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## **DISCUSSION PAPER: THE LEGAL OBLIGATION TO RECORD CIVILIAN CASUALTIES OF ARMED CONFLICT**

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### **EXECUTIVE SUMMARY**

The Oxford Research Group's (ORG) Recording of Casualties of Armed Conflict (RCAC) Programme has concluded a research project on identifying the international legal obligation to record civilian casualties of armed conflict. As a result 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 has identified the elements of the international legal obligation. The various sources of law drawn upon to identify this right include the Geneva Conventions; the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and other human rights instruments; reports and statements of the United Nations; case law of the European Court of Human Rights and the Inter-American Court of Human Rights; and the principles of customary international law.

When placed in the context of casualty recording, the principles spread amongst these instruments and sources come together naturally to form a binding obligation on states. The findings of this report indicate that a move towards establishing a systematic mechanism of casualty recording in all theatres of armed conflict is necessary and required by law.

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

#### **1. There are binding international legal obligations upon parties to 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;**

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[http://www.oxfordresearchgroup.org.uk/publications/briefing\\_papers\\_and\\_reports/discussion\\_paper\\_legal\\_obligation\\_record\\_civilian\\_casualtie](http://www.oxfordresearchgroup.org.uk/publications/briefing_papers_and_reports/discussion_paper_legal_obligation_record_civilian_casualtie)

- 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.**

## 1) INTRODUCTION

The Oxford Research Group's Recording of Casualties of Armed Conflict Programme seeks to raise public awareness and build political will towards establishing a global and systematic mechanism of recording the details of every individual killed as a consequence of armed conflict.

Civilians are all too often the forgotten casualties of war and accepted by all parties involved as unavoidable 'collateral damage' in military operations. It is evident that civilian loss of life will result from conflict and much academic analysis and policy work is on-going regarding the protection of civilians in wartime situations. It is evident that governments do not record civilian casualties in any type of systematic basis and those that do so do not publish the records.

This research proceeds from the view that every individual is entitled to human dignity and recognition in the eyes of the state and within the international legal framework. Aside from questions of targeting and special protection of civilians, the right to have one's death recorded on an official record is a necessity from a number of standpoints.

- From an official and political point of view, public state institutions ought to maintain records of the deaths of its citizens and use this data to inform the public, shape policy and appreciate the overall impact of a conflict on the population.
- From a military point of view, with the increasing significance of the movement to protect civilians, such data is essential to analyse the effects of certain military practices and techniques. The data is crucial to the development of advanced military policy which aims to avoid and minimise civilian casualties in conflict.
- From a moral point of view, every civilian and combatant is entitled to recognition in the eyes of the state as a valued citizen, invested with rights provided under the frameworks of international law. No citizen should have their life arbitrarily taken, and especially ought not to fall within the category of 'missing' because of state failure to record the details of their death. Also, no family should have to suffer the agony of uncertainty which this categorisation inflicts on the familial unit.
- International institutions tasked with investigating violations of international law and ensuring effective prosecution of perpetrators of the gravest crimes outlined in law need access to such information and, importantly, need to rely on the accuracy of such information in order to undertake fair, informed and effective prosecutions.
- From a human security point of view, not only does the endemic failure to record the civilian casualties of military actions provide them with impunity, the bitterness and indeed rage resulting from this failure can itself be a driver for future conflict.

Advances in forensic and information technology are continuously providing new means to assist recording of casualties of armed conflict, thus progressively diminishing practical and financial obstacles to the undertaking of this work.

This report finds that states are in fact **legally obliged** to undertake casualty recording. By virtue of the dual strengths and protections enshrined in International Humanitarian Law (IHL) and International Human Rights Law (IHRL), we demonstrate that there is a legal obligation to record the details of individual casualties, whether combatant or civilian. The burden lies on states to make sure that this work is done, but it has largely been left to civil society organisations, many of whom are members of the International Practitioner Network connected by the Oxford Research Group's 'Every Casualty' Programme.<sup>3</sup> The responsibility for this task, although admirably adopted by these organisations and many others, legally lies with the government of respective states involved in armed conflict. This responsibility can be discharged in various ways, including funding these organisations, as discussed in the report's recommendations. The details of these legal obligations will be laid out within this report.

The law is a living and constantly developing mechanism in imposing obligations on states and individuals, as well as providing solid respective rights. The major contribution of this report lies in the identification of this state responsibility in the dual provisions of IHL and IHRL, and supported by customary international law. In any conflict, the states involved should take the responsibility for ensuring that all parties with an interest in casualty recording, including non-governmental organisations, are properly co-ordinated.

The researchers acknowledge that another critical issue in armed conflict is the issue of who falls within the definition of a civilian, particularly in situations of terrorist attacks and Non-International Armed Conflict. The authors of this report believe that this issue does not need to be resolved for the purposes of this study as it is argued that the legal obligations contained herein apply to all casualties be they civilian or combatant.

## 2) METHODOLOGY

This report is the result of a full literature review of the responsibilities of states in armed conflict, with a focus on the protection of civilians and the rights of combatants and civilians under the existing legal framework. It rests on a comprehensive database of the relevant Conventions and treaties, and evaluated academic analysis of the law and the practical problems arising in the application of these legal instruments. It has considered the commentary and recommendations of United Nations bodies such as the Working Groups on Enforced and Involuntary Disappearances, the United Nations General Assembly – particularly in its work on the Missing - and the Human Rights Council. The project also involved a study of the reports of Non-Governmental Organisations (NGOs) and advocacy groups such as the International Commission on Missing Persons (ICMP), the International Committee of the Red Cross (ICRC), Amnesty International and Human Rights Watch.

The case law of the European Court of Human Rights in respect to cases taken by individuals in the context of armed conflict was researched and analysed. Existing customary international law, as usefully compiled in the ICRC's Study on Customary International Humanitarian Law, was reviewed in the effort to clarify the legal standing of states.

From these resources, as referenced in the body and index of this report, the authors arrived at their conclusion that a governmental responsibility exists to record casualties of armed conflict. The legal arguments are outlined in detail below.

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<sup>3</sup> ORG's International Practitioner Network is a project to facilitate productive communication and collaboration between casualty recording organisations worldwide, and to give their work greater public prominence. The principal platform for the network is a website, [everycasualty.org](http://everycasualty.org), which provides a showcase for each participating organisation, and is a one-stop source for information on conflict's casualties worldwide and the organisations that record them.

### 3) STRUCTURE OF REPORT

This report is divided into two main topics, firstly the treaty and customary International Humanitarian Law obligations and then International Human Rights Law obligations and those identified in the European Convention of Human Rights as the European Court of Human Rights has considered these issues in the context of armed conflict. The report then incorporates the two branches of law with a schematic diagram of the legal obligation to record the casualties of armed conflict as determined by the research. The report concludes with a series of recommendations directed at issues that require further research and those that will require action by states.

### 4) INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law, also known as *jus in bello*, is the body of law composed of international treaty and customary rules which both restrict the right of parties to use means and methods of warfare in the name of humanity and protects people and objects affected by international or Non-International Armed Conflict.

There are three aspects to this investigation of the obligations to record casualties under International Humanitarian Law:

- (1) The first is the universally ratified four Geneva Conventions of 1949. These treaties established extensive obligations with respect to military casualties but are vague and general with respect to civilian casualties.
- (2) The second is the less universally ratified Additional Protocols I and II of 1977. These treaties provide far more extensive obligations with respect to missing and killed civilians but are not applicable to many states who currently participate in ongoing armed conflict; for example, Israel and the United States.
- (3) The third source of International Humanitarian Law is international customary humanitarian law. Customary international law as defined in Article 38 (1) (b) of the Statute of the International Court of Justice is general practice accepted as law. The evidence of practice can be found in decisions of courts, national legislation, statements by states representative in international organisations and the opinion of legal scholars, to mention a few. The customary international humanitarian law rules have been developed by an influential study by the International Committee of the Red Cross in 2005 include a series of rules with respect to the dead and a series of rules with respect to the missing. The findings of this study are based on prolonged and consistent action by the majority of states as accepted by the international community as customary law.

As a result of the comprehensive analysis by the drafters of the study, it is evident that these rules specify that the obligations with respect to civilian casualties approach the wide obligations with respect to military casualties. It is, however, evident that in order to find these obligations attention to the three sources of humanitarian law listed above is needed.

#### 4.1) TREATY PROVISIONS

##### 4.1.1) Military Personnel in an International Armed Conflict.

The Geneva Conventions drafted at the end of the Second World War contain extensive and complete obligations with respect to military personnel. Obligations are contained in all three Geneva Conventions that relate to military personnel who are involved in International Armed Conflict.

## **Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949:**

### **Article 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.

### **Article 16**

Parties to the conflict shall record as soon as possible, in respect of each wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.

These records should if possible include:

- (a) Designation of the Power on which he depends;
- (b) Army, regimental, personal or serial number;
- (c) Surname;
- (d) First name or names;
- (e) Date of birth;
- (f) Any other particulars shown on his identity card or disc;
- (g) Date and place of capture or death;
- (h) Particulars concerning wounds or illness, or cause of death.

As soon as possible the above mentioned information shall be forwarded to the Information Bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of a double identity disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

### **Article 17**

Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.

Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead.

They shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found. For this purpose, they shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country. These provisions shall likewise apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

As soon as circumstances permit, and at latest at the end of hostilities, these Services shall exchange, through the Information Bureau mentioned in the second paragraph of Article 16, lists showing the exact location and markings of the graves together with particulars of the dead interred therein.

#### **Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea:**

##### **Article 18**

After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, 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, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.

##### **Article 19**

The Parties to the conflict shall record as soon as possible, in respect of each shipwrecked, wounded, sick or dead person of the adverse Party falling into their hands, any particulars which may assist in his identification. These records should if possible include:

- (a) Designation of the Power on which he depends;
- (b) Army, regimental, personal or serial number;
- (c) Surname;
- (d) First name or names;
- (e) Date of birth;
- (f) Any other particulars shown on his identity card or disc;
- (g) Date and place of capture or death;
- (h) Particulars concerning wounds or illness, or cause of death.

As soon as possible the above-mentioned information shall be forwarded to the information bureau described in Article 122 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, which shall transmit this information to the Power on which these persons depend through the intermediary of the Protecting Power and of the Central Prisoners of War Agency.

Parties to the conflict shall prepare and forward to each other, through the same bureau, certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one half of the double identity disc, or the identity disc itself if it is a single disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead. These articles, together with unidentified articles, shall be sent in sealed packets, accompanied by statements giving all particulars necessary for the identification of the deceased owners, as well as by a complete list of the contents of the parcel.

#### **Article 20**

Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. Where a double identity disc is used, one half of the disc should remain on the body. If dead persons are landed, the provisions of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, shall be applicable.

#### **Article 21**

The Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead. Vessels of any kind responding to this appeal, and those having of their own accord collected wounded, sick or shipwrecked persons, shall enjoy special protection and facilities to carry out such assistance. They may, in no case, be captured on account of any such transport; but, in the absence of any promise to the contrary, they shall remain liable to capture for any violations of neutrality they may have committed.

### **Geneva Convention III Relative to the Treatment of Prisoners of War:**

#### **SECTION III**

#### **DEATH OF PRISONERS OF WAR**

#### **Article 120**

Wills of prisoners of war shall be drawn up so as to satisfy the conditions of validity required by the legislation of their country of origin, which will take steps to inform the Detaining Power of its requirements in this respect. At the request of the prisoner of war and, in all cases, after death, the will shall be transmitted without delay to the Protecting Power; a certified copy shall be sent to the Central Agency.

Death certificates in the form annexed to the present Convention, or lists certified by a responsible officer, of all persons who die as prisoners of war shall be forwarded as rapidly as possible to the Prisoner of War Information Bureau established in accordance with Article 122. The death certificates or certified lists shall show particulars of identity as set out in the third paragraph of Article 17, and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the graves.

The burial or cremation of a prisoner of war shall be preceded by a medical examination of the body with a view to confirming death and enabling a report to be made and, where necessary, establishing identity.

The detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried, if possible according to the rites of the religion to which they belonged, and

that their graves are respected, suitably maintained and marked so as to be found at any time. Wherever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place.

Deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves. Bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased.

In order that graves may always be found, all particulars of burials and graves shall be recorded with a Graves Registration Service established by the Detaining Power. Lists of graves and particulars of the prisoners of war interred in cemeteries and elsewhere shall be transmitted to the Power on which such prisoners of war depended. Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the Power controlling the territory, if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

#### **Article 121**

Every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, as well as any death the cause of which is unknown, shall be immediately followed by an official enquiry by the Detaining Power.

A communication on this subject shall be sent immediately to the Protecting Power. Statements shall be taken from witnesses, especially from those who are prisoners of war, and a report including such statements shall be forwarded to the Protecting Power.

If the enquiry indicates the guilt of one or more persons, the Detaining Power shall take all measures for the prosecution of the person or persons responsible.

It can be concluded from all of these provisions that there are extensive and complete obligations with respect to recording the identity of those who are combatants in an International Armed Conflict.

#### **4.1.2) Civilians in an International Armed Conflict**

The above detailed provisions for combatants stand in marked contrast to the provisions relating to civilian deaths which are contained in the fourth Geneva Convention that is specifically concerned with protection of civilian persons.

#### **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.

The provisions with respect to the missing and the dead civilians are not extensively set out until Additional Protocols to the Geneva Conventions of 1977. The provisions begin with a general statement of the right of families to know the fate of their relatives. There are specific provision 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 the Fourth Convention, 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.

### **The United Kingdom Ministry of Defence Manual of the Law of Armed Conflict:**

The United Kingdom is a party to the additional protocols and the **United Kingdom Ministry of Defence Manual of the Law of Armed Conflict** (hereafter 'The Manual') is an important and impressive component of state practice of a party to Additional Protocol I. Its provisions are detailed and satisfactory in relation to recording casualties, although unfortunately limited to international conflict. The dead are not defined in the manual but some of the provisions are referenced to the Fourth Geneva Convention.

### Relevant Provisions in The Manual:

The dead must be protected against pillage and maltreatment. Looting of the property of the dead and mutilation of their bodies are stated to be war crimes.

The remains of the dead are to be honourably interred (unless burial at sea is appropriate), in so far as possible in individual graves, and if possible, according to the rites of the religion to which the deceased belonged.

Bodies must not be cremated, except for imperative reasons of hygiene or for motives based on the religion of the deceased. If cremation occurs, the circumstances and the reasons for it must be stated in the death certificate. The ashes must be respectfully treated and kept by the office of graves registration service until properly disposed of according to the wishes of the home country.

Graves must be respected and properly maintained.

Graves must be marked so that they may always be found and should, if possible, be grouped according to the nationality of the deceased.

Graves' registration services must be officially established at the outbreak of hostilities and, as soon as circumstances permit, the adverse parties and any other concerned authorities are required to seek agreement for:

- (a) the permanent protection and maintenance of grave sites
- (b) access to those grave sites by relatives of the deceased and the representatives of the official graves registration services;
- (c) the return of remains to the home state on that state's request or, unless that state objects, on the request of the next of kin.

In the absence of agreement, the authorities of the territory in which the grave sites are situated may (a) offer to facilitate the return of the remains to the home state; and (b) if such an offer is not accepted within five years from the date of the offer, and after due notice, adopt arrangements for dealing with such remains in accordance with their own domestic laws relating to cemeteries and graves.

Parties to a conflict are required to ensure that, in so far as circumstances permit, bodies are given an individual medical examination: To confirm the fact of death, to establish the identity of the deceased, and to enable a report about the death to be made.

Where the death of, or serious injury to, a prisoner of war or internee has been caused, or is suspected to have been caused by a sentry, another prisoner of war or internee, or by any other person, due to an unknown cause, the detaining power is required to:

- (a) hold an official inquiry immediately;
- (b) inform the protecting power immediately;
- (c) take statements from witnesses;
- (d) send a report including such statements to the protecting power
- (e) If the inquiry indicates culpability, the detaining power must take all necessary steps to prosecute those responsible.

*Exhumation is permitted only (a) in accordance with an agreement on the matters of grave or (b) in accordance with overriding public necessity (which may include 'medical or investigative necessity').*

The authorities of the territory in which the grave sites are situated are required to respect the remains and to give notice to the home state of the intended exhumation together with details of the intended place of re-internment.

The Manual also provides that each party must search for persons reported missing by an adverse party and also facilitate such searches by the provision of relevant information. It specifies that **Additional Protocol I** encourages the parties to make arrangements for joint teams from both sides to search for, identify, and recover the dead from battlefield areas, such teams to be respected and protected while carrying out their duties. This task involves the collection of the wounded and sick and their protection against pillage and ill-treatment. The living must be adequately cared for, the dead protected from despoliation.

#### 4.1.3) Combatants and Civilians in a Non-International Armed Conflict

Regrettably the Additional Protocol I provisions are not duplicated in **Additional Protocol II** which only has a general provision for searching for the dead and disposing of them, not the recording of casualties. It should be noted that this provision applies equally to those who engage in the conflict (known as 'fighters' in the Manual of Non-International Armed Conflict) and civilians. There is of course major difficulty in these conflicts is distinguishing those who are civilians and those who are combatants:

##### **Article 8**

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.

As Additional Protocols I and II are not universally ratified and as Additional Protocol II applicable in Non-International Armed Conflict contains such limited obligations, it is necessary to determine the customary international law in this field. Customary international law is universally binding unless there are persistent objector states.

#### 4.2) CUSTOMARY INTERNATIONAL LAW

The International Committee of the Red Cross **Customary International Humanitarian Law Study** (hereafter the Study) co-authored by Jean-Marie Henckaerts and Louise Doswald-Beck in Chapter 35 'The Dead' and Chapter 36 'The Missing' argues for the customary status of the essence of the extensive treaty provisions in Additional Protocol I and argues that all the provisions will apply to Non-International Armed Conflict. This study importantly also clarifies the scope of the obligation. The rule is cited (in Italics) and commentary taken from the Study is included in part below the rule.

##### **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.*

Each party to the conflict has to take **all possible measures** to search for and collect the dead. This would include permitting humanitarian organisations or the civilian populations to assume this task. Permission to conduct such an activity must not be denied arbitrarily. Presumably however, permission would be denied if military operations were still being conducted and there were further risks to life.

The Study suggests that there should be an arrangement between the parties to suspend fire and to remove the dead from the battlefield, an idea introduced by **Additional Protocol I** and supported by the

United States. The rule applies to all the dead, without adverse distinction. The rule applies to the dead of both sides of the conflict and also to civilians.

Good practice according to the Study involves using humanitarian organisations such as the ICRC in the searching for, collecting and documenting the missing and deceased persons.

**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.*

The Study supports the application of this rule in international and Non-International Armed Conflict.

**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.*

This rule is again stated to be applicable to both kinds of armed conflict as part of the general requirement of respect for family life. However, the rule is rather general and requires agreement between parties for the remains to be returned. **Additional Protocol I** recognises the need for such as agreement and sets out a procedure to be followed in the absence of agreement.

**Non-International Armed Conflict:**

The Study gives examples of state practice to support the applicability of this rule to Non-International Armed Conflict as there are no treaty provisions:

One example given is an exchange under ICRC auspices of the mortal remains of more than 1000 soldiers and LTTE fighters in Sri Lanka in 1999. Furthermore, in 1985, Columbia'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.

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'. The **Plan of Action for the Years 2000-2003**, adopted by the 27<sup>th</sup> **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'.

**Rule 115**

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

This rule is supported by an analysis of extensive state practice which establishes this rule as a norm of customary international law applicable in both international and Non-International Armed Conflict.

**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.*

This rule is applicable in both types of armed conflict. This obligation is in the 1949 Geneva Conventions and is also set out in numerous military manuals. The study states that the obligation to identify the

dead is an obligation of means, and parties have to use their best efforts and all means at their disposal in this respect. There is consistent practice that supports this rule in Non-International Armed Conflict, for example in Argentina and Columbia, as outlined in the ICRC study. Human Rights Special Rapporteurs and other human rights mechanisms have also called for such measures in the context of the conflicts in Chechnya, El Salvador, and the former Yugoslavia.

The international community has also acted to support this obligation including the **1974 United Nations General Assembly Resolution** which called upon parties to cooperate '*in providing information on the missing and dead in armed conflicts*'.

### **Chapter 36 Missing Persons**

These rules with respect to missing persons are argued to be customary in both international and Non-International Armed Conflict.

#### **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.*

This rule is motivated by the right of families to know the fate of their missing relatives. As with the dead, the obligation to account for missing persons is an obligation of means. This includes search for and facilitation of the search for persons reported missing as a result of the conflict. Each party to the conflict has a duty to keep records of deceased persons and of persons deprived of their liberty.

This rule is argued in the study to be customary by virtue of practice in a number of military manuals, some national legislation and official statements. For example, in an official statement in 1987, the United States 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 requested that persons missing as a result of the conflicts in Bosnia and Herzegovina, Cyprus, East Timor, Guatemala, Kosovo and the former Yugoslavia be accounted for.

International practice includes **UN General Assembly Resolution 3220** which calls 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*'.

These rules are currently in the process of academic examination by the international law academic community, but it can be argued that the extensiveness of the state practice identified and the rigour of the research support the customary status of these rules.

## **5) INTERNATIONAL HUMAN RIGHTS LAW**

A series of rights under the framework of International Human Rights Law recognise the fundamental right of all persons under the law to be recognised as equal citizens with inherent dignity and worth, kept secure and free from torture and ill-treatment. These rights are summarised in the schematic diagram provided in Table 1 and expanded upon below, in Section 5.1. The provisions of IHRL place a firm obligation on states to ensure that these rights are upheld to the best of their ability. Within situations of officially declared crisis, it is generally accepted that some rights can be limited and that risk to the citizenry is heightened, leading sometimes to unavoidable violations of the human rights system. However, official derogation (even where possible) from IHRL is extremely rare for political and practical reasons. Therefore, most states in modern conflicts, regardless of their nature and scale, are responsible for upholding the full spectrum of the rights of their citizenry.

It can be argued that a general principle exists within international law to record the deaths of citizens. It is a world-wide practice, unquestioned in its importance and carried out systematically in the vast majority of countries. Death is the point at which the human person ceases to need the protection of the state in many regards, but some rights continue to exist in relation to the rights of the individual and of his/her family members. There are no reasonable objections to carrying out the practice (aside from concerns regarding cost, which as an argument is losing credibility) and it can only serve to benefit both the state and wider society. The right to have one's death recorded logically arises from the existing human rights law. The principle most certainly applies in relation to the registration of birth, which is regarded as necessary to invest the person with full legal personality and status. The recognition of the cessation of the life of a person can itself be seen as a right. Regardless of whether the dead can be said to have human rights, a debate within the academic community, many rights nevertheless arise from those of the living.

People have the right to expect treatment with dignity after death, and anthropological research confirms that respect for the dead is universally consistent. Similarly, the living relatives of the deceased have the right to information regarding their loved ones. Official confirmation of the death of a loved one may also be needed in practical terms, in order to claim widow's benefits for example. Wider society has a right to information, especially with regard to historical truth. This right is particularly crucial when situations of conflict and mass atrocity are at hand. The primary role of IHRL with regard to recording deaths is to protect against anonymous death and to oblige the state to account for missing persons. The provisions below come together to have this effect.

## **5.1) RELEVANT INTERNATIONAL HUMAN RIGHTS LAW**

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

The strength and virtue of the UDHR represents the commitment of the world's nations to uphold the dignity of all persons and provide recourse to justice for those aggrieved. It is a pledge to progress towards peace, security of person and better standards of life. While the UDHR is not legally binding in itself, it exists in order to define, and to act as a guide to interpretation of, the rights contained in the United Nations Charter, which is binding on all member states. It is the over-arching standard of rights to which every nation should aspire and seek to adhere and its obligations are arguably part of customary international law.

The provisions pertinent for our purposes include:

#### **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.

The UDHR provides the basis for the enactment of the following treaties (relevant provisions noted):

**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

**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

Together, these instruments create a robust system of human rights protection. The Right to Recognition before the Law, the Right to Life, the Right to Freedom from Torture and Inhumane and Degrading Treatment, the Right to Information and the Right to Family Life are undeniable. These basic rights are required to be upheld by procedures of the state. It follows from these rights that:

- Each and every member of every society has the right to have one's death recorded, investigated and, if appropriate, prosecuted.
- 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.

#### **5.2) THE INHERENT DIGNITY OF THE HUMAN PERSON:**

The human person is required to be afforded dignity by the state. Dignity is understood as a foundational concept of the IHRL framework, although culturally variable. Treatment of the dead with dignity is an extremely prevalent notion world-wide, and as such can be considered a general principle to be protected by IHRL. Dignified treatment includes guaranteeing recognition before the law, legal personality by virtue of the official registration of identification and nationality, and the right to have one's interests protected in the legal system. Dignity demands that the state does not allow a person to lose these rights by falling into the category of 'missing'. It also includes the right to be treated with respect in a physical sense – to have one's body disposed of in accordance with one's wishes and religious views, not to have one's remains despoiled, and to have one's place of rest identified and properly maintained.

Dignity is specifically mentioned in the following IHRL texts.

- **UDHR, Preamble:** *'Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (...) the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person (...)*
- **ICCPR, Preamble; ICESCR, Preamble; and CAT, Preamble:** *'In accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the*



*equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (...) Recognizing that these rights derive from the inherent dignity of the human person (...)*

### 5.3) THE IMPORTANCE OF THE FAMILY UNIT:

The UDHR recognises the stated rights as the ‘*inalienable rights of all the members of the human family*’ which are the ‘*foundation of freedom, justice and peace in the world*’. This approach is given legal significance by the provisions of the human rights treaties:

- **Article 17, ICCPR** protects the individual from unlawful interference with one’s privacy, family, home and correspondence. **Article 23** notes the status of the family as ‘*the natural and fundamental group unit of society*’ and emphasises that it should be protected by the state. These articles point to an understanding of the importance of the family unit and offer a commitment to protect that unit.
- The **ICESCR, Article 4** recognises that protection and assistance should be accorded to the family unit in the ‘*widest possible*’ manner. Limitations (derogations) may only be put in place when determined by law, accepted as compatible with the nature of the rights, and when the derogation exists only to promote the general welfare of society.
- The right to respect for private and family life is outlined in **Article 8, ECHR** and is limited in applicability by **Article 8(2)** which outlines situations in which the right may be curbed by the public authorities. The exercise of the right shall only be limited where lawful and necessary in a democratic society. Examples of a necessary situation are included: national security; public safety; economic well-being of the country; prevention of disorder or crime; and protection of health, morals, and the rights and freedoms of others.

### 5.4) EXCEPTIONS TO THE PROVISIONS OF IHRL:

International Human Rights instruments contain both derogable and non-derogable rights. In times of crisis or public emergency, such as declared war, the state has the right to derogate from some of the protections afforded under IHRL, necessarily limiting the rights of the citizens in order to increase its capacity to deal with the situation. The UDHR does not mention derogation – it is the beacon to which we aspire in terms of human rights and forms the basis of the other instruments, which provide more detail in real-world application.

Derogations with regard to acts of war are permitted subject to strictly defined criteria of **necessity** and **lawfulness**. Derogations exist to take the realities of war and situations of public emergency into account while providing the upmost protection to those under the power of the state. The State Party must demonstrate the necessary nature of such measures, and prove that it remains consistent with international law. In practice, for our purposes, it is rare that a state will actually seek to derogate. States in the midst of internal conflict are slow to define the situation as a ‘war’, preferring to avoid international interest and the perception that the situation might not be under control.

The state cannot, by means of derogation, avoid its obligations to protect the Right to Life and the Right to be Free from Torture. All instruments are clear in this regard. However, there are some considerations within a context of armed conflict where civilian deaths are deemed not to be violations of the Right to Life.

**Article 4, ICCPR** states that derogations may be made from the provisions of the Covenant in times of an officially proclaimed public emergency, which ‘*threatens the life of the nation*’. The derogation must be strictly required in the context of the emergency. Of the rights relevant to this project, no derogation is allowed from Article 6, the right to life, or Article 7, the right not to be subjected to torture or to cruel, inhuman or degrading treatment. Notably, however, the Right to Life provides that nobody should be

'arbitrarily' deprived of his or her life. Within this word, deaths in the context of conflict can fall outside the remit of the Right to Life in the ICCPR. Military action carried out in a legitimate fashion will not, in the event of deaths incurred, amount to a breach of this right as it will not be considered unlawful, therefore not 'arbitrary.'

In the **ECHR** the Right to Life is positively protected by the state, with the exception of deprivation of life which occurs by the '*use of force which is no more than absolutely necessary*' in certain justifiable circumstances. These circumstances include:

- The defence of another from unlawful violence;
- The prevention of an escape of a lawfully detained person;
- The lawful arrest of an individual; and
- Action lawfully taken in quelling a riot or insurrection.

**Article 15, ECHR** deals specifically with derogation in times of war or public emergency and clearly delineates the responsibility of the contracting State to depart from its obligations under the Convention only when strictly required by the situation. Measures adopted must remain consistent with all binding international law obligations and the Secretary General of the Council of Europe must be kept fully apprised of decisions made and the justificatory reasons. The restrictions applied cannot be used for any purpose other than that prescribed.

An act resulting in deprivation of life will not be regarded a breach of the ECHR if it meets the criteria of necessity and lawfulness, requiring a consideration of proportionality and legitimacy. Although derogation in reality is rare, it is important for our purposes to note the process of determining whether a death is considered 'legally' incurred. Clearly, in order to pass judgement on the cause of death, a full and thorough investigation must be carried out. Accountability is a key concern. The circumstances of the death need to be examined in detail, even in situations of armed conflict. The case of missing persons must be approached in a similar fashion. The circumstances of their disappearance must be examined in order to ascertain whether they have in fact been killed.

## **5.5) THE EUROPEAN COURT OF HUMAN RIGHTS'S (ECtHR) REASONING AND APPLICATION OF IHL TO SITUATIONS OF ARMED CONFLICT**

The ECtHR has, in cases in recent years, delivered judgement on cases which traditionally would only have been dealt with under IHL. This thread of emerging jurisprudence falls neatly in line with the multi-faceted approach to the upholding of rights which we pursue in this report.

By providing an arena for individuals to take a case against a state in the context of its military activities and on the basis of human rights denied to them, the Court has opened an avenue to recourse which had not previously been explored. The court has dealt only with cases dealing with internal, as opposed to international, conflicts and therefore has not infringed upon areas where IHL would be the primary source of enforceable law. This is a step towards plugging the gap in IHL which allows victims in internal conflicts no redress against the aggressor state. It has not gone as far as to apply this jurisprudence to the actions of a state outside its territory, thereby avoiding any potential clash with IHL.

### **5.5.1) ECHR, ARTICLE 1**

States must '*secure to everyone within their jurisdiction the rights and freedoms defined*' (therein).

This measure, in conjunction with the specific provisions identified as applicable to casualty recording, creates a positive obligation on states. In terms of establishing a responsibility to record casualties of conflict, the important articles to consider in the ECHR are **Article 2** (the right to life), **Article 3** (the right to be free from torture, inhuman and degrading treatment) and **Article 5** (the right to family life). The

Court has decided in favour of the claimants on the basis of Articles 2 and 3 in cases wherein it was alleged that their rights had been infringed by the state and its armed forces during military action. This new thread of jurisprudence also allows, and has called for, scrutiny of military practices, which could lead to reform and improvement within the military.

The fact that these rights have been raised and upheld by the ECtHR within this context demands that we take the next logical step – to accept that these rights are concretely applicable to victims of armed conflict in terms of acknowledgement and recording of death.

#### 5.5.2) ECHR, ARTICLE 2, CIVILIAN DEATHS CAUSED BY STATE FORCES:

Where civilian deaths have resulted from the actions of state agents, investigation is crucial. The use of force by security forces must be ‘absolutely necessary’, as derived from the criteria laid out in **Article 2**, for example, the purpose of protecting life (*Ahmet Ozkan & Others v. Turkey*).

The Court will also see fit to investigate whether the potential use of lethal force was used:

- In pursuit of a legitimate aim;
- Whether the decision to proceed was proportionate in the circumstances; and
- The degree of caution must rise to the standard expected from a ‘law-enforcement body in a democratic society’. (*Isayeva, Yusupova & Bazayeva v. Russia*)

#### Risk to Civilian Life:

The planning and execution of operations must attempt to identify the inherent dangers to civilian life and take all feasible precautions to minimise and prevent risk in this regard (*Isayeva, Yusupova & Bazayeva v. Russia*). **Article 2 (1), ECHR** requires that States take appropriate steps to safeguard civilian life within their jurisdiction. See *Isayeva v. Russia*, where the Court found that the military were pursuing the legitimate aim of countering terrorist activity. However, the manner of attack was not consistent with Russia’s obligation to protect civilian lives. Therefore, the Court found a violation of **Article 2**.

#### ‘Missing’ or ‘Disappeared’ Persons:

Persons who have gone missing or ‘disappeared’ in the context of a situation of national unrest, who may or may not subsequently have been discovered to have died, may have their rights vindicated before the ECtHR.

Relations of the ‘disappeared’ may allege that the state has been instrumental in the presumed death of their loved one. The Court will look to the circumstances of the case in order to establish whether a prima facie case against the state forces has been submitted. The relevant standard of proof in attributing liability for the persons’ death to the state security forces in question is that of ‘beyond reasonable doubt’ (*Baysayeva v. Russia*). Inferences will be drawn from the circumstances: the manner in which the person disappeared; the fact that he or she was last seen in the custody of state agents; or the absence of that person, and news from that person, for a prolonged period of time. A presumption of death will be reinforced where the situation ‘could be regarded as life-threatening’ (*Sangariyeva & Others v. Russia*). Where the facts of the case and the available evidence provide support to the presumption that the person in question was in fact abducted by the state authorities and subsequently killed or kept in undocumented detention, the burden of proof lies with the authorities to rebut the presumption by providing a ‘satisfactory and convincing explanation’ (*Khashiyev & Akayeva v. Russia*). Obviously, the responsibility of the authorities to account for the treatment of, and fate of, a person within their control is particularly rigorous where they alone have exclusive knowledge of events, and the person dies or disappears thereafter.

### The Procedural Aspect of Obligations under Article 2:

A reading of **Article 2** in conjunction with **Article 1** implies procedural obligations, to ensure that safeguards are practical and effective (McCann & Others v. UK; Ilhan v. Turkey). The ECtHR provides clear case law in this regard. The state is under a strict obligation to fully and effectively investigate deaths, regardless of circumstances. This obligation is particularly stringent when a state agent is implicated in the fatality.

*Ahmet Ozkan & Others v. Turkey: ‘(N)either the prevalence of violent clashes in the area at the time nor the high incidence of fatalities there could displace the obligation under Article 2 to ensure that an effective, independent investigation was conducted into the deaths arising out of clashes involving the security forces, the more so in cases such as the present where the circumstances were in many respects unclear.’*

Prompt investigations are crucial in terms of protecting the life of the ‘disappeared.’ Steps taken or omitted in the initial period of the person’s absence can drive or undermine the effectiveness of the effort to discover the facts of the situation. An acquiescent state authority attitude in this regard can point to insincerity of concern for the individual, a lack of objectivity, or tacit approval of the situation (Baysayeva v. Russia). Investigations must be carried out within a reasonable timeframe and driven at an institutional level, rather than at the behest of family members, once the authorities are aware of the situation. The fact that The Commission on Missing Persons is conducting investigations in the region, or into the particular case, is not sufficient to discharge the obligation of the state authorities (Cyprus v. Turkey).

*These principles must, by extension, be applied to the obligation to record casualties of armed conflict. The easiest way for a state to adhere to its obligations would be to systematically investigate deaths and disappearances, record the identity of the dead, make this information publicly available, and treat the deceased with dignity by properly disposing of the body in accordance to the family’s wishes (where possible).*

In Cyprus v. Turkey, the Court specifically referred to Turkey’s failure to search for the dead or wounded, or to carry out burials. This reference to IHL is symbolic of the mergence of the two bodies of law in a progressive sense. The presence of the armed forces in the areas in question in Northern Cyprus, by placing restrictions on access, directly prevented any independent investigations, while the authorities continued to refuse to account for the fates of the persons last seen in their custody in that area, most certainly amounting to a ‘life-threatening’ circumstance, given the large-scale killings and disappearances at that time. Turkey’s investigative duties, as inferred by the Court, included searching for the dead. Logically, once searched for and found, this would include a mechanism of recording the identities of dead.

#### 5.5.4) ARTICLE 3, ECHR

Discussion of **Article 3** in the ECtHR’s case law on this subject pivots on the right of family members of a ‘disappeared’ person to be free of torture and degrading or inhuman treatment. Living in a prolonged state of uncertainty regarding the fate of a loved one is considered by the Court to be torturous and inhuman treatment, amounting to a breach of this right. Where the state in question, once made aware of the existence of a prima facie case of concern, does not respond appropriately to the relative in question, coupled with a failure to adequately investigate and keep the relative apprised of developments in the process, this will amount to a breach of their duty under **Article 3**.

State authorities must, to adhere to their obligations under the Convention:

- Demonstrate an appreciation for the seriousness of the allegations;

- Engage in an investigation; and
- Provide relevant information to the family members concerned as to progress.

The violation arises from official indifference to an allegation which demands investigation, rather than the factual disappearance of the person (Varnava & Others v. Turkey). As stated in Cyprus v. Turkey, such official silence in the face of familial agony and uncertainty attains the level of severity which can only be categorised as inhuman treatment.

**Criteria for Victim Status:** (laid out in the case of Cyprus v. Turkey)

- The proximity of the family tie;
- The particular circumstances of the relationship;
- The extent to which the relative witnessed the event after which the individual in question disappeared;
- The involvement of the relative in attempts to attain information from the authorities and drive the investigation; and
- The manner in which the relative had been treated by the authorities when requesting information and action.

These special factors ‘give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation.’ Dependent on the circumstances of the case, the Court will look at the overall context in accepting victim status. The fact that the relative did not actually witness the arrest or abduction of the person may not negatively affect their claim to victimhood. The essential element is the ‘agony’ endured by the lack of information made available by the authorities.

In Akkum and Others v. Turkey, the Court considered the applicant to have undergone torture by finding his son’s body mutilated. The anguish caused to him amounted to degrading treatment, and within the circumstances, where the state authorities were reasonably believed to be the perpetrators, they had violated **Article 3** of the ECHR in respect to the applicant.

## 5.6) THE RIGHT TO TRUTH

The concept of a public ‘Right to Truth’ is central to the discourse of the human rights community. It is a general principle from which many rights can be recognised and derived, including the Right to Life, the Right to Legal Recognition, the Right to be Free from Torture, and the Right to Seek Reparation for the Violation of Fundamental Rights. It is the basis from which we demand investigation, accountability, and prosecution of the guilty, particularly in the context of human rights violations where state impunity blocks the route to justice for the aggrieved. The ‘Joinet Principles’ (included in the Annex), put together by the Special Rapporteur on Impunity, Louis Joinet, in 1997 described the Right to Truth as an ‘*imprescriptible and inalienable right for individuals as well as for society*’. The Principles state that governments must investigate gross human-rights abuses, preserve the data, make such information accessible, and publicly report the findings of investigations. These principles are widely accepted within the UN system, expressly by the General Assembly in a 2006 Resolution on ‘**Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**’ (included in the Annex) and by many states as foundational concepts in the protection of victims and prosecution of serious human rights abuses. Individuals must be accounted for by the state under all circumstances as an essential component of the general principle of the Right to Truth. Recording the details of the deceased and investigating the cause of death, as well as accounting for the missing, are necessary practices in order to ensure that this public right is upheld.

**6. SCHEMATIC DIAGRAM (TABLE 1)**

The following schematic diagram sets out comprehensively the various components of the legal obligation imposed on states following civilian casualties that result from armed conflict either International or Non-International Armed Conflict. This includes both treaty and customary law obligations, the obligations found by the ICRC Study forming the basis for the structure of the diagram.

<b>1. Search for and Collection of the Dead</b>		
	<b>International Humanitarian Law</b>	<b>International Human Rights Law</b>
<b>(a) Search for Missing Persons</b>	<b>Article 33 Additional Protocol I (hereafter AP I)</b> includes the obligation as soon as circumstances permit and at the latest from the end of active hostilities, each party to the conflict shall search for parties that have been reported missing by the adverse party.	<b>The Right to Recognition before the Law:</b> Universal Declaration of Human Rights (hereafter UDHR), Article 6 & Article 15 (1); International Covenant on Civil and Political Rights (hereafter ICCPR), Part III, Article 16. <b>The Right to Liberty and Security of Person:</b> ICCPR, Part III, Article 9 (1). <b>The Right to Life:</b> UDHR, Article 3; European Convention of Human Rights (hereafter ECHR), Article 2; ICCPR, Part III, Article 6. Includes the procedural obligation of the state to investigate causes of death, to determine ‘intentional’ or ‘arbitrary’ nature of death: ICCPR, Part II, Article 2 (3); Article 2, ECHR, supported by European Court of Human Rights (hereafter ECtHR) case law (see <u>Varnava &amp; Others v. Russia</u> ).
<b>(b) Search for and collection of the dead</b>	<b>Article 16 2<sup>nd</sup> paragraph GC IV</b> As far as military considerations allow, each Party to the Conflict shall facilitate the steps taken to search for the killed. <b>Article 33 (4) AP I and Article 8 AP II</b> – all possible measures to search for the dead.	Part of the state’s obligation to investigate the fate of missing persons: <b>The Right to Recognition before the Law, the Right to Liberty and Security of the Person, the Right to Life</b> (as above).
<b>(c) Provision of Information on Missing Persons</b>	<b>Article 33 AP I</b> Each party shall record the information with respect to persons that have died in detention and to the full extent possible record information of persons that have died as a result of hostilities or occupation. <b>Article 136 Geneva Convention</b>	The state must account for missing persons. Necessary to ensure the protection of <b>the Right to Recognition before the Law, the Right to Liberty and Security of the Person, the Right to Life</b> (as above). The family of the missing have the right to be free from the agony of uncertainty regarding

	<b>IV (hereafter GC IV)</b> –each party to the Conflict shall establish an Official Information Bureau responsible for transmitting information with respect of the POW’s and protected persons who are in its power.	the fate of their family members. <b>The Right to be Free from Torture:</b> UDHR, Article 5; ECHR, Article 3, supported by ECtHR case law (see <i>Cyprus v. Turkey</i> ) ; ICCPR, Part III, Article 7; Convention Against Torture (hereafter CAT), Article 2 & 14. The state must provide such information where available, and otherwise undertake an investigation.
<b>(d) International Cooperation to Account for Missing Persons</b>	<b>Article 140 GC IV</b> – a Central Information Agency shall be created in a neutral country for the purpose of collecting all information it may obtain respecting internees.	UN Charter, Article 55: <b>Member States have Pledged to Cooperate</b> in order to achieve its purposes, including universal respect for, and observance of, human rights and fundamental freedoms. To include the <b>Right to Recognition before the Law, the Right to Liberty and Security of the Person, the Right to Life, and The Right to be Free from Torture.</b>
<b>(e) Right of the Families to Know the Fate of their Relatives</b>	<b>Article 26 GC IV</b> – Each party to the conflict shall facilitate inquiries by members of families with respect to other family members. <b>Article 32 AP I</b> – implementation of the sections with respect to missing or dead prompted by the right of families to know the fate of their relatives.	<b>Recognition of the Importance of the Family Unit:</b> UDHR, Article 12 & Article 16 (3); ECHR, Article 8; ICCPR, Article 17 & 23; International Convention on Economic Social and Cultural Rights (hereafter ICESCR), Preamble & Article 10. <b>The Right to be Free from Torture</b> (as above). <b>The Right to Freedom of Information:</b> UDHR, Article 19. <b>The Right to Effective Remedy for Violations:</b> UDHR, Article 8.
<b>Customary International Law Rule:</b> <i>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.(Rule 112)</i>		

<b>2. Treatment of the Dead</b>		
	<b>International Humanitarian Law</b>	<b>International Human Rights Law</b>
<b>(a) Respect for the Dead</b>	<b>Article 16 2<sup>nd</sup> paragraph GC IV</b> – protection of those killed against ill-treatment <b>Article 34(1) AP I</b> – remains of persons killed shall be respected.	<b>Inherent Dignity of the Human Person:</b> UDHR, Preamble; ICESCR, Preamble; ICCPR, Preamble; CAT, Preamble; ECHR based on UDHR’s fundamental principles.

	<b>Article 4 AP II</b> – prohibition against outrages on personal dignity	<b>Committing Outrages against Personal Dignity</b> is a war crime under the Statute of the ICC, Articles 8(2)(b)(xxi) and 8(2)(c) (ii).
<b>(b) Protection of the Dead from Despoliation</b>	<b>Article 16 2<sup>nd</sup> paragraph GC IV</b> – protection against despoliation <b>Article 4 AP II</b> – prohibition against pillage of dead persons <b>Article 8 AP II</b> – prevention of dead from being despoiled.	<b>Inherent Dignity of the Human Person</b> , see above. <b>The Right to be Free from Torture.</b> See in particular <u>Akkum &amp; Others V. Turkey</u> . The anguish caused to the applicant as a result of the mutilation of the body of his son was held to amount to degrading treatment contrary to Article 3, ECHR. <b>Committing Outrages against Personal Dignity</b> is a violation of IHRL (see above).
<b>Customary International Law Rule:</b> <i>Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. (Rule 113)</i>		

<b>3. Return of the Remains and Personal Effects of the Dead</b>		
	<b>International Humanitarian Law</b>	<b>International Human Rights Law</b>
<b>(a) Return of Remains</b>	<b>Article 130 2<sup>nd</sup> paragraph GC IV</b> - ashes of deceased detainees returned to next of kin <b>Article 34 AP I</b> - remains of persons who have died as a result of hostilities or occupation to be returned to next of kin or maintain gravesites	<b>Inherent Dignity of the Human Person</b> , see above. <b>Recognition of the Importance of the Family Unit</b> , see above.
<b>(b) Return of Personal Effects</b>	<b>Article 139 GC IV</b> – return of valuables of internees <b>Article 34 (2) (c) AP I</b> – adverse parties conclude agreements for to facilitate return of personal effects of the dead	<b>The Right to Own Property and Not to be Arbitrarily Deprived of One’s Property:</b> UDHR, Article 17. This right extends to the property and inheritance rights of heirs, where the individual is missing or dead. The state is obliged to return property to the family of the deceased. Articles of sentimental value may fall within the obligation to ensure <b>Recognition of the Importance of the Family Unit.</b>
<b>Customary International Law Rule:</b> <i>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. (Rule 114)</i>		



<b>4. Disposal of the Dead with Dignity</b>		
	<b>International Humanitarian Law</b>	<b>International Human Rights Law</b>
<b>(a) Respect for the Religious Beliefs of the Dead</b>	<b>Article 130 1<sup>st</sup> paragraph GC IV</b> –burial if possible according to the rites of religion to which they belonged.	<b>The Right to Freedom of Religion:</b> UDHR, Article 18; ICCPR, Article 18; ECHR, Article 9. <b>Inherent Dignity of the Human Person</b> , see above. The state must dispose of the body in accordance with the wishes of the dead, where known. Refusal of a proper burial as <b>Committing Outrages Against Personal Dignity</b> .
<b>(b) Cremation of the Dead</b>	<b>Article 130 2<sup>nd</sup> paragraph GC IV</b> – cremation only for imperative reasons of hygiene or for motives based on the religion of the deceased and the reasons shall be set out in detail in the death certificate.	<b>The Right to Freedom of Religion.</b> <b>The Inherent dignity of the Human Person.</b> Also, <b>Recognition of the Importance of the Family Unit</b> would suggest that families ought to be able to mourn in accordance with their wishes and religious beliefs. States must avoid <b>Committing Outrages Against Personal Dignity</b> .
<b>(c) Burial in Individual Graves</b>	<b>Article 130 2<sup>nd</sup> paragraph GC IV</b> – deceased detainees in individual graves unless unavoidable circumstances require the use of collective graves	<b>The Right to Freedom of Religion.</b> <b>The Inherent dignity of the Human Person.</b> <b>Recognition of the importance of the family unit.</b> <b>To avoid Committing Outrages Against Personal Dignity.</b>
<b>(d) Respect for and Maintenance of Graves</b>	<b>Article 130 1<sup>st</sup> paragraph GC IV</b> – graves shall be respected and properly maintained. <b>Article 34 AP I</b> – as soon as possible agreements to be concluded to maintain the gravesites permanently.	<b>The Right to Freedom of Religion.</b> <b>The Inherent dignity of the Human Person.</b> <b>Recognition of the importance of the family unit.</b>
<b>Customary International Law Rule:</b> <i>The dead must be disposed of in a respectful manner and their graves respected and properly maintained. (Rule 115)</i>		

<b>5. Accounting for the Dead</b>		
	<b>International Humanitarian Law</b>	<b>International Human Rights Law</b>
<b>(a) Identification to the Dead prior to Disposal</b>	<p><b>Article 129 2<sup>nd</sup> paragraph GC IV</b> – deaths of internees shall be certified by a doctor and a death certificate showing the cause of death</p> <p><b>Article 33 (2) AP I</b> – each party record information on those who have died during period of detention and carry out the search for and recording of information concerning persons who died in other circumstances as a result of hostilities or occupation and agree on arrangements for teams to identify the dead from battlefield areas.</p>	<p><b>Right to Recognition before the Law, the Right to Liberty and Security of the Person, 3<sup>rd</sup> the Right to Life.</b> The missing and the deceased must be accounted for by the state in accordance with these rights, and also to prevent violations of the <b>Right to be Free from Torture</b> of the family members of the missing or deceased.</p>
<b>(b) Recording of the Location of the Graves</b>	<p><b>Article 130 3<sup>rd</sup> paragraph GC IV</b> - lists showing the exact location and marking of graves together with particulars of the dead interred therein shall be made by the Graves Registration Service lists to be forwarded to the Power on whom the deceased depended.</p>	<p>Accountability extends to the proper burial and recording of the details of the place of burial. <b>Right to Recognition before the Law, the Right to Liberty and Security of the Person, the Right to Life.</b> Providing details of the place of burial supports the <b>Recognition of the importance of the family unit.</b> Avoids <b>Committing Outrages Against Personal Dignity.</b></p>
<b>(c) Marking of Graves and Access to Gravesites</b>	<p><b>Article 130 1<sup>st</sup> paragraph GC IV</b> – graves must be marked so that they can easily be found.</p> <p><b>Article 34 AP I</b> – facilitate access to gravesite by relatives of the deceased.</p>	<p>Providing access to and full details of the place of burial supports the <b>Recognition of the importance of the family unit</b> and avoids <b>Committing Outrages Against Personal Dignity.</b></p>
<p><b>Customary International Law Rule:</b> <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. (Rule 116)</i></p>		

<b>6. Identification of the Dead after Disposal</b>	
<b>International Humanitarian Law</b>	<b>International Human Rights Law</b>
<p><b>Article 34 (4) AP I</b> – exhumation is allowed only where it is a matter of overriding public necessity, including cases of investigative necessity.</p>	<p><b>The Right to Life.</b> Procedural element includes that states must investigate cause of death. Supported by ECtHR case law. (See <a href="#">Cyprus v. Turkey</a>)</p> <p><b>The Right to be Free from Torture.</b> Identification of the deceased is necessary end the ‘agony’ endured by the family due to state failure to provide information. (See <a href="#">Cyprus v. Turkey</a>)</p>
<p><b>Customary International Law Rule:</b> <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. (Rule 116)</i></p>	

<b>7. Information Concerning the Dead (Death Certificate)</b>	
<b>International Humanitarian Law</b>	<b>International Human Rights Law</b>
<p><b>Article 130 GC IV</b> – provides for the establishment of an Official Graves Registration Service.</p> <p><b>Article 33 AP I</b> – parties shall record the information specified in Article 138 of the Fourth Geneva Convention with respect to persons who died in detention and for those who died in other circumstances as a result of hostilities or occupation record information and search for the casualties.</p>	<p><b>The Right to Recognition before the Law</b> necessarily includes the right to have one’s death officially recognised.</p>
<p><b>Customary International Law Rule:</b> <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. (Rule 116)</i></p>	

## 7) CONCLUSIONS

The human rights obligations with respect to the dead and missing enhance and support the obligations of states involved in conflict which are outlined in International Humanitarian Law and customary international law. It seems undeniable that a mechanism established within the state to record civilian deaths, whether a national emergency is declared or not, would assist the state in avoiding violations of both humanitarian and human rights law.

The establishment of a casualty-recording mechanism could actively tackle impunity, recognise and ease the suffering of family members, restore dignity to the deceased and promote the protection of human rights. The Human Rights Council has, in various resolutions, proposed that these goals be prioritised, through improved communication between the state and family members, increased effort by the state to elucidate the fate of disappeared persons, and the complementary establishment of truth and reconciliation commissions. An effective recording mechanism would operate to deliver these goals in a very real sense.

There is no doubt that the above named obligations are scattered and disconnected. They are determined from analysis of several different instruments and customary rules within International Humanitarian Law and International Human Rights Law. The question must be raised as to whether a comprehensive obligation regarding casualty recording, incorporating all of the diverse aspects of searching for the victims, retrieving their bodies, burying them with dignity and notifying their relatives, should be set out in one legal instrument. However, the disconnected nature of the legal obligation does

not undermine its existence. This report establishes the basis for the assertion that each and every casualty of armed conflict, combatant or civilian, must have his or her death recorded.

## **8) RECOMMENDATIONS**

- Immediate discussion must take place amongst the member states of the United Nations as to whether a new legal instrument is required to consolidate the findings of this report setting out in detail and in one place a summary of the legal obligations with respect to recording casualties
- All participants in armed conflict should set out in their Military Manuals the international legal obligations with respect to civilian casualties.
- States should forthwith ensure that non-governmental civilian casualty recording organisations receive the appropriate resources and funding to continue their vital work in casualty recording.

## 9) ANNEX: TEXT OF SELECTED UN DOCUMENTS

### 9.1) BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

#### **UNGA, 60th Session, 21 March 2006, A/RES/60/147 Resolution adopted by the General Assembly:**

[on the report of the Third Committee (A/60/509/Add.1)]

*Guided* by the Charter of the United Nations, the Universal Declaration of Human Rights, 1 the International Covenants on Human Rights, 2 other relevant human rights instruments and the Vienna Declaration and Programme of Action,<sup>3</sup>

*Affirming* the importance of addressing the question of remedies and reparation for victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law in a systematic and thorough way at the national and international levels,

*Recognizing* that, in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field (...)

*Recommends* that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general;

3. *Requests* the Secretary-General to take steps to ensure the widest possible dissemination of the Basic Principles and Guidelines in all the official languages of the United Nations, including by transmitting them to Governments and intergovernmental and non-governmental organizations and by including the Basic Principles and Guidelines in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*.

#### **Preamble:**

*The General Assembly,*

*Recalling* the provisions providing a right to a remedy for victims of violations of International Human Rights Law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of International Humanitarian Law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court,

And regional conventions, in particular article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms,

Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under International Human Rights Law and International Humanitarian Law which are complementary though different as to their norms (...)

## **II. Scope of the obligation:**

3. The obligation to respect, ensure respect for and implement International Human Rights Law and International Humanitarian Law as provided for under the respective bodies of law, includes, inter alia, the duty to:

- (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;
- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- (d) Provide effective remedies to victims, including reparation, as described below.

## **III. Gross violations of International Human Rights Law and serious violations of International Humanitarian Law that constitute crimes under international law:**

4. In cases of gross violations of International Human Rights Law and serious violations of International Humanitarian Law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

## **IX. Reparation for harm suffered:**

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of International Human Rights Law or serious violations of International Humanitarian Law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

22. *Satisfaction* should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in International Human Rights Law and International Humanitarian Law training and in educational material at all levels.

#### **X. Access to relevant information concerning violations and reparation mechanisms:**

24. States should develop means of informing the general public and, in particular, victims of gross violations of International Human Rights Law and serious violations of International Humanitarian Law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of International Human Rights Law and serious violations of International Humanitarian Law and to learn the truth in regard to these violations.

#### **9.2) SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY ['JOINET PRINCIPLES'], IN: THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: QUESTION OF THE IMPUNITY OF PERPETRATORS OF HUMAN RIGHTS VIOLATIONS (CIVIL AND POLITICAL):**

Revised Final Report Prepared by Mr Joinet [UN Special Rapporteur on Impunity (Civil and Political Rights)] Pursuant to Sub-Commission Decision 1996/119 (E/CN.4/Sub.2/1997/20/Rev. 1, Annex II; Geneva: Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, 1997), 9-17, here 10-13 [inspired DRPGPG Articles 1, 5, 9-10.]

#### **Preamble:**

'The General Assembly (...) Equally aware that forgiveness, which may be an important factor of reconciliation, implies, insofar as it is a private act, that the victim or the victim's beneficiaries know the perpetrator of the violations and that the latter has recognized the deeds and shown repentance, (...) Convinced, therefore, that national and international measures must be taken (...) with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity (...).'

#### **Right To Know - General Principles:**

Principle 1: 'The inalienable right to the truth. Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through systematic, gross violations of human rights, to the perpetration of heinous crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of violations in the future.'

Principle 2: 'The duty to remember. A people's knowledge of the history of its oppression is part of its heritage and, as such, must be preserved by appropriate measures in fulfillment of the State's duty to

remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.'

Principle 3: 'The victims' right to know. Irrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate.'

Principle 4: 'Guarantees to give effect to the right to know. States must take appropriate action to give effect to the right to know. If judicial institutions are wanting in that respect, priority should initially be given to establishing extrajudicial commissions of inquiry and to ensuring the preservation of, and access to, the archives concerned.'

Principle 5: 'Role of the Extrajudicial Commissions of Inquiry. Extrajudicial commissions of inquiry shall have the task of establishing the facts so that the truth may be ascertained, and of preventing the disappearance of evidence. In order to restore the dignity of victims, families and human rights advocates, these investigations shall be conducted with the object of securing recognition of such parts of the truth as were formerly constantly denied.'

Right To Know - C. Preservation of and Access to Archives Bearing Witness to Violations (extracts):

Principle 13: 'Measures for the preservation of archives. The right to know implies that archives should be preserved. Technical measures and penalties shall be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of human rights violations.'

Principle 14: 'Measures for facilitating access to archives. (...) When access is requested in the interest of historical research, authorization formalities shall normally be intended only to monitor access and may not be used for purposes of censorship.'

**Right To Reparation-A. General Principles (extract):**

Principle 36: 'Scope of the right to reparation. (...) In the case of forced disappearances, when the fate of the disappeared person has become known, that person's family has the imprescriptible right to be informed thereof and, in the event of decease, the person's body must be returned to the family as soon as it has been identified, whether the perpetrators have been identified, prosecuted or tried or not.'



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