurisprudence with respect to the dead and missing in the European Court of Human Rights (‘ECtHR’), the Inter-American Court of Human Rights and the United Nations Human Rights Committee. The case law tends to focus on three, connected provisions in the various human rights treaties: the right to life, the right to freedom from torture and the right to a family life. There is also discussion of the freedom of religion.

It is clear from the jurisprudence of the ECtHR that Article 2 of the European Convention on Human Rights requires States not only to refrain from the intentional and unlawful taking of life but also to take appropriate steps to safeguard the lives of those within their jurisdiction. This positive obligation entails both a substantive and procedural element, with the former putting obligations on states to prevent a breach of the right to life, and the latter requiring states to conduct an effective official investigation in circumstances where there has been a suspected breach of the right. The ECtHR has additionally stated that the procedural

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131 Similar cases have not been located in the African Court of Human Rights.

132 In the ECHR see, for example, McCann and Others v. the United Kingdom, European Court of Human Rights (ECtHR), no. 18984/91, 27 September 1995, Series A no. 324; Osman v. the United Kingdom, ECtHR, no 87/1997/871/1083, 28 October 1998, Reports of Judgments and Decisions 1998-VIII. On the search for missing persons, see particularly: Cyprus v. Turkey, ECtHR [Grand Chamber (GC)], no. 25781/94, 10 May 2001, ECHR 2001-IV; Varnava and Others v. Turkey, ECtHR [GC], nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, ECHR 2009; Aslakhanova and Others v. Russia, ECtHR, nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, 18 December 2012.

133 McCann and Others v. the United Kingdom, European Court of Human Rights (ECtHR), no. 18984/91, 27 September 1995, Series A no. 324; Osman v. the United Kingdom, ECtHR, no 87/1997/871/1083, 28 October 1998,
obligation to provide some form of effective official investigation also exists when an individual has gone missing in life-threatening circumstances, and this obligation is not confined to cases involving State agents.\textsuperscript{134}

The United Nations Human Rights Committee has considered several cases concerning persons who have disappeared or been killed in armed conflict, including in Algeria, Bosnia and Herzegovina, Chechnya and Nepal. In 2015, the Committee considered the case of Božo Mandić, who had been reported missing in Bosnia and Herzegovina on 7 July 1995, and whose remains had never been recovered.\textsuperscript{135} The Committee found that:

No ex officio prompt, impartial, thorough and independent investigation has been carried out by the State party to clarify his fate and whereabouts and to bring the perpetrators to justice. The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which a failure by a State party to investigate allegations of violations and to bring to justice perpetrators of certain violations (notably torture and cruel, inhuman and degrading treatment, summary and arbitrary killings and enforced disappearances) could in and of itself give rise to a separate breach of the Covenant.\textsuperscript{136}

The United Nations Human Rights Committee found a violation of Article 6, the right to life, due

\begin{footnotesize}
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\item\textsuperscript{134} Varnava and Others v Turkey [GC], supra fn. 10, para. 136; Osmanoğlu v Turkey, ECtHR, no. 48804/99, 24 January 2008, para. 87.
\item\textsuperscript{135} UN Doc. CCPR/C/115/D/2064/2011, Mandić and Bosnia and Herzegovina, views of the HRC, 5 November 2015.
\item\textsuperscript{136} UN Doc. CCPR/C/115/D/2064/2011, Mandić and Bosnia and Herzegovina, views of the HRC, 5 November 2015 para. 8.2.
\end{itemize}
\end{footnotesize}
to the state’s failure to investigate the facts of the disappearance.\textsuperscript{137} These findings were repeated in another Bosnian case and the views were released on the same day.\textsuperscript{138} In this case the allegations were that Ermin Kadirić was executed by the Army of the Republica Srpska (VRS) in 1992, his mortal remains were removed and concealed, and the whereabouts of his body remained unknown. The Committee found again that there was a failure by the state to investigate, in violation of the right to life procedural obligation. It also stated that:

the State party remains under an ongoing obligation to locate, exhume, identify and return the victim’s mortal remains to the family, as well as to identify, prosecute and sanction those responsible for the crimes concerned.\textsuperscript{139}

A further case decided in 2017 made similar findings with respect to location and identification.\textsuperscript{140}

In a 2019 case arising from the conflict in Chechnya, the United Nations Human Rights Committee referred to its recent General Comment on the right to life:\textsuperscript{141}

\begin{quote}
  \textbf{7.3} The Committee recalls its general comment No. 36 (2018) on the right to life, according to which the State party has an obligation to investigate all claims of potentially unlawful deprivation of life. Investigations and prosecutions of potentially unlawful deprivation of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of
\end{quote}

\textsuperscript{137} UN Doc. CCPR/C/115/D/2064/2011, Mandić and Bosnia-Herzegovina, para. 8.4.
\textsuperscript{139} UN Doc. CCPR/C/115/D/2048/2011, Kadirić v. Bosnia and Herzegovina, para. 9.3.
\textsuperscript{140} UN Doc. CCPR/C/119/D/2206/2012, Lale and Popović v. Bosnia and Herzegovina, views of the HRC, 17 March 2017, paras. 7.2 and 7.3
\textsuperscript{141} UN Doc. CCPR/C/125/D/2524/2015, Magomadova v. Russian Federation, views of the HRC, 19 March 2019.
Potentially Unlawful Death (2016), and must always be independent, impartial, prompt, thorough, effective, credible and transparent.

In this case, the complainant alleged that her brother had died in Russian state custody but his body had not been recovered, and in the 23 years since his disappearance she had not discovered the circumstances of his death or his body’s whereabouts. She argued this constituted a violation of the right to life. There are similar cases regarding the conflicts in Algeria and Nepal, which together constitute a large body of case law supporting the conclusion that state authorities must search for the bodies of the disappeared and determine the cause of death.

The prohibition against torture and inhuman or degrading treatment or punishment as set out, for example, in Article 3 of the European Convention on Human Rights, is another fundamental human rights provision relevant to our proposed legal obligations on casualty recording.

This provision is directly related to the suffering caused to the victim’s family members and next-of-kin as a consequence of the death or disappearance of their loved one. The failure on the part of the state to investigate this suspicious death or disappearance may give rise to a violation of the prohibition on inhuman and degrading treatment in respect of those family members. The ECtHR, once again in extensive jurisprudence, has found violations of this

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142 See paragraph 11 of the Minnesota Protocol and the United Nations Human Rights Committee’s General Comment No. 36, para. 27.
143 General comment No. 36, para. 28.
144 Magomadova v. the Russian Federation, views of the HRC, 19 March 2019, paras. 7.4 and 7.7.
146 See, eg, Mediterranean Missing Project report for a study on the impact on families who were unsure of the fate of their loved ones confirmed that the family members suffered from so-called ‘ambiguous loss’, as their lives were trapped in ambiguity (2016).
147 Cyprus v. Turkey, [GC], Orhan v. Turkey, ECtHR, no. 25656/94, 18 June 2002; Varnava and Others v. Turkey,
article where the state’s actions passed a ‘minimum level of severity’, inflicting moral pain and mental suffering on relatives of the deceased or missing person.\textsuperscript{148} Indeed, the ECtHR has stressed the importance of an effective investigation in establishing the truth – not only for the families of the victim, but also for other victims, as well as for the general public who have the right to know what transpired.\textsuperscript{149} The cases from the United Nations Human Rights Committee cited above also contained findings of violations of Article 7 of the ICCPR.

The right to family is further protected in Article 23 of the ICCPR.\textsuperscript{150} A relevant passage from one of the United Nations Human Rights Committee Bosnian cases states:

\begin{quote}
7.6 The Committee notes the authors’ claims that their rights under articles 7, 17 and 23 (1), read in conjunction with article 2 (3), of the Covenant have been violated. It also notes the anguish and distress caused to the authors by the continuing uncertainty resulting from not knowing where their mothers’ remains may be and the impossibility, if they are deceased, of giving them a proper burial. It further notes that, although the authors provided DNA samples to the authorities in 2003 in order to facilitate the identification of the mortal remains of Mrs. Lale and Mrs. Popović, they have not received a response from the competent authorities. The Committee considers that
\end{quote}

\begin{footnotes}
\item[148] Whether a family member is a victim of an Article 3 violation will depend on the existence of special factors which give the suffering … a dimension and character distinct from the emotional distress which may be considered as inevitably caused to relatives of a victim of a serious human rights violation’. \textit{Çakici v. Turkey}, ECtHR [GC], no 23657/94, 8 July 1999, ECHR 1999-IV, para. 98.
\item[149] \textit{El-Masri v. the former Yugoslav Republic of Macedonia}, ECtHR [GC], no. 39630/09, 13 December 2012, ECHR 2012, para. 191.
\end{footnotes}
these circumstances, together with the lack of information as to the fate and whereabouts of Mrs. Lale and Mrs. Popović, amount to inhuman and degrading treatment in violation of article 7, read in conjunction with article 2 (3), of the Covenant, with regard to the authors.\textsuperscript{151}

Importantly, it is the Inter-American Court of Human Rights that considered cases from internal armed conflicts in Colombia, Guatemala and El Salvador, focusing specifically on the rights of family members. There are many more cases than those cited here but the four below contain pertinent statements in relation to the legal standards proposed in this updated report. It can be asserted that this jurisprudence supports particularly the identification of the victim, notification of family members and clarification of the cause of death.

The first case, decided by the Court in 2005, concerns the 1997 Mapiripan Massacre in Colombia. The court declared the situation in Colombia to be an internal armed conflict,\textsuperscript{152} and found that the Government of Colombia was responsible for the activities of paramilitaries who massacred an estimated 49 individuals.\textsuperscript{153} The court found a violation of the right to humane treatment of the next-of-kin of the victims and specifically referred to the ‘lack of opportunity to bury their next of kin in accordance with their traditions, values or beliefs…’ The court held that there was a violation of Article 8, the right to a fair trial, because the massacre was not investigated in an effective and impartial manner.\textsuperscript{154} This included non-identification of the alleged victims, destruction of the forensic evidence and the fact that the state did not ‘establish the cause, manner, place and time of the executions’. This included a lack of

\textsuperscript{151} UN Doc. CCPR/C/119/D/2206/2012, Lale and Popovic v. Bosnia and Herzegovina, views of the HRC, 17 March 2017, para. 7.6.
\textsuperscript{152} Inter-American Court of Human Rights, \textit{Case of the Mapiripan Massacre v. Columbia}, Judgment of September 15, 2005, para. 96.
\textsuperscript{153} Inter-American Court of Human Rights, \textit{Case of the Mapiripan Massacre v. Columbia}, para. 124.
\textsuperscript{154} Inter-American Court of Human Rights, \textit{Case of the Mapiripan Massacre v. Columbia}, para. 191.
autopsies for all but two of the victims.\textsuperscript{155}

The Court made similar findings in 2006, in relation to the disappearance of 43 persons in Colombia in January 1990. By the time of the Judgment, the domestic courts had only clarified the fate of six of the disappeared.\textsuperscript{156} In a crucial paragraph, the Court cites with approval the guiding principles contained in the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, which specifies that investigating State authorities must try as a minimum to:

\begin{itemize}
  \item[(a)] Identify the victim;
  \item[(b)] Recover and preserve the probative material related to the death to contribute to any possible criminal investigation;
  \item[(c)] Identify possible witnesses and obtain their statements;
  \item[(d)] Determine the cause, method, place and moment of death, as well as any pattern or practice that could have caused the death; and
  \item[(e)] Distinguish between natural death, accidental death, suicide and murder.
\end{itemize}

In addition, it refers to the manual’s direction that the scene of the crime must be searched exhaustively, autopsies carried out and human remains examined rigorously by competent professionals.\textsuperscript{157}

\begin{flushright}
\textsuperscript{155} Inter-American Court of Human Rights, \textit{Case of the Mapiripan Massacre v. Columbia}, para. 191.
\textsuperscript{156} Inter-American Court of Human Rights, \textit{Case of the Pueblo Bello Massacre v. Columbia}, Judgment of January 31, 2006, para. 2.
\end{flushright}
The third relevant case is the Rio Negro Massacres v. Guatemala. As with Colombia, the Court declared the situation of violence in Guatemala from 1962 to 1996 to be an internal armed conflict and that the State’s armed forces together with paramilitary groups were responsible for 92 per cent of the related disappearances. In a key paragraph of its decision, the Court indicated the importance of states’ human rights obligations in the case of enforced disappearances:

112. In its consistent case law since 1988, the Court has established the permanent or continuing nature of the forced disappearance of persons, which has been recognized repeatedly by international human rights law. The Court classified the series of multiple and continuing violations of various rights protected by the Convention as forced disappearance of persons based on the development that, at the time, had taken place in the sphere of international human rights law. This Court’s case law has been a pioneer in the consolidation of a comprehensive perspective on the multiple violation of the rights affected and the continuing or permanent nature of the forced disappearance of persons, in which the act of disappearance and its execution start with the deprivation of the liberty of the person and the subsequent absence of information on his or her fate, and remains while the whereabouts of the disappeared person remain unknown or until his or her remains have been identified with certainty.

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159 Inter-American Court of Human Rights, *Case of Rio Negro Massacres v. Guatemala*, para. 56.
In another important paragraph the Court states:

155. The American Convention does not explicitly establish the right to “bury the dead.” The Inter-American Court has addressed this issue not as a substantive right, but in the context of the reparations in cases of forced disappearances; mainly, as a result of the violation of another right that is established in the Convention. Thus, for example, the Court has ordered that, if the remains of a disappeared person are found, they must be returned to his or her next of kin, and the State must cover the funeral or burial costs.\footnote{244} Also, in other cases, the Court has referred to the impossibility of burying the dead as a fact that increases the suffering and anguish of the next of kin, which can be considered in the reparations when determining an amount for the non-pecuniary compensation in their favor.\footnote{161}

In this case, due to the importance of burial in the Mayan culture, the Court found a violation of the right to freedom of conscience and religion of the survivors, as they could not bury their relatives in a culturally appropriate manner.\footnote{162} Furthermore, the court held that ‘[i]n cases of grave human rights violations, such as the ones in this case, the exhumation and

\footnote{161} Inter-American Court of Human Rights, \textit{Case of Rio Negro Massacres v. Guatemala}, para. 155.

\footnote{162} Inter-American Court of Human Rights, \textit{Case of Rio Negro Massacres v. Guatemala}, paras. 156-165.

identification of the deceased victims forms part of the State’s obligation to investigate’.\textsuperscript{163} The state’s obligation also includes upholding ‘the right of the victim’s next of kin to know the victim’s fate and, as appropriate, the whereabouts of his or her remains’.\textsuperscript{164}

The final case is that of the Massacres of El Mozote and nearby places v. El Salvador, concerning the killing of approximately 1,000 people in a massacre by military units in 1981.\textsuperscript{165} The Court concluded that from 1980 until 1991 El Salvador was ‘immersed in an internal armed conflict’ which killed about 75,000 of its citizens.\textsuperscript{166} In this case, there was an important statement of the impact on the human rights of the victims’ next-of-kin. The Court stated:

197. Regarding the next of kin of the victims who were executed, in its most recent case law in cases of massacres, the Court has reiterated that the next of kin of the victims of certain grave human rights violations, such as massacres, can, in turn, be victims of violations to their personal integrity. Also, in this type of case, the Court has considered that the right to mental and moral integrity of the victims' next of kin has been violated owing to the additional suffering and anguish they have experienced as a result of the subsequent acts or omissions of the State authorities in relation to those facts and due to the absence of effective remedies. The Court has considered that “conducting an effective investigation is a fundamental and determinant element for the protection of certain rights that are violated or

\textsuperscript{163} Inter-American Court of Human Rights, \textit{Case of Rio Negro Massacres v. Guatemala}, para. 217.
\textsuperscript{164} Inter-American Court of Human Rights, \textit{Case of Rio Negro Massacres v. Guatemala}, para. 217.
In another relevant section, the Court discussed the right to truth as part of Article 13 of the Convention. This states:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

The Court held that:

Regarding the alleged violation of Article 13 of the Convention, the Court recalls that any person, including the next of kin of victims of grave human rights violations, has the right to know the truth, under Articles 1(1), 8(1) and 25 and also, in certain circumstances, Article 13 of the Convention; therefore, they and society in general must be informed of what happened.

The decisions in these four cases, along with the numerous other cases decided in the Inter-American Court of Human Rights, affirm states’ obligation to search for the dead, determine their identify and the cause and circumstances of their death, and return mortal remains to relatives for a culturally appropriate burial. As a result of this and the customary humanitarian law examination above, the legal standards proposed in this report’s conclusion are well supported.

European case law considers the third of the relevant rights - the right to a family life. The

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United Nations Human Rights Committee in the cases cited above chose not to examine separately the right to a family life. That is unfortunate as the right to family life engages the specific obligations with respect to collection of the bodies, respecting the bodies, notifying relatives and returning the remains or burying the dead with dignity. The ECtHR jurisprudence contains specific reference to Articles 8 and 9 of the Convention, and states that:

[T]he failure to collect the bodies of the dead in an orderly manner will likely constitute an interference with the obligation to respect private and family life.¹⁶⁸

The Court has found that dealing appropriately with the dead out of respect for the feelings of the deceased’s relatives can fall within the scope of Article 8.¹⁶⁹

In relation to Article 9, right to freedom of religion and belief, the relationship of these obligations is not as firmly rooted in the jurisprudence. However, the persuasive argument has been made that ‘decent, dignified and respectful treatment of the body must be provided with due regard to religious and cultural traditions of the family where these are known’.¹⁷⁰ This right was also specifically referred to in the jurisprudence of the Inter-American Court of Human Rights in the case of the Rio Negro Massacres v. Guatemala¹⁷¹ (see above).

¹⁶⁸ Last Rights Statement, 9.
¹⁶⁹ Genner v. Austria, ECtHR, no 55495/08, 12 January 2016, para. 35, citing Hadri-Vionnet v. Switzerland, ECtHR, no. 55525/00, 14 February 2008, para. 15.
¹⁷⁰ Last Rights Statement, 15-16.
Disaster events including Covid-19

The global pandemic which began in early 2020 has highlighted the public interest in knowing how many people have died in mass casualty events. Disasters are treated in law separately from conflict events, but analysis reveals similar legal obligations towards the missing and dead.

In 2016, the ICRC and International Federation of the Red Cross and Red Crescent Societies (hereafter IFRC) released the 2\textsuperscript{nd} edition of the Manual for the Management of Dead Bodies after Disasters.\textsuperscript{172} The report contains a number of important principles, including that:

\begin{itemize}
  \item [T]he dead and the bereaved should be respected at all times;
  \item [T]he priority for affected families is to know the fate of their missing loved ones; and
  \item [U]ndignified handling and disposal of dead relatives may further traumatize relatives and should be avoided at all times. Careful and ethical management of dead bodies, including disposal, should be ensured including respect for religious and cultural sensitivities.
\end{itemize}

Finally, in a question-and-answer section concerning mass burials the answer contains language of legal obligation, stating:

\begin{quote}
Rapid mass burial of victims is not justified on public health grounds. Rushing to dispose of bodies without proper identification traumatizes families and communities and may have serious legal consequences (i.e., the inability to recover and identify remains).
\end{quote}

The ICRC has brought the disaster field together with IHL in an advisory service publication

‘Humanity after Life: Respecting and Protecting the Dead’. This document deals with the legal obligations towards the dead and missing in armed conflict, disasters and in the course of migration. It is evidence that the legal treatment of casualties is similar no matter what the cause of the death.

In 2008 the Brookings-Bern project on Internal Displacement released Operational Guidelines and a Field Manual entitled ‘Human Rights and Natural Disasters’. Within the report is a section entitled ‘Family Life and Missing or Dead Relatives’, which states that:

> Appropriate measures should be taken to collect and identify the mortal remains of those deceased, to prevent their despoliation or mutilation, and to facilitate the return of the remains to the next of kin. If the remains cannot be returned – for example when the next of kin cannot be identified or contacted – they must be disposed of respectfully and in a manner which will help their further recovery and identification.

The manual goes on to state that cremation should be avoided, that burials should be conducted ‘in a manner that respects the dignity and privacy of the dead’ and that local religious and cultural practices should be respected. It also states that the funerary sites should be protected and family members should be advised of the location of the gravesites. Family members should also be allowed ‘to recover the remains of their dead for further forensic examination’. The detail and specificity of the treatment of the dead in disasters is indicative of the importance of the principle of dignity in death and how this is located within the family. Family members have the right to know how their loved ones died, including in disaster events.

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One of the main topics of discussion related to the global coronavirus pandemic is the number of deaths caused by the various variants. At the time of writing this report, the death toll globally was recorded at 5.7 million people, but it is likely deaths have been under-reported. Another major feature of the discussion has been the way in which the numerous dead have been treated. Because of the forced isolation measures, many families have not been able to honour the dead in the way they would have wished. In reference to the dead of India, Corpuz stated ‘[i]n time of public health crisis like war, disasters and pandemics, the bodies of the dead should be treated with respect and dignity and uphold the right of bereaved families to know what happened to their loved ones’. This letter by Corpuz was written in response to reports of round-the-clock cremations in India. In response to reports of the mishandling of bodies of Covid-19 patients, the National Human Rights Commission in India recommended that the government should enact legislation to uphold the dignity and protect the rights of the dead. The NHRC argued that although there was no specific law in India protecting the rights of the dead, they relied on:

[s]everal international covenants, Supreme Court and high court judgements as well as guidelines issued by various governments... requiring decent burial/cremation according

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176 For example, see a discussion of the methodology of counting the bodies, [https://www.economist.com/graphic-detail/coronavirus-excess-deaths-tracker](https://www.economist.com/graphic-detail/coronavirus-excess-deaths-tracker).


to respective religious customs and practices.\textsuperscript{181}

At international level, the ICRC released General Guidelines for the Management of the Dead of Covid-19. Due to the importance of the principles contained in these Guidelines, paragraphs from the introduction are stated here in full:

The dignity of the deceased and their loved ones must be respected throughout the process. This is a humanitarian imperative that should guide the management of the dead in all circumstances.

Every effort should be made to ensure the dead are reliably identified, failing which human remains must be properly documented and traceable to enable future recovery and identification. This will help the deceased from becoming missing persons.

Measures for managing the dead need to recognize the interests and rights of families and communities and afford families utmost respect in accordance with their cultural and religious needs.

These standards for treatment of victims of disaster events echo the international legal obligations towards those who have died as a result of armed conflict. The primary principles are respect for human dignity and the right of family members to learn the fate of their relatives.

\textsuperscript{181} National Human Rights Commission, India, NHRC issues advisory to the Centre and States to ensure dignity and the rights of the dead, \url{https://nhrc.nic.in/media/press-release/nhrc-issues-advisory-centre-and-states-ensure-dignity-and-rights-dead-14052021}. 

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Conclusion

The examination of the new developments in human rights law provides support to our original legal standards save and except for the returning of personal effects and discouragement of exhumation. If anything, the practice seems to support exhumation as a means of identification and determining the cause of death and therefore the proposed standard on exhumation has been deleted. There is not enough case law in human rights on the return of personal effects to argue customary status.

Amendment of legal standards

After examination of the latest developments in the treatment of the dead in both international humanitarian law and international human rights law, our original legal standards are amended into two sections. The first section contains the rules that are unquestionably international legal obligations. The second section contains those rules that in our respectful opinion should be part and parcel of a comprehensive legal regime towards the missing and the dead.

This report completes a decade-and-a-half of examination of the legal standards that are applicable when a person is killed, or is missing and presumed dead, as a result of international or non-international armed conflict.

REVISED LEGAL STANDARDS:

THE CONTENT OF THE INTERNATIONAL LEGAL OBLIGATION TO RECORD EVERY CIVILIAN CASUALTY OF ARMED CONFLICT

1. All states are subject to the following binding international legal obligations:
a) Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.

b) Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction.

c) Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited.

d) All reasonable steps must be taken to identify the deceased and to determine the cause of death.

e) Parties 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.

f) The dead must be disposed of in a respectful manner and their graves respected and properly maintained.

g) The dead are to be buried with dignity and in accordance with their religious or cultural beliefs.

h) The dead are to be buried individually and not in mass graves.

i) With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves.

These international legal obligations taken together constitute a binding international legal obligation upon every party to an armed conflict to record every civilian or military casualty whether in an International or Non-International Armed Conflict.
2. As part and parcel of those legal obligations identified above:

i) Parties to the conflict must return the personal effects of the deceased to their next of kin.

ii) Exhumation of dead bodies is only to be permitted in circumstances of public necessity, which will include identifying cause of death;

iii) The authorities of the state in which the body is found should provide a death certificate, which as far as possible will identify the cause of death;

iv) There should be established in the case of civilian casualties an official graves registration service.