

Management of the dead from the Islamic law and international humanitarian law perspectives: Considerations for humanitarian forensics

Ahmed Al-Dawoody*

Dr Ahmed Al-Dawoody, born in Egypt, is the Legal Adviser for Islamic Law and Jurisprudence at the International Committee of the Red Cross (ICRC) and a Visiting Professor at the Geneva Academy of International Humanitarian Law and Human Rights in Geneva, Switzerland. Prior to joining the ICRC, he was an Assistant Professor in Islamic studies and Islamic law at Al-Azhar University in Cairo. Dr Al-Dawoody has served as Assistant Director of Graduate Studies for the Institute for Islamic World Studies and coordinator of the MA program in contemporary Islamic studies at Zayed University in Dubai, United Arab Emirates. He has taught in Egypt, the United States, the UK, the UAE and Switzerland. He has published more than two dozen articles and book chapters on Islamic law and is the author of *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011).

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Abstract

This article discusses a number of contemporary issues and challenges pertinent to the management of the dead in contemporary armed conflicts and other situations of violence and natural disasters under Islamic law and international humanitarian law. Among the issues and challenges faced by forensic specialists in Muslim contexts at present are collective burial, quick burial of dead bodies, exhumation of human remains, autopsy, burial at sea, and handling of the bodies by the opposite sex. The article concludes that both legal systems have developed rules which aim at the protection of the dignity and respect of dead bodies, and that they complement each other to achieve this protection in specific Muslim contexts. The main objectives of this article are twofold: firstly, to give an overview of the Islamic law position on these specific questions and challenges, in order to, secondly, provide some advice or insight into how forensic specialists can deal with them.

Keywords: management of the dead, decent burial, autopsy, collective graves, burial at sea, Islam, Islamic law, international humanitarian law, Islamic law and IHL, jihad, Islamic law of armed conflict, war in Islamic law, forensics, humanitarian forensics.

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Introduction

In Islam, human dignity is a right given by God to all people, who are referred to in the Qur'an as God's vicegerents on earth and entrusted with the mission of *'imrāh al-arḍ* (roughly translated, creating civilization on earth). Islam grants certain rights to humans even before they are born, and others after their death. Whether they are dead or alive, the dignity and respect required includes that of the human body, created by God in the perfect shape.¹ As an indication of the respect given to the human body even during armed conflict, the Prophet Muhammad (d. 632) instructed Muslim soldiers to avoid targeting the faces of enemy combatants during military engagement on the battlefield.² In a Hadith narrated by his wife 'Āishah (d. 678), the Prophet Muhammad said that "breaking the bone of a dead

1 Qur'an 95:4. This and other Qur'anic texts (20:55, 77:25–26) make it clear that dead bodies are to be buried.

2 See, for example, Hadith 715 in Hibah Allah ibn al-Ḥasan ibn Manṣūr al-Lākā'ī, *Sharḥ Uṣūl I'tiqād Ahl al-Sunnah wa al-Jamā'ah min al-Kitāb wa al-Sunnah wa Ijmā'* al-Ṣaḥābah, ed. Aḥmad Sa'd Ḥamdān, Vol. 3, Dār Ṭibah, Riyadh, 1981, p. 423; Hadith 2458 in Muḥammad ibn Fattūḥ al-Ḥumaydī, *Al-Jamī' bayn al-Ṣaḥīḥayn al-Bukhārī wa Muslim*, ed. 'Alī Ḥusayn al-Bawwāb, 2nd ed, Vol. 3, Dār ibn Ḥazm, Beirut, 2002, pp. 210 ff.; Hadith 516 in Aḥmad ibn 'Amr ibn Abī 'Āṣīm al-Ḍaḥḥāk, *Kitāb al-Sunnah*, ed. Muḥammad Nāsir al-Dīn al-Albānī, Vol. 1, Al-Maktab al-Islāmī, Beirut, 1979, p. 228; Aḥmad ibn 'Alī ibn Ḥajar al-'Asqalānī, *Bulūgh al-Marām min Adillah al-Ḥukām*, ed. Iṣām Mūsā Hādī, Vol. 1, Dār al-Ṣiddīq, Saudi Arabia, 2002, p. 377; 'Abd al-'Azīz Ṣaqr, 'Al-'Alāqāt al-Dawliyyah fi al-Islām Waqt al-Harb: *Dirāsah lil-Qawā'id al-Munazzimah li-Sayr al-Qitāl*, Mashrū' al-'Alāqāt al-Dawliyyah fi al-Islām No. 6, Al-Ma'had al-'Ālamī lil-Fikr al-Islāmī, Cairo, 1996, p. 56.

person is equivalent to breaking it when the person is alive”.³ This Hadith underlies the fundamental principle of respecting dead bodies in Islam,⁴ and in one sense any crime committed against a dead body remains punishable in the same way as it was when the person was alive.

In many ancient and modern civilizations, traditions and religions, death is a mere transitional phase between one stage of life and another. Burying dead bodies is therefore one of the ways of ensuring the dignity and respect of the dead and respecting the feelings of their living loved ones. Qur’an 5:31 narrates that when Cain did not know how to deal with the body of his brother Abel, whom he had murdered, God sent a raven to teach Cain indirectly how to bury his brother’s body by digging in the ground to bury another raven. Religions, traditions and cultural practices throughout history have influenced the ways in which dead bodies are managed both in times of armed conflict and in times of peace, and still continue to do so.

It is interesting to note that burying and grave regulations, as well as even the etiquette of visiting graves, are deliberated in the Islamic legal literature, a form of law that sometimes combines what is purely legal with what it is religious and/or what is ethical. This characteristic is one of the factors that keeps Islamic law alive, self-imposed and practiced even in areas that are not codified in the legal systems of Muslim States and for which the courts have no jurisdiction. This indicates the significant impact that Islamic law can have in influencing societal behaviour.

The main focus of discussion in this article is not situations of death in normal circumstances, during peace time. This article discusses the management of dead bodies mainly in the context of armed conflicts and other situations of violence and natural disasters under Islamic law, and shows how these Islamic law norms are consistent with international humanitarian law (IHL). It addresses a number of contemporary issues and challenges faced by forensic specialists pertinent to the management of the dead in armed conflicts in Muslim contexts. These issues and challenges include the search for and collection of dead bodies (both Muslim and non-Muslim mortal remains), the repatriation of mortal remains and the personal effects of the dead, disposal of the dead, collective graves, quick burial, exhumation of human remains, autopsy, and burial at sea. The main objectives of this article are twofold: firstly, to give an overview of the Islamic law position on these specific questions and challenges, in order to, secondly, provide some advice or insights into how forensic specialists can deal with these challenges.

- 3 See Hadith 24783 in Ahmad ibn Hanbal, *Musnad al-Imām Ahmad ibn Ḥanbal*, Vol. 6, Mu’assasah Qurṭubah, Cairo, p. 105; Hadith 2307 in Sulaymān ibn al-Ash’ath Abū Dāwūd, *Sunan Abī Dāwūd*, ed. Muḥammad Muḥyī al-Dīn ‘Abd al-Ḥamīd, Vol. 3, Dār al-Fikr, Beirut, p. 212; ‘Alī ibn Ahmad ibn Sa’īd ibn Ḥazm, *Al-Muhallā*, ed. Committee of the Revival of Arabic Heritage, Dār al-Āfaq al-Jadīdah, Beirut, Vol. 5, p. 166, and Vol. 11, p. 40; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū’*, Vol. 5, Dār al-Fikr, Beirut, 1997, p. 263; Kingdom of Saudi Arabia, “Fatwas of the Permanent Committee”, available at: www.alifta.net/Fatawa/fatawaDetails.aspx?language=en&BookID=7&View=Page&PageNo=1&PageID=3094 (all internet references were accessed in September 2018).
- 4 Abroo Aman Andrabi, “Medical Ethics within the Islamic Tradition and the Specific Issues in the Modern Scientific Era”, *International Journal of Multidisciplinary Research and Development*, Vol. 5, No. 2, 2018, p. 114.

Search for and collection of the dead

The classical Islamic law of armed conflict was based on certain texts – scriptural, historical and legal – that primarily addressed seventh-century war contexts in which (1) the conflicting parties in some cases knew the enemy combatants by name, partly because of their tribal affiliations, and (2) the extent of destruction and casualties was very limited, on account of the primitive weaponry available and the custom of conducting hostilities away from populated areas. The point here is to explain the remarkable documentation that is still available today, including lists of war fatalities in the early battles that took place during the Prophet’s lifetime – mainly between 624 and 632 – and the names of prisoners of war (PoWs), as well as some statements describing how they were treated during captivity. By way of example, as can be seen from a quick Google search, historical records document the full names of seventy fatalities from the opposing party and fourteen fatalities from the Muslim party at the Battle of Badr in March 624, while a similar number of fatalities is recorded among the Muslims in the Battle of Uḥud in March 625. These are the highest recorded numbers of fatalities in the battles between the Muslims and their enemies until the death of the Prophet Muhammad in 632. Even the tribal affiliation of each fatality was recorded, and in some cases, who killed who. This is understandable in tribal cultures, where even today some people in Muslim societies trace their genealogy or family tree back to the Prophet’s time.

Early Islamic sources reflect a long-standing practice of parties to conflict accounting for dead bodies, sometimes in great detail. This was the first and obvious obligation in the process of respecting the dead bodies of heroes/martyrs whose heroism and sacrifices ensured that Islam survived and reached later generations of Muslims until the present. Therefore, these accounts are still being studied to commemorate the heroism and sacrifices of the early Muslim martyrs. Islamic rulings at that time were driven by practical concerns. Respecting the mortal remains of the deceased necessitated giving them a decent burial in order to, first, prevent their bodies from being preyed upon by wild animals, and second, allow their families and loved ones to visit their graves. Such concerns remain relevant today.

Hadith (reported sayings, deeds and tacit approvals of the Prophet Muhammad) collections and *Sīrah* (biographies of the Prophet Muhammad) literature indicate that during the Prophet’s lifetime on the battlefield, women provided *inter alia* the humanitarian acts and services given by health-care personnel and aid societies in contemporary armed conflicts. Notwithstanding the fact – which is documented in many reports – that some women fought on the battlefield at that time, their roles mainly included, as explained by Nusaybah bint al-Ḥārith al-Anṣariyyah (a Hadith narrator and jurist known by the nickname Umm ‘Aṭiyyah (d. 643)), treating the injured, looking after the sick, preparing food⁵ and, in the words of al-Rubī’ bint Mī’wwidh bin ‘Afrā’ (d. 665), “repatriating the injured and dead bodies back to

5 See Hadith 1812 in Muslim ibn al-Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad Fū’ād ‘Abd al-Bāqī, Vol. 3, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, p. 1447; Hadith 1065 in A. ibn Ḥanbal, above note 3, Vol. 5, p. 84; Hadith 33650 in ‘Abd Allah ibn Muḥammad ibn Abī Shaybah, *Al-Kitāb al-Muṣannaf fi al-Aḥādīth wa al-Āthār*, ed. Kamāl Yūsuf al-Ḥūt, Vol. 6, Maktabah al-Rushd, Riyadh, 1988, p. 537.

al-Madinah”.⁶ In Arabic, the word *al-madīnah*, previously called Yathrib, means the city or the town, which here refers to the city that still carries the same name in Saudi Arabia, to which early Muslims fled after the escalation of the persecution of Meccans in 622.⁷

The quotation of the words of al-Rubī‘ showing that women took part in the evacuation of the mortal remains of Muslim bodies and the documentation of fatalities in every military engagement, particularly in the *Sīrah*, makes an important point. It shows that the search for and collection of dead bodies are essential actions that must be taken to ensure respect for the dignity of human bodies. For example, after the cessation of hostilities in the Battle of Uḥud, the Prophet Muhammad asked his companions to search for Sa‘d ibn al-Rabī‘ (d. 625) to find out if he was among the fatalities or if he was still alive. In the same battle, the Prophet Muhammad searched for the body of his uncle Ḥamzah (d. 625) after the cessation of fighting.⁸ The search for and collection of the dead during the Prophet’s lifetime is documented in the available *Sīrah* literature because, firstly, it was much easier during this period compared to later periods in Islamic history since the size of the Muslim army and consequently its fatalities and casualties at the time were much smaller, and secondly, historians wanted to document everything that was reported about the life of the Prophet. The significance of documenting the Prophet’s sayings, actions and tacit approvals, which all constitute the Sunnah (tradition) of the Prophet, is that it acts as the second source of Islamic legislation after the Qur’an. Therefore, the Sunnah shows that the search for, identification and collection of dead bodies among the Muslim army is an obligation on Muslims. The disposal of the dead bodies of the opposing party will be discussed below. In consistence with the Islamic rules referred to above, the following IHL rules stipulate that parties to the conflict shall take all possible measures to search for the dead: in non-international armed conflicts (NIACs), Article 8 of Additional Protocol II (AP II) and Rule 112 of the International Committee of the Red Cross (ICRC) Customary Law Study (whenever circumstances permit); and in international armed conflicts (IACs), Article 15(1) of Geneva Convention I (GC I), Article 18(1) of Geneva Convention II (GC II), and Rule 112 of the ICRC Customary Law Study.⁹ According to Article 16(2) of Geneva Convention IV (GC IV), parties to the conflict also have an obligation to facilitate the steps taken to search for those killed, as far as military considerations allow.

6 See Hadith 2727 in Muḥammad ibn Ismā‘īl al-Bukhārī, *Al-Jāmi‘ al-Ṣaḥīḥ al-Mukhtaṣar*, ed. Muṣṭafā Dīb al-Baghā, 3rd ed., Vol. 3, Dār ibn Kathīr, Damascus and Beirut, 1987, p. 1056; Wabbah al-Zuhaylī, *Mawsū‘ah al-Fiqh al-Islāmī wa al-Qaḍāyā al-Mu‘āṣirah*, Vol. 7, Dār al-Fikr, Damascus, 2010, p. 437.

7 This shows, as referred to above, that in some battles the conflicting parties chose to engage in hostilities outside of towns and populated areas in order to avoid causing incidental harm to civilians and civilian objects. The prime examples here are the battles of Badr and the battle of Uḥud, which both took place outside of town. The battle of Badr took place near a well of the same name in the desert between Mecca and Madīnah, while the battle of Uḥud took place near the mountain of Uḥud.

8 See W. al-Zuhaylī, above note 6, Vol. 7, p. 448.

9 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul.

Repatriation of the mortal remains and personal effects of the dead

The burial of the deceased is a collective obligation (*farḍ kifāyah*) on the Muslim community. This means that the entire Muslim community will be guilty if a Muslim body is not buried,¹⁰ unless this was beyond their knowledge or capacity. As can be seen from the words of al-Rubī‘, Muslims observe the practice of returning the dead bodies of Muslim soldiers from the battlefield to their families. Obviously, this is to ensure respect for the family of the dead by burying the bodies closer to them, similar to Rule 105 of the ICRC Customary Law Study, which states that “[f]amily life must be respected as far as possible”.¹¹ Otherwise, when it is impossible to return bodies from the battlefield to their families, burying dead bodies in collective graves will be permitted in this case of necessity, as discussed below. Likewise, returning dead bodies to the opposing party finds precedence in early Islamic history. At the Battle of the Trench in 627, where Muslims numbered less than one third of the coalition of their enemy attackers, Nawfal ibn ‘Abd Allah ibn al-Mughīrah died when he attempted to jump, on horseback, the trench that Muslims had dug around Medina to prevent the Meccans’ attack. When the Meccans offered payment for the body of Nawfal, the Prophet Muhammad gave them the body and refused to accept the payment.¹²

Therefore, when it comes to the return of mortal remains in IACs, Islamic law is consistent with the provisions of the Geneva Conventions related to honourable burial, and in agreement with Article 34(2)(c) of AP I and Rule 114 of the ICRC Customary Law Study, which states that “[p]arties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin”.¹³ In fact, classical Islamic law rules are not only consistent here with IHL, but appear to go even further than the traditional IHL rule in protecting the dignity of the dead and respecting the needs of their loved ones. In many cases, IHL allows for burial of the mortal remains without attempting to return them to their families so long as they are “honourably interred”. For instance, nobody argued that the burial of World War II soldiers on the beaches of Normandy,

10 See Fatwa 4263 issued by the current Grand Mufti of Egypt on 24 January 2018, available at: www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14229&LangID=1.

11 ICRC Customary Law Study, above note 9, Rule 105, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule105.

12 See Muhammad ibn Ishāq, *Al-Sirah al-Nabawīyyah*, ed. ‘Abd al-Malik ibn Hishām, annotated by Fu‘ād ibn ‘Alī Hāfiẓ, Vol. 3, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2000, pp. 123 ff.; ‘Abd al-Malik ibn Hishām and Muhammad ibn Ishāq, *The Life of Muhammad: A Translation of Ishāq’s Sirat Rasūl Allāh*, trans. Alfred Guillaume, Oxford University Press, Oxford, 1955, pp. 450–460; Ahmad ibn ‘Alī ibn Hajar al-‘Asqalānī, *Fath al-Bārī Sharh al-Sahīh al-Bukhārī*, ed. Muḥib al-Dīn al-Khaṭīb, Vol. 6, Dār al-Ma‘rifah, Beirut, p. 283; Hadith 1715 in Muḥammad ibn ‘Isā al-Tirmidhī, *Al-Jāmi‘ al-Ṣaḥīh Sunan al-Tirmidhī*, ed. Ahmad Muhammad Shākir *et al.*, Vol. 4, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, p. 214; Ahmad Abū al-Wafā, *Al-Nazariyyah al-‘Āmmah lil-Qānūn al-Dawli al-Insāni fi al-Qānūn al-Dawli wa fi al-Sharī‘ah al-Islāmiyyah*, Dār al-Nahdah al-‘Arabiyyah, Cairo, 2006, p. 297.

13 ICRC Customary Law Study, above note 9, Rule 114, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule114.

rather than their remains being returned to their loved ones, was in violation of IHL, whereas today families might expect that their loved ones' remains would be returned after death.¹⁴ However, as Rule 114 of the ICRC Customary Law Study notes, there is a “growing trend” of recognizing the obligation of parties to a conflict to facilitate the return of the remains of the dead to their families upon request.

IHL also requires parties to both IAC and NIAC to return the personal effects of the deceased to the party to which they belong.¹⁵ As noted in the ICRC Customary Law Study:

Practice indicates that the personal effects which can be returned include last wills, other documents of importance to the next of kin, money and all articles of an intrinsic or sentimental value; weapons and other materials which may be used in military operations may be kept as war booty.¹⁶

However, classical Islamic law provides that the property of a defeated non-Muslim enemy became war booty – as was the norm in international relations at the time. The classical Islamic rules on war booty are largely based on scriptural sources – Qur'an 8:41 and the Sunnah – and are regulated in detail in the Islamic legal compendia. In brief, one fifth of the booty is to be distributed to certain beneficiaries¹⁷ and the rest is to be distributed to the army. Some Ḥanafī and Shāfi'ī jurists give the ruler the freedom to return property to the defeated adversary. The general and strict rule is that the ruler is the one in charge of distributing the booty¹⁸ and, therefore, it is prohibited for Muslims to take anything from the booty before it is given to them by the ruler; this constitutes an act of looting, which is a major sin/crime in Qur'an 3:161.¹⁹ The Second Caliph 'Umar ibn al-Khaṭṭāb (r. 634–644) sent written instructions to his officials that read: “Do not steal from the booty, do not betray; do not kill a child; and fear God in the farmers.”²⁰

14 See Grazyna Baranowska, “Advances and Progress in the Obligation to Return the Remains of Missing and Forcibly Disappeared Persons”, in this issue of the *Review*.

15 GC I, Art. 16(4); GC II, Art. 19(3); ICRC Customary Law Study, above note 9, Rule 114 (Commentary); AP I, Art. 34(2)(c) requires parties to facilitate the return of personal effects to the home country upon its request, or to the next of kin, unless that country objects, as soon as circumstances and the relations between adverse parties permit.

16 ICRC Customary Law Study, above note 9, Rule 114.

17 Qur'an 8:41.

18 W. al-Zuhaylī, above note 6, Vol. 7, p. 614.

19 See, for example, Abū Yūsuf Ya'qūb ibn Ibrāhīm al-Ansārī, *Al-Radd 'alā Siyar al-Awzā'ī*, ed. Abū al-Wafā al-Afghānī, Dār al-Kutub al-'Ilmiyyah, Beirut, p. 48; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar al-Kabīr*, ed. Ṣalāḥ al-Dīn al-Munjid, Vol. 4, Ma'had al-Makhtūṭāt, Cairo, pp. 1206, 1208, 1239; Muḥammad ibn Idrīs al-Shāfi'ī, *Al-Umm*, 2nd ed., Dār al-Ma'rifa, Beirut, 1973, Vol. 4, pp. 251, 262, and Vol. 7, pp. 336, 345.

20 The instruction of the Second Caliph 'Umar ibn al-Khaṭṭāb to his soldiers to “fear God in the farmers” means to beware of deliberately targeting non-combatant farmers because this will incur the punishment of God. Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid*, Vol. 1, Dār al-Fikr, Beirut, p. 281; Muwaffaq al-Dīn 'Abd Allah ibn Aḥmad ibn Qudāmah, *Al-Mughnī: Fi Fiqh al-Imām Aḥmad ibn Ḥanbal al-Shaybānī*, Vol. 9, Dār al-Fikr, Beirut, 1984, p. 251; Rudolph Peters, *Jihad in Classical and Modern Islam*, Markus Wiener, Princeton, NJ, 1996, p. 35.

In conflicts between Muslims or what can be classified as NIACs, according to classical Islamic law, money and weapons confiscated from armed rebels – both living and dead – must be returned to them after the cessation of hostilities.²¹ In other words, it is prohibited for both parties to take war booty in inter-Muslim fighting. If respected, this specific ruling in inter-Muslim fighting can protect many civilian objects such as cultural and private property from being looted and/or destroyed. This is particularly true if either or both parties to the armed conflict use Islamic law as their source of reference. Under IHL, nonetheless, it is worth pointing out here that “[t]he obligation to return the personal effects of the dead in non-international armed conflicts is not provided for in treaty law, but it is likely that this issue is regulated under domestic law”.²²

Disposal of dead bodies

Muslim mortal remains

Islamic law has developed detailed regulations regarding the disposal of the dead bodies of Muslims and, importantly for the concern of this article, has made a separate body of rules for the disposal of the body of the *shahīd* (martyr, plural *shuhadāʾ*). Succinctly, classical Muslim jurists unanimously identify the martyr as one who dies in fighting against the *kuffār* (unbelievers) – precisely, non-Muslim enemy belligerents – or what can be categorized as NIAC according to the classical caliphate paradigm where all Muslims were united under the rule of one government.²³ By virtue of this paradigm, any inter-Muslim armed conflict would be considered NIAC, while conflict with a non-Muslim-majority country would be IAC. The classical jurists deliberated whether the specific regulations regarding the disposal of the bodies of martyrs apply in the case of dead bodies in inter-Muslim fighting, specifically in the case of fighting against *bughāh* (armed rebellion), or what can be categorized as NIAC. The majority of the jurists agreed that the same regulations that apply to martyrs apply in this case as well.²⁴ Although classed as a martyr in a certain respect, the dead body of a Muslim who is killed in natural disasters or catastrophes, or who is burned or drowns but not in the fighting contexts referred to above, receives the same ordinary process of body

21 See Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Series in Islamic Theology, Law, and History, Vol. 2, Palgrave Macmillan, New York, 2011, p. 164; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar*, ed. Majid Khadduri, Al-Dār al-Muttaḥidah, Beirut, 1975, p. 229; M. ibn Qudāmah, above note 20, Vol. 9, p. 11; ‘Abd al-Qādir ‘Awdah, *Criminal Law of Islam*, trans. Zakir Aijaz, Vol. 1, Kitab Bhavan, New Delhi, 2005, p. 119; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, 2006, p. 238.

22 ICRC Customary Law Study, above note 9, Rule 114.

23 See ‘Abd al-Raḥman ibn Gharmān ibn ‘Abd Allah al-Karīmī Al-‘Umarī, *Aḥkām al-Shahīd fī al-Fiqh al-Islāmī*, Maktabah Dār al-Bayān al-Ḥadīthah, Al-Ṭā’if, 2001, pp. 140–147.

24 *Ibid.*, pp. 148–157.

disposal as those who die in normal circumstances.²⁵ Significantly, *al-murtath*, one who was injured in the fighting in the above contexts but was then rescued and lived a normal life for a while and later died because of the injury received in the war, should not have the same process of body disposal as the martyr, according to the majority of the jurists.²⁶

The two battles referred to above, Badr in March 624 and Uḥud in March 625, respectively created the precedents upon which the rules for handling the dead bodies of non-Muslims and Muslims were derived, basically because these two battles witnessed the highest number of fatalities between the Muslims and their enemies during the lifetime of the Prophet Muhammad. Therefore, based on the process of handling the dead bodies of the Muslim martyrs in the Battle of Badr and the relevant reports attributed to the Prophet Muhammad, Muslim jurists agree that the following three rules should be observed exclusively in the case of martyrs. First, with the exception of mainly Sa‘īd ibn al-Musayyab (d. 712–713) and al-Ḥasan al-Baṣrī (d. 728), Muslim jurists agree that there should be no ritual washing for the body of the martyr. This majority understanding has been the norm and practice throughout Islamic history until today, though there are a host of divergent opinions among the jurists in all of these three rules, basically because of conflicting reports attributed to the Prophet Muhammad. Ibn al-Musayyab and al-Baṣrī based their opinion mainly on logistical considerations: they argued that the martyrs of the Battle of Uḥud were buried without the ritual purification because it was not practically possible to bring water from Medina to the battlefield in the desert for such a number of dead bodies.²⁷ However, the majority based their ruling on various theological rationales, including that burying the martyrs in their blood is a testimony to their great status and the sacrifices they made in the Islamic just war.²⁸ Second, there should be no shrouding of the martyrs, and they should be buried in the same clothes in which they are killed.²⁹ Third, no funeral prayer should be performed on the bodies of the martyrs.³⁰ Again, some jurists explain this by the precedent followed by the Prophet Muhammad in the Battle of Uḥud, while others give theological rationales related to the special status of the martyrs and the idea that they are alive in the presence of their God (Qur’an 3:169), and that their sins are already forgiven and therefore no funeral prayer is needed for them.³¹

25 *Ibid.*, p. 75.

26 See *ibid.*, pp. 168–180.

27 *Ibid.*, pp. 248–251.

28 See, for example, *ibid.*, pp. 254–257; Josep Lluís Mateo Dieste, *Health and Ritual in Morocco: Conceptions of the Body and Healing Practices*, trans. Martin Beagles, Brill, Boston, MA, and Leiden, 2013, p. 159.

29 ‘A. Al-‘Umarī, above note 23, pp. 259–275.

30 *Ibid.*, pp. 276–289.

31 Ahmad ibn Muḥammad ibn Salāmah al-Taḥāwī, *Tawḍīḥ ba’d al-Muṣṭalahāt al-‘Ilmiyyah fī Sharḥ al-‘Aqīdah al-Taḥāwīyyah: Wa ma’ah al-As’ilah wa al-Ajwibah al-Murdiyyah ‘alā Sharḥ al-Taḥāwīyyah*, ed. Muḥammad ibn ‘Abd al-Raḥman al-Khamīs, Dār Ilāf, Kuwait, 1999, p. 214. See Asma Afsaruddin, *Striving in the Path of God: Jihād and Martyrdom in Islamic Thought*, Oxford University Press, New York, 2013, pp. 102–105.

Because of this great status of the martyrs under Islamic law and in Muslim cultures, it is interesting to add here that the Libyan ex-president Muammar Qadhafi, killed on 20 October 2011, wrote in his will that in case he is killed at the hands of his enemies, he “would like to [be] buried, according to Muslim rituals [applicable in the case of martyrs], in the clothes I was wearing at the time of my death and my body unwashed”.³² Obviously, this indicates that Qadhafi expected that he might be killed and felt that he deserved to be treated as a martyr, since he evidently considered his cause to be just. Similarly, images of Palestinians killed by the Israeli military show that they are buried as martyrs – i.e., without ritual washing or shrouding. Examples of celebrating and commemorating this great status of martyrs in modern Muslim cultures include hanging images of martyrs in the streets of Iran, Egypt, Lebanon and Syria, and naming schools, streets etc. after martyrs killed both in international and non-international armed conflicts in many Muslim countries, whether killed in the fighting against Muslims or non-Muslims. Therefore, it is important that those who handle the dead bodies of Muslims who are classified as martyrs are informed about these rules and take into considerations the specific rules that do not allow washing, shrouding or performing funeral prayer. In any case, such decisions are left to the family of the deceased.

Non-Muslim mortal remains

For both Muslim and non-Muslim enemies, there is a duty to collect and bury dead bodies of the opposing party and, as shown above, returning dead bodies of the opposing party finds precedence in early Islamic history. If for any reason the adversary does not bury its dead, then it becomes the obligation of the Muslims to do so. The Andalusian jurist Ibn Ḥazm (d. 1064), of the extinct Zāhirī school, justifies this obligation by arguing that if Muslims do not bury the dead bodies of their enemy in this case, the bodies will decompose or will be eaten by beasts or birds, which will be tantamount to mutilation, prohibited under Islamic law.³³ Among the many instructions of the Prophet Muhammad on the prohibition of mutilations is the following: “Do not loot, do not be treacherous and do not mutilate.”³⁴ The rationale behind the obligation to bury dead bodies of the enemy in case they are not buried by the opposing party is protecting the human dignity of dead bodies, which, although not mentioned in classical Islamic law books, leads to respecting the feelings of the families. In addition to that, some jurists have also argued that burying the dead bodies of the enemy in this case serves the *maṣlahah* (public interest) of the Muslims because it prevents harm to passers-by³⁵ – i.e., public health grounds. (It is worth mentioning here that there

32 See Rema Rahman, “Who, What, Why: What Are the Burial Customs in Islam?”, *BBC News*, 25 October 2011, available at: www.bbc.com/news/magazine-15444275.

33 ‘A. ibn Ḥazm, above note 3, Vol. 5, p. 117.

34 Mālik ibn Anas, *Al-Muwattaʿa*, ed. Muḥammad Fūʿād ‘Abd al-Bāqī, Vol. 2, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1985, p. 448.

35 See W. al-Zuhaylī, above note 6, Vol. 7, p. 445; ‘Abd Allah ibn ‘Umar ibn Muḥammad ibn al-Saḥaybānī, *Aḥkām al-Maqābir fī al-Sharīʿah*, Dār ibn al-Jawzī, Al-Damamn, 2005, p. 233.

is a common misunderstanding that the dead spread disease and therefore pose public health risks, though there are of course situations where this is true, as in the case of infectious diseases like Ebola.) In a word, it is the element of *maṣlahah* – and not the humanitarian element – that surfaces in the classical Muslim jurists’ deliberations on the Muslim obligation to bury the dead bodies of the enemy in cases where they are not buried by the opposing party. Hadith collections and *Sīrah* literature show that Muslims buried the dead bodies of the enemy in the Battle of Badr in March 624, in a collective grave in a place known as al-Qalīb and in other places until there was not a single dead body left unburied.³⁶ Despite the fact that the Islamic scriptural, classical legal and historical sources focus purely on the jurisprudential aspects of the discussion on the obligation to bury dead bodies of the enemy and hence do not elaborate on the humanitarian principles behind this obligation, the Islamic legal position is in agreement with the modern IHL principles on this issue as stated in Article 17 of GC I, Article 120 of Geneva Convention III (GC III), Article 130 of GC IV and Rule 115 of the ICRC Customary Law Study, which states that “[t]he dead must be disposed of in a respectful manner and their graves respected and properly maintained”.³⁷

Collective graves

The rule in Islamic law is that every dead body should be buried in an individual grave.³⁸ However, in cases of necessity, two or three dead bodies, or even more if needs be, can be buried in the same grave. Male and female dead bodies should be buried in separate graves and if necessity dictates otherwise, classical Muslim jurists add that a barrier of dust should be placed between the bodies.³⁹ It was in the Battle of Uḥud that Muslims suffered the highest recorded number of fatalities at that time in a single military encounter, and the Muslims told the Prophet Muhammad that it was difficult for them to dig individual graves for each of the seventy martyrs. Hence, the Prophet told them to dig deeper and bury two or three in each grave. Based on this precedent, Muslim jurists agree that collective graves are permitted in cases of necessity such as in armed conflicts and other situations of violence or natural disasters.⁴⁰

36 See Hadith 26404 in A. ibn Ḥanbal, above note 3, Vol. 6, p. 276; Muhammed ibn Jarīr al-Ṭabarī, *Tarīkh al-Ṭabarī*, Vol. 2, Dār al-Kutub al-‘Ilmiyyah, Beirut, p. 37; W. al-Zuhaylī, above note 6, Vol. 7, pp. 445 ff.; ‘Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, Vol. 1, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1985, p. 57; ‘A. ibn Ḥazm, above note 3, p. Vol. 1, p. 124.

37 ICRC Customary Law Study, above note 9, Rule 114.

38 Muḥammad ibn Muḥammad ibn Aḥmad ibn al-Ikhwah, *M‘ālim al-Qurbah fī Talab al-Hisbah*, eds Muḥammad Maḥmūd Sha‘bān and Ṣiddīq Aḥmad ‘Isā al-Muṭṭī‘ī, Al-Hay‘ah al-‘Āmmah lil-Kitāb, Cairo, p. 106; ‘A. ibn al-Saḥaybānī, above note 35, p. 218; Fatwa 4263, issued by the current Grand Mufti of Egypt on 24 January 2018, available at: www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14229&LangID=1.

39 M. ibn al-Ikhwah, above note 38, p. 106. See also ‘A. ibn al-Saḥaybānī, above note 35, p. 223.

40 ‘A. Al-‘Umārī, above note 23, pp. 292 ff.; ‘A. ibn al-Saḥaybānī, above note 35, pp. 221–224.

Collective graves for dead bodies, usually from the same family, are common in many Muslim countries at present, simply because of the shortage of spaces available for graveyards in villages and towns and/or because of the unaffordability of building a grave for every dead body. It is worth adding here that there are different Islamic rulings⁴¹ and regional, cultural and traditional practices throughout the Muslim world regarding the digging and/or building of graves and the marking of graves with the names of the deceased. For example, in some countries graves are built over the ground and marked with the name/s of the deceased and date of death in order to identify the different bodies, which is permissible in Islamic law according to Fatwa 4341 given by the current Grand Mufti of Egypt on 7 March 2018.⁴² Nonetheless, in other Muslim countries, bodies are buried under the ground without the names of the deceased. Such differences should be respected in different regions by the international organizations concerned if services are provided in the context of armed conflicts and natural disasters in the Muslim world. However, if such traditional practices will hinder humanitarian assistance to victims – mainly management of dead bodies by forensic specialists in this context – then engaging with community and religious leaders and explaining the risks and the danger such practices may cause can help gain their support for the work of international organizations.

Classical Muslim jurists agree that Muslims and non-Muslims should be buried in separate graves.⁴³ They have, however, deliberated various specific cases in this regard. For example, in cases where the religious identity of a number of dead bodies cannot be identified, conflicting opinions are given by the jurists. The majority opine that they are to be buried in special graves, not in the Muslims' graves or the non-Muslims'. However, one minority argues that they are to be buried in the Muslims' graves, and another minority thinks they should be buried in the non-Muslims' graves.⁴⁴ Despite this difference of opinion, jurists agree that if the body of a dead child is found and her/his religious identity cannot be identified, the body should be buried in a Muslim grave.⁴⁵ The practice of separate Muslim and non-Muslim graves is still observed in Muslim countries, and it would be advisable to observe this practice in cases of armed conflicts and other situations of violence or natural disasters if the religious identity of dead bodies can be identified. If this practice is no longer observed in certain Muslim contexts, the issue of separating the graves should not be raised by international organizations in times of armed conflicts or other situations of violence or natural disasters.

Decent burial without adverse distinction

The discussion above shows that burying the dead bodies of a Muslim army is an obligation on that army, while burying the bodies of their adversaries is an

41 See, for example, 'A. ibn al-Saḥaybānī, above note 35, pp. 147–212.

42 See: www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14347&LangID=1.

43 'A. ibn al-Saḥaybānī, above note 35, p. 231.

44 *Ibid.*, p. 229.

45 *Ibid.*, p. 236.

obligation if the enemy do not bury their own dead. In Islamic thought, all people are born in a state of *fiṭrah*⁴⁶ (roughly translated, a pure state of nature), and when they die, any grounds for enmity or hostility that existed towards them before their demise comes to an end. They are considered to have moved to another life/state where they are in the hand of the Almighty, and respecting their dead bodies is a sort of respect of their humanity. In the early years of the first decade of the Islamic era, hostility arose between the nascent Muslim society and three main Jewish tribes in Medina, but when a funeral procession of a Jew passed by the Prophet Muhammad, he stood up in respect for the dead body. It seems that one of the companions of the Prophet did not expect him to stand up in respect to this dead body, and informed him that this was a funeral procession for a Jew. The Prophet Muhammad succinctly responded, condemning the mere fact of questioning the respect for any dead body with the following words: “Isn’t it a [human] soul?”⁴⁷

Therefore, respect for the dead entails the decent burial of dead bodies regardless of whether they are members of the Muslims’ army or the enemy’s. Ya’lā ibn Murrah reported:

I travelled with the Prophet (peace be upon him) on more than one occasion, and I did not see him leave a human corpse behind; whenever he came across one, he ordered its burial, without asking whether the person was a Muslim or an unbeliever.⁴⁸

Apparently, it is not clear whether the context of travel referred to by Ya’lā ibn Murrah here is during armed conflict or not, but in any case it is interesting to note that this report is reminiscent of Rule 112 of the ICRC Customary Law Study in two respects, among others: first, not making a distinction between dead bodies (i.e., whether they are from the Muslim party or the enemy), and second, whether or not they have taken part in hostilities. Rule 112 reads: “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*.”⁴⁹

Furthermore, decent burial of dead bodies is an obligation for Muslims because respecting the dignity of humans should be observed whether they are alive or dead, as shown in Ya’lā ibn Murrah’s report above. Therefore, Islamic law and modern IHL principles are compatible in this regard since both ensure the decent burial of dead bodies, as can be seen, for example, in Article 17(3) of GC I, Article 120(4) of GC III, Article 130(1) of GC IV and Rule 115 of the ICRC Customary Law Study, and stress that decent burial of dead bodies should

46 M. ibn Anas, *Al-Muwattaʿa*, above note 34, Vol. 1, p. 241.

47 See Hadith 1250 in M. al-Bukhārī, above note 6, Vol. 1, p. 441; Hadith 70 in ‘Alī ibn Al-Ja’d, *Musnad ibn Al-Ja’d*, ed. ‘Amir Aḥmad Ḥaydar, Vol. 1, Mu’assasah Nādir, Beirut, 1990, p. 27.

48 ‘Alī ibn ‘Umar Al-Dāraqutnī, *Sunan al-Dāraqutnī*, eds Shu’aib al-Arna’ūt, Ḥassan ‘Abd al-Mun’im Shalabī and Sa’id al-Laḥām, Vol. 5, Mu’assasah al-Risālah, Beirut, 2004, p. 204.

49 ICRC Customary Law Study, above note 9, Rule 112 (emphasis added). See also GC I, Art 15(1); GC II, Art. 18(1); AP I, Art. 33(4); AP II, Art. 8.

be carried out, “if possible, according to the rites of the religion to which they belonged”.

In the same vein of burying dead bodies as part of respecting the human dignity of the deceased and their families, under Islamic law, limbs of dead bodies or even severed limbs of those who are still alive, such as in cases of surgical operations or amputations carried out under Islamic corporal punishments, must be also buried.⁵⁰ Broadly, Muslim jurists agree that body parts found after the burial of dead bodies should be buried, and Ḥanbalī jurists add that such body parts should be buried next to the grave or inside it but without uncovering the dead body to reassemble it.⁵¹ Their deliberations on burying recovered body parts resulted in different rulings regarding whether or not the performance of Islamic burial rituals is required, such as ritual washing and funeral prayers on such body parts.⁵² In Islam, *ḥarq* (cremation) or merely discarding such limbs are disrespectful to human dignity. In fact, classical Muslim scholars have gone further, advocating even burying parts of the body such as fingernails and hair, whether this was for the sake of respect for the human body or for hygiene purposes, and stating that these should be also buried in the ground, not in a grave but under the soil.⁵³ This approach reflects the idea that burying dead bodies and human limbs is necessary for protecting human honour and dignity in Islamic legal, cultural and traditional practices, which explains the practice of quick burial in Muslim contexts, as discussed below.

Prohibition of mutilation

In the same line of protecting the human body as part of the respect for human dignity, under the Islamic law of armed conflict, mutilation of an enemy body is strictly prohibited. Mutilation of enemy bodies as a sign of revenge was recorded in fighting between the Arabs, and the practice of carrying the severed heads of enemy military leaders was reported in the wars between the Romans and the Persians.⁵⁴ In the battle of Uḥud in March 625, many bodies of dead Muslims were brutally mutilated, including the body of the Prophet Muhammad’s uncle, Ḥamzah ibn ‘Abd al-Muṭṭalib. The Prophet Muhammad and other Muslims vowed revenge on their enemies by mutilating their bodies in future military engagements, and when the Qur’anic text 16:126–127 was revealed, the Prophet Muhammad prohibited mutilation. Among the Prophet’s instructions regulating

50 ‘A. ibn al-Sahaybānī, above note 35, pp. 238 ff. On the use of the medical profession in Islamic corporal punishment, see Ahmed Al-Dawoody, “Use of the Medical Profession in Torture and Punishment”, in Ayman Shabana (ed.), *The Encyclopedia of Islamic Bioethics*, Oxford University Press, New York, forthcoming 2018, available at: www.oxfordislamicstudies.com/article/opr/t343/e0259.

51 Kuwaiti Ministry of Awaqaf and Islamic Affairs, *Al-Mawsū‘ah al-Fiqhiyyah al-Kuwaytiyyah*, Vol. 21, Kuwait, 2001, p. 19.

52 *Ibid.*

53 *Ibid.*, p. 21.

54 See Muḥammad ibn al-Ḥassan al-Shaybānī, *Sharḥ Kitāb al-Siyar al-Kabīr*, ed. Abī Abdullah Muḥammad Ḥassan Muḥammad Hassan Ismā‘il al-Shafi‘ī, commentary by Muḥammad ibn Aḥmad al-Sarakhsī, Vol. 1, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1997, p. 79.

the use of force during armed conflicts: “Do not loot, do not be treacherous and do not mutilate.”⁵⁵ Affirming the brutality of mutilation, the Prophet Muhammad prohibited mutilation even if it was the body of a rabid dog.⁵⁶ Similarly, the first caliph Abū Bakr (d. 634) sent written instruction to his governor in Hadramaut, Yemen, which read: “Beware of mutilation, because it is a sin and a disgusting act.”⁵⁷ When Muslims severed the head of Yannāq al-Biṭrīq, the Syrian army commander, and justified it by reciprocity, Abū Bakr rebuked the justifiers with the following words: “Are we going to follow the Persians and the Romans? We have what is enough: the book [the Qur’an] and the reports [i.e., tradition of the Prophet].”⁵⁸ This response is quite revealing because it shows that Muslims are self-motivated to abide by Islamic law and hence if Muslim scholars disseminate the Islamic law of armed conflict among Muslims, it could have a big influence on the use of force in certain contexts in which arms bearers use Islamic law as their source of reference. In the context of management of the dead, if forensics specialists familiarize themselves with the Islamic law positions on the issues and challenges with which they are confronted in Muslim contexts, they can better communicate their humanitarian and scientific messages and in most cases overcome those challenges.

It should be added here that despite these clear-cut texts prohibiting mutilation, a few jurists such as al-Māwardī (d. 1058) and al-Shawkānī (d. 1834) opine that if it will serve the interest of Muslims (i.e., if it will help them win the war), severing the heads of enemy military leaders can be carried out as a means of intimidating the adversary and thus forcing them to stop the war.⁵⁹ Obviously, resorting to the principle of *maṣlaḥah* (public interest), as in this example, could be used to justify contradicting things based on the calculations of the individual/s deciding what will constitute the interests of the Muslims. More importantly, this exemplifies a characteristic of Islamic law where in many cases a host of conflicting rulings are developed by Muslim jurists on a given issue, and this explains the great weight given to *ijmā’* (consensus) as the third source of legislation in Islamic law following the Qur’an and the Sunnah. Furthermore, in case of the lack of an *ijmā’* on a certain issue, still the jurists give more weight to following the ruling that is adopted by the *jumhūr al-fuqahā’* (majority of the jurists). In the same vein, a ruling that (1) contradicts the majority’s ruling and/or (2) more specifically is not grounded or rightly grounded on the Islamic sources of legislation and therefore contradicts the Islamic legal maxims is designated by the jurists as *shādh* (irregular, odd, weak, strange, abnormal). As a consequence, Muslim jurists and scholars

55 M. ibn Anas, *Al-Muwatta’*, above note 34, Vol. 2, p. 448.

56 See Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūt*, Dār al-Ma’rifah, Beirut, Vol. 9, pp. 135, 196, Vol. 10, pp. 129, 131, Vol. 16, p. 145, and Vol. 26, p. 175.

57 Quoted in ‘A. Ṣaqr, above note 2, p. 57.

58 Yadh Ben Ashour, *Islam and International Humanitarian Law*, ICRC, 1980, p. 7; Zayd ibn ‘Abd al-Karīm al-Zayd, *Muqaddimah fi al-Qānūn al-Dawli al-Insānī fi al-Islām*, ICRC, 2004, p. 48.

59 See Muḥammad ibn ‘Alī ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akḥbār*, Vol. 8, Dār al-Jil, Beirut, 1973, p. 74; Muḥammad ibn ‘Alī ibn Muḥammad al-Shawkānī, *Al-Sayl al-Jarrār al-Mutadaffiq ‘alā Ḥadā’iq al-Azhār*, ed. Muḥammad Ibrāhīm Zāyid, Vol. 4, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1984, p. 568.

argue that this category of rules developed by individual jurists throughout Islamic history should not be followed by Muslims. But from both a practical and a scholarly perspective, such conflicting Islamic rulings should be known, analyzed and attributed to their proponents, whether they belong to the category of the *shādh* rulings or not. If non-experts in Islamic law – Muslims or non-Muslims alike – engage in Islamic law, it is not a sufficient excuse to say “I am not a Muslim” or “I am not an expert” to justify presenting *shādh* rulings as representing the true Islamic position on a given issue. Therefore, analyzing and classifying Islamic rulings could be useful in informing non-expert followers of Islamic law about such positions so that they can make informed decisions about which rules they should follow. The point here is that dissemination and education on Islamic law is necessary as long as Islamic law is being followed. This should not only be the case with Muslims, but it goes without saying that for any informed decisions or policies taken by States or international organizations related to Islam and in certain situations related to Muslim societies, in general, understating of Islamic law and its impact on society is essential.

Quick burial

Different manifestations of the principle of respect for dead bodies exist in different cultures and periods. In Islamic law and Muslim cultures, burying the dead in the ground is the right way of respecting dead bodies, while cremation is prohibited under Islamic law because, unlike in some cultures, it is considered a violation of the dignity of the human body.⁶⁰ As an illustration of this, although the current Grand Mufti of Egypt Dr Shawki Allam issued Fatwa 3246 on 14 May 2015 permitting the cremation of the dead bodies of Ebola victims and then burying them in graves after that if cremation is the correct method to stop the spread of the disease,⁶¹ other scholars and muftis rejected this fatwa because they considered that cremation is still prohibited even in this case.⁶² In normal situations, based on reports attributed to the Prophet Muhammad, it is (to use Islamic legal terminology) *mustahab*, preferred, to bury the dead bodies quickly⁶³ – i.e., it is not *farḍ/wājib* (compulsory). However, no specific indications of how quick the burial should be given in these reports. But in cases of *al-maṭ'ūn* (a stabbed person), *al-maflūj* (a semi-paralyzed person) and *al-masbūt* (a comatose person), some jurists advocate that it is preferred that Muslims wait for *yaūm wa laylah* (a day and a night) until the death of persons in such cases is

60 See, for example, Fatwa 1896, issued by Dar al-Ifta of Egypt on 26 June 2001, available at: www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?sec=fatwa&ID=11896; Fatwa 17513 issued by the General Presidency of Scholarly Research and Ifta in the Kingdom of Saudi Arabia, available at: <https://tinyurl.com/ycqxsxzip>; Fatwa issued by the Islamic High Council of Australia, available at: <https://tinyurl.com/y9q934h7>.

61 See: www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?sec=fatwa&ID=13425.

62 See: www.elnabaa.net/632207.

63 See Hadith 1252 in M. al-Bukhārī, above note 6, Vol. 1, p. 442; 'A. ibn Hazm, above note 3, p. Vol. 5, p. 154; M. Al-Nawawī, above note 3, Vol. 5, p. 230; Muḥammad al-Khatīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifah Ma'ānī Alfāz al-Minhāj*, Vol. 1, Dār al-Fikr, Beirut, p. 340.

confirmed.⁶⁴ The reason behind waiting in these three cases is simply because there is a possibility that the individual in question is not dead yet. They may be in a coma, and therefore the jurists preferred that the burial should be delayed until death is confirmed. But if there is a suspicion that death is due to criminal action, then burial is to be postponed until the body is examined.⁶⁵ A few jurists have added that waiting for relatives of the deceased is one of the reasons for postponing burial of the dead body, unless the length of time required is so long that the body will decay.⁶⁶ These discussions about the time frame do not change if the dead body is unclaimed or unidentified: the same rationale of respecting a human dead body applies. The humanitarian concern of respecting dead bodies will prompt Muslims to quickly bury unclaimed or unidentified bodies.

Apart from these Islamic legal deliberations, cultural and traditional practices play a major role in most of the issues related to the management of the dead. In Muslim as well as some other non-Muslim cultures, there is a tendency to quickly bury the dead, which in some cases hinders the work of forensic specialists working in Muslim contexts. This is especially true in cases of armed conflict and other situations of violence and natural disasters, and is mainly due to two reasons. First, relatives and neighbours want to prevent the body from starting to emit the odour of death, especially in some countries where temperatures are high and there are not enough fridges to keep the dead bodies in cool temperatures, or where electricity blackouts occur often and without warning, let alone in villages and remote places in the desert without electricity. Quick burial in these situations is motivated by the desire to respect the dead bodies. Second, extended relatives and neighbours want to shorten the pain of the deceased's family members and loved ones by burying the body, and to save the family from a state of fear and anxiety that the body of the deceased might decay and start to give off the odour of death, which is understandably painful for the family. Therefore, for forensic specialists to be given enough time to undertake their job, providing fridges to protect dead bodies is necessary in addition to engaging community and religious leaders and local authorities in convincing the public and relatives of the dead that giving forensic specialists enough time to examine the bodies is important for establishing their identity. Otherwise, families of the dead risk being in pain for the rest of their lives due to being unable to identify and visit the graves of their loved ones.

64 See A. al-'Asqalānī, above note 12, Vol. 3, p. 184; Muḥammad 'Abd al-Raḥman ibn 'Abd al-Raḥīm al-Mubarkāfūrī, *Tuhfah al-Aḥwadhī bi-Sharḥ Jāmi' al-Tirmidhī*, Vol. 4, Dār al-Kutub al-'Ilmiyyah, Beirut, p. 82.

65 See Fatwa 66120 issued by the Fatwa Centre affiliated to the Qatari Ministry of Endowments (Awqaf) and Religious Affairs, available at: <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=Fatwald&Id=66120>.

66 See 'Abd al-Ra'ūf al-Mināwī, *Fayd al-Qadīr Sharḥ al-Jāmi' al-Ṣaḡhīr*, Al-Maktabah al-Tujāriyyah al-Kubrā, Vol. 3, Cairo, 1937, p. 310.

Exhumation of human remains

In Islamic parlance and early Islamic history, the term *nabsh al-qubūr* (exhumation of graves) is strongly associated with the crime of grave robbery; whether the jurists referred to exhuming the body for criminal actions or for other purposes such as the examples given below, they used the same term of *nabsh al-qubūr*. According to the forty-five-volume *Al-Mawsū‘ah al-Fiqhiyyah al-Kuwaytiyyah* (*Kuwaiti Islamic Law Encyclopaedia*), the *nabbāsh* (grave robber) is one who digs up graves to steal the shrouds or ornaments from the dead bodies,⁶⁷ a crime that disqualifies its culprit as a witness.⁶⁸ Partly because of this historical association, the Arabic words for exhumation of graves have a very negative connotation in many parts of the Arabic-speaking cultures. In addition to that, in principle, respect for dead bodies entails not exhuming their graves and therefore classical Muslim jurists agree on the prohibition against exhuming graves without necessity.⁶⁹ One of the distinctive characteristics of Islamic law is that classical Muslim jurists not only developed rules regulating the situations that Muslims encounter in their everyday lives in many areas of Islamic law, but they also envisaged hypothetical cases/situations and developed rules regulating them in case they may happen. Therefore, classical Muslim jurists deliberated the permissibility of exhuming graves in a number of cases, including apparently hypothetical ones.

According to a Hadith narrated by Anas ibn Mālik (d. 712), when the Prophet Muhammad arrived at Medina, he built a mosque in a place where some graves were exhumed and palm trees were cut down.⁷⁰ Based on this Hadith and this precedent, Muslim jurists agree that it is permissible to build a mosque in place of exhumed graves, meaning that it is potentially permissible to exhume graves for other purposes as well. Furthermore, there is another precedent where a dead Muslim body was exhumed for the purpose of transfer from a collective grave to an individual grave closer to the family of the dead. Jābir ibn ‘Abd Allah ibn ‘Amr, one of the Muslims whose father was buried in a collective grave with the body of ‘Amr ibn al-Jumūḥ ibn Zayd ibn Ḥarām al-Anṣārī in the battle of Uḥud, explains how much pain he was in because his father’s body was buried in a collective grave on the battlefield in Uḥud, about five kilometres from where he was living in Medina, and that he did not rest until his father’s body was transferred after six months to an individual grave in Medina.⁷¹ Although there are some reports in which the Prophet Muhammad instructs Muslims to bury the Muslim martyrs where they were killed on the battlefield, these instructions were linked with the battle of Uḥud, where it was not logistically possible for the

67 See Kuwaiti Ministry of Awqaf and Islamic Affairs, above note 51, Vol. 40, p. 18.

68 See Muḥammad ibn al-Ḥasan ibn Muḥammad ibn ‘Alī ibn Ḥamdūn, *Al-Tadhkirah al-Ḥamduniyyah*, ed. Iḥsān ‘Abbās and Bakr ‘Abbās, Vol. 5, Dār Ṣādir, Beirut, 1996, p. 214.

69 See Kuwaiti Ministry of Awqaf and Islamic Affairs, above note 51, Vol. 40, p. 25.

70 See Hadith 781 in Aḥmad ibn Shu‘ayb al-Nasā‘ī, *Sunan al-Nasā‘ī al-Kubrā*, ed. ‘Abd al-Ghaffār Sulaymān al-Bindārī and Sayyid Kasrawī Ḥasan, Vol. 1, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1991, p. 259.

71 See Aḥmed ibn al-Ḥussein ibn ‘Alī al-Bayhaqī, *Sunan al-Bayhaqī al-Kubrā*, ed. Muḥammad ‘Abd al-Qādir ‘Atṭā, Vol. 4, Dār al-Bāz, Mecca, 1994, p. 58; ‘A. ibn al-Saḥaybānī, above note 35, p. 494.

Muslims to transfer all dead bodies from the battlefield to Medina.⁷² Therefore, this specific precedent of exhuming one of the dead bodies that was buried in a collective grave in the battle of Uḥud indicates that exhuming dead bodies for the purposes of transfer to the place of origin, and/or establishing the identity of the buried person such as in the case of dead migrants, is permissible under Islamic law. In fact, Shaykh Makhlūf, the Grand Mufti of Egypt from 5 January 1946 to 7 May 1950 and from March 1952 to December 1954, issued a fatwa permitting the transfer of the mortal remains of “the last Ottoman sultan, ‘Abd Al-Majīd, and his wife, who were embalmed and buried in France, to be buried in Egypt”.⁷³

Other examples of exhuming graves were deliberated also for religious purposes (or what is described in Islamic parlance as the rights of God), civil liability cases (rights of humans) and even public interest considerations.

Examples of exhuming mortal remains for religious purposes include exhumation because a dead body is buried without the ritual washing, or shrouding, or the funeral prayer. The jurists agree that there is no need for exhuming the mortal remains to perform the funeral prayer because it can be performed at the grave without exhuming the body. Similarly, they tend to reject exhumation if the body was buried without shrouding because they argue that the grave already satisfies the purpose of covering the body, while they tend to accept exhuming the dead body if it was buried without the ritual washing.⁷⁴ Furthermore, bearing in mind that according to Islamic burial rituals, a Muslim dead body is to be placed lying on its right side and facing in the direction of Qibla, do these considerations constitute a ground for exhuming the mortal remains to make sure that their burial is in accordance with Islamic religious burial rituals? The jurists’ answer to this is negative,⁷⁵ which is in line with the Islamic tendency for leniency when it comes to the rights of God, unlike when it comes to the rights of the humans, as the following examples show.

Examples of exhuming mortal remains for civil liability cases include if gold,⁷⁶ money or valuable belongings are buried with the dead bodies, if the deceased swallowed a piece of jewellery before death, or if the body is buried in a usurped land and the landowner asks for the removal of the grave from the land, or in case of a living foetus in the womb of a dead woman. In all of these examples, the jurists support the exhumation of the graves⁷⁷ because after death, the possession of all such items accompanying the dead body is to be legally

72 See Vardit Rispler-Chaim, “The Ethics of Postmortem Examination in Contemporary Islam”, *Journal of Medical Ethics*, Vol. 19, No. 3, 1993, p. 166.

73 *Ibid.*

74 Muḥammad al-Ghazālī, *Al-Waṣīṭ fi al-Madhhab*, eds Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir, Vol. 2, Dār al-Salām, Cairo, 1997, p. 390; M. ibn al-Ikhwah, above note 38, p. 106. It is worth adding here that the jurists Ashhab and Ṣahnūn, from the Māliki school of law, prohibit performing the funeral prayer at the grave: see ‘A. ibn al-Ṣaḥaybānī, above note 35, p. 350.

75 Ḥasan ibn ‘Ammār Shurunbulālī, *Kitāb nūr al-Idāḥ wa Najāt al-Arwāḥ*, Dār al-Ḥikmah, Damascus, 1985, p. 98.

76 See Hadith 3088 in Abū Dāwūd, above note 3, Vol. 3, p. 181.

77 See, for example, M. al-Ghazālī, above note 74, Vol. 2, p. 390; Ḥ. Shurunbulālī, *Kitāb nūr al-Idāḥ*, above note 75, p. 98; M. ibn al-Ikhwah, above note 38, p. 106.

transferred to the heirs of the dead according to their prescribed shares under Islamic law. Hence, loose personal items and valuables found with dead bodies during armed conflicts or natural disasters should be handed to their next of kin. Likewise, the right of the living, in this case the owner of the usurped land upon which the grave is built, overrides the respect of dead bodies. The same rationale applies for rescuing the living foetus, otherwise it will constitute a crime against a living human soul, yet unborn.

Examples of exhuming mortal remains for the purpose of public interest include exhuming graves to build public roads⁷⁸ or if the graves were hit by floods or leaks.⁷⁹ Public interest considerations here constitute legitimate grounds for exhumation of graves.

Therefore, the issue of the exhumation of human remains as deliberated in Islamic legal tradition reflects not only the Islamic religious, legal and ethical dimensions, but also the cultural and contextual dimensions of the seventh and eight centuries. As shown, exhumation of human remains is permissible in some cases and prohibited in others. On the one hand, the prohibition in some of these cases is based solely or mainly on the jurists' discretion of what constitutes disrespect for human dignity. On the other hand, the permissibility is based in some cases on the jurists' discretion of what constitutes the public interest of the Muslim community. This explains the different rulings developed by the jurists and the various practices adopted in Muslim societies accordingly. Thus, forensic specialists working in Muslim societies should familiarize themselves with both the Islamic regulations on the management of the dead and how far the cultural practices in these societies correspond with what Islamic law says. This is in order to enable them to take informed decisions that will ensure respect for the dead bodies. In cases where such cultural practices constitute challenges to the forensic specialists' work, engaging with Islamic institutions, scholars and community leaders becomes essential in order to address these challenges.

Autopsy

Autopsy, or post-mortem examination, means the dissection of dead bodies for educational, scientific or legal purposes – i.e., determining the cause of death. This practice was not unknown in Islamic history. Abū Bakr Muḥammad ibn Zakariyyah al-Rāzī, known in the West as Rhazes (854–925), and Al-Ḥusayn ibn 'Abd Allah ibn Sīnā, known in the West as Avicenna (d. 1037), both of whom were born in today's Iran, used to perform autopsies for educational purposes. But the Syrian-born and -educated 'Alī ibn Abī al-Ḥazm ibn al-Nafīs, (d. 1288), later the director of the Nāṣirī Hospital in Cairo, who was known as the first to describe the pulmonary circulation of the blood, did not perform autopsies for

78 'A. ibn al-Saḥaybānī, above note 35, p. 492.

79 *Ibid.*, p. 493.

educational purposes because he was of the opinion that it was impermissible under Islamic law.⁸⁰

At present, autopsy is practiced in Muslim countries by specialists in the department of forensics based either in the Ministry of Justice or the Ministry of health. Nevertheless, unless an autopsy is performed in case of a court order because there is a suspicion that death is due to a criminal action and the family themselves are interested to know the cause of death, there is still a popular tendency in Muslim societies to reject autopsy because it will disfigure, and hence desecrate, the dead body. The Arabic word *tashrīh*, used for anatomy/autopsy, culturally and psychologically indicates in the mind of Arabic-speakers the act of cutting the body into pieces or at least cutting the corpse open in a cruel way. In addition to that, the psychological and emotional rejection of autopsy is due to the delay of the burial of the dead.⁸¹ Since the issue of autopsy is not treated in the Islamic scriptures or classical legal literature, the current Islamic legal deliberations on the issue by many muftis basically reflects a sort of deliberation between the principle of respect for dead bodies, on the one hand, and the legal imperatives of identifying the cause of death in case of suspicion of criminal action and the scientific and educational benefits of autopsy, on the other. Based on the principle of *maṣlaḥah* (public interest) and the Islamic legal maxims *al-ḍarūrāt tubīḥ al-mahzūrāt* (necessity overrides the prohibition) and *ikhtiyār akhaf al-ḍararayn* (choice of the lesser of two evils), most Muslim jurists and major Islamic law and fatwa councils in many Muslim countries such as Egypt, Saudi Arabia, Jordan and Palestine permit autopsies both for criminal investigations and scientific and educational benefits. The example of dissecting a dead mother's womb to rescue the foetus given by classical Muslim jurists is borrowed here by contemporary muftis to allow autopsy.⁸²

In order to accommodate the religious beliefs of both Jews and Muslims who object to post-mortem examination and delayed burials on religious grounds in the UK, the government allows for an alternative examination method: a magnetic resonance imaging (MRI) scan of the bodies that replaces the traditional invasive post-mortem examination.⁸³ This is a good alternative because it also expedites the burial process and therefore no grounds for objection to post-mortem examination exist. The main problem with the MRI scan is that its cost is high, particularly in cases where there are large numbers of dead bodies, such as in the context of armed conflicts and other situations of violence or natural disasters. Although the current Islamic position on autopsy and modern scientific

80 See Madadin Mohammed and Magdy A. Kharoshah, "Autopsy in Islam and Current Practice in Arab Muslim Countries", *Journal of Forensic and Legal Medicine*, Vol. 23, March 2014, p. 81.

81 Aziz Sheikh, "Death and Dying: A Muslim Perspective", *Journal of the Royal Society of Medicine*, Vol. 91, March 1998, p. 139.

82 See: <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&lang=A&Id=56064>.

83 See: Martin Beckford, "Muslims and Jews to Be Allowed to Have Different Post-Mortems", *The Telegraph*, 21 April 2009, available at: www.telegraph.co.uk/news/religion/5195466/Muslims-and-Jews-to-be-allowed-to-have-different-post-mortems.html; Paul Britton, "Body Scans Instead of Post Mortems", *Manchester Evening News*, 18 April 2010, available at: www.manchestereveningnews.co.uk/news/greater-manchester-news/body-scans-instead-of-post-mortems-955338.

achievements can help in minimizing the popular objection to post-mortem examinations in Muslim contexts, it is still necessary to raise awareness in Muslim societies about advancements in forensic science and to correct misconceptions that post-mortem examination amounts to cruel mutilation of dead bodies.⁸⁴

Handling of bodies by the opposite sex

Throughout history, religious, cultural and traditional norms have shaped the interaction between the sexes. Conservative traditions and norms dictate the extent of interaction between the sexes in Arab and Muslim-majority countries, and in some cases these may be stricter than the Islamic norms or may even contradict them. Non-Muslim minorities in Muslim societies usually have similar conservative social norms as well. Health-care workers in non-Muslim societies – and to a much lesser extent in Muslim societies – face some challenges or “dilemmas”⁸⁵ in providing medical services to observant Muslim patients, especially female patients. Most notable among these challenges is the examination of patients by health-care professionals of the opposite sex, particularly when this involves touching the skin or uncovering the body. Joining their expertise, Muslim medical professionals and Islamic law experts have been working together over the last few decades to respond to new medical issues and develop Islamic medical ethics.⁸⁶

The handling of dead bodies by forensic specialists of the opposite sex, in principle, follows the same Islamic position on the examination of patients by medical professionals of the opposite sex, a subject of one of the chapters in the most authoritative Sunni canonical Hadith collections by Muḥammad ibn Ismā‘īl al-Bukhārī (d. 870).⁸⁷ The Majma‘ al-Fiqh al-Islāmī (Islamic Law and Jurisprudence Council) affiliated to the Jeddah-based Muslim World League issued Decree No. 85/12/d8 in its eighth conference, held in Brunei on 21–27 June 1993, to the effect that Muslim female patients should be examined by Muslim female medical professionals, and if those are not available, then by a trusted female non-Muslim medical professional. If there are no female medical professionals, then a Muslim male medical professional should perform the examination, and if one is not available, a non-Muslim male medical professional should do so. In case of examination by medical professionals from the opposite sex, the spouse or a *mahram* (a relative with whom marriage is prohibited) should be present during the examination in order to avoid the prohibited *khalwah* (seclusion between a non-*mahram* male and a female).⁸⁸ However, in

84 See M. Mohammed and M. Kharoshah, above note 80, p. 80.

85 See Roni Caryn Rabin, “Respecting Muslim Patients’ Needs”, *New York Times*, 1 November 2010, available at: www.nytimes.com/2010/11/01/health/01patients.html.

86 For example, the Islamic Code of Medical Ethics, promulgated by the First International Conference on Islamic Medicine in Kuwait in 1981; the Code of Ethics of the Medical Profession in the Kingdom of Saudi Arabia; and the Code of Ethics of the Medical Profession in Egypt.

87 See Hadith 5355 in M. al-Bukhārī, above note 6, Vol. 5, p. 2151.

88 Majma‘ al-Fiqh al-Islāmī, “Qarār Raqam: 85/12/d8 bi-Sha’n Mudāwah al-Rajul lil-Mar’ah”, *Majalah Majma‘ al-Fiqh al-Islāmī*, Vol. 8, No. 3, 1994, p. 412.

case of necessity these rules no longer apply, based on the Islamic legal maxim of *al-ḍarūrāt tubīḥ al-maḥzūrāt* (necessity overrides the prohibition). Hence, first, examination by medical professionals of the opposite sex could be done in the following examples of necessity: lack of specialization, lack of trust in the proficiency of the medical professionals involved, or during armed conflicts where male Muslims are fighting and female health-care personnel are needed to treat the injured and wounded.⁸⁹ Second, the requirement of the presence of the spouse or a *maḥram* during the examination also does not apply in case of accident and emergency medicine because this is a case of necessity.⁹⁰

It is worth adding here that, in Islam, the pursuit of medical knowledge and the provision of medical services (just as with other essential services for the community) are *farḍ kifāyah* (a collective duty) – i.e., a religious duty incumbent on the Muslim community as a whole⁹¹ – and failure to provide this service by specialists will mean that the entire Muslim community will be sinful. Therefore, based on this duty and the Islamic requirement of providing medical services by specialists from the same sex as far as possible, Decree No. 85/12/d8 recommends that health authorities in the Muslim world encourage women to join the medical profession.⁹² Because of its noble mission and important role, the medical profession enjoys a prominent place both in the Islamic normative sources and Muslim societies, and at present, female medical students outnumber their male counterparts in some Muslim-majority countries.

Therefore, when handling dead bodies in Muslim societies, medical services and forensic specialists should keep these rules in mind. It goes without saying that understanding these Islamic law rules, on the one hand, and cultural and traditional norms in the various Muslim contexts, on the other, is invaluable for better communication⁹³ and for taking the appropriate decision in Muslim contexts. This is because there are wide variances in Muslims' practices both on the societal and individual levels, let alone the fact that average Muslims are not educated about these Islamic rules and the flexibility that characterizes Islamic law. The principle of *maṣlaḥah* as one of the methods of the Islamic law-making process and the Islamic legal maxims referred to above show the flexibility and changeability as well as adaptability of Islamic rules to certain circumstances. The point is that accommodating and respecting Muslim religious and cultural needs without hampering the forensic specialists' work will facilitate their work. If that is not possible, whether because of time constraints⁹⁴ or technical reasons, then Islamic law itself should be invoked in these situations. In other words, engaging local and international Islamic law institutions and individual Islamic law experts on these challenges facing forensics specialists in Muslim contexts and bringing

89 See 'Alī Dawūd al-Jaffāl, "Mudāwah al-Rajul lil-Mar'ah wa al-Mar'ah lil-Rajul", *Majalah Majma' al-Fiqh al-Islāmī*, Vol. 8, No. 3, 1994, p. 49.

90 *Ibid.*

91 A. Al-Dawoody, above note 50; see also: www.fatawah.net/Fatawah/434.aspx.

92 *Majma' al-Fiqh al-Islāmī*, above note 88, p. 412.

93 R. C. Rabin, above note 85.

94 *Ibid.*

to their consideration and investigation such challenges can provide authentic Islamic law solutions that are acceptable in Muslim societies.

Burial at sea

It is interesting to find that classical Muslim jurists have deliberated the question of burial at sea, though their discussion was not necessarily linked to the context of armed conflict. Nonetheless, it is worth recalling that classical Muslim jurists have deliberated on this question since the seventh and eighth centuries, when (1) there were no international conventions governing this question and (2) a state of war was the norm in international relations at the time, unless a peace treaty was concluded, as is reflected in the jurists' deliberations on this question. Succinctly, the rationale behind their discussion of this question appears to be the need to ensure decent burial of dead bodies in case death takes place on board a ship at sea.

In this situation, the classical Muslim jurists' position envisaged the following three cases. First, if the body can wait until the ship reaches the shore without decay, burial should be postponed until the ship reaches the shore and the body can be buried as usual in a grave.⁹⁵ This ruling is based on the case of Abū Ṭalḥah Zayed ibn Sahl ibn al-Aswad ibn Ḥarām, who died⁹⁶ on board a ship at sea and his dead body was kept for seven days until the ship reached the first island where the dead body could be buried.⁹⁷ Second, if the body cannot wait until it reaches the shore without decay, then it should be tied to pieces of wood and placed in the water so that it will float and the waves will take it to the nearest shore, if that location is inhabited by Muslims who will respect the body and honourably bury it. Third, if the body will be received at the nearest shore by enemies who may desecrate the body, the body should be tied to a heavy object and lowered into the sea.⁹⁸ In any case, whether the dead body will be buried at sea or not, the Islamic burial rituals must be performed in accordance with the rules set out above.

Under the section titled “Rules Related to a Dying Person: Rules about Burial of the Dead Body”, the official website of the office of his eminence Al-Sayyid Ali Al-Husseini Al-Sistani, the prominent Shī‘ī authority, succinctly gives the Islamic position as follows:

If a person dies on a ship and if there is no fear of the decay of the dead body and if there is no problem in retaining it for some time on the ship, it should be kept on it and buried in the ground after reaching the land. Otherwise, after giving Ghusl, *Hunut*, *Kafan* and *Namaz-e-Mayyit* [ritual washing, shrouding and funeral prayer], it should be lowered into the sea in a vessel of clay or with a

95 Muhammad al-‘Arabī al-Qarawī, *Al-Khulāṣah al-Fiqhiyyah ‘alā Madhhab al-Sādah al-Mālikiyyah*, Dār al-Kutub al-‘Ilmiyyah, Beirut, p. 157; ‘A. ibn al-Sahaybānī, above note 35, p. 43; www.sistani.org/english/book/48/2189/.

96 While some sources say that he died in 663–4, other sources say that he died in 671.

97 See Muhammad ibn Sa‘d, *Al-Ṭabaqāt al-Kubrā*, Vol. 3, Dār Ṣādr, Beirut, p. 507; M. Al-Nawawī, above note 3, Vol. 5, p. 244; ‘A. ibn al-Sahaybānī, above note 35, p. 43.

98 ‘A. ibn al-Sahaybānī, above note 35, pp. 43–45.

weight tied to its feet. And as far as possible it should not be lowered at a point where it is eaten up immediately by the sea predators.⁹⁹

The above discussion shows that the secret burial of Osama bin Laden at sea by US forces was not in accordance with Islamic law as far as the burial place is concerned.¹⁰⁰ Although the US forces claim that bin Laden was buried in accordance with the proper Islamic burial rituals,¹⁰¹ by which they most likely mean the ritual washing, shrouding and funeral prayer, there is no justification for burying his body at sea in light of the jurists' discussion above. According to Islamic law, dead bodies are to be buried in graves in the ground and the issue of burial at sea is deliberated only in the above situation. The US administration took the decision to bury bin Laden in a secret place at sea because if he were buried in an actual grave in the ground, it would become a shrine for some Muslims.¹⁰²

Protection of dead bodies surfaced, time and again, in these Islamic deliberations regarding burial at sea, though, most notably, establishing the identity of the dead bodies is absent in these deliberations, among other considerations included in Article 20 of GC II:

Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by 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.

Conclusion

Studying the above specific contemporary issues and challenges pertinent to the management of the dead in contemporary conflicts in Muslim contexts, under both Islamic law and IHL, leads to the following conclusions. First, although the two legal systems have different sources, emerged in two different eras and, therefore, address primarily different conflict contexts, they both attempt to protect the dignity of and respect for dead bodies. Second, the two legal systems can complement each other at the present time to achieve the protection of dead bodies in the context of armed conflicts and other situations of violence and natural disasters in Muslim contexts. That is because, on the one hand, although IHL is the universally accepted, most advanced legal regime "that seek[s] to limit

99 See: www.sistani.org/english/book/48/2189/.

100 See, e.g., Ian Black and Brian Whitaker, "Sea Burial of Osama bin Laden Breaks Sharia Law, Say Muslim Scholars", *The Guardian*, 2 May 2011, available at: www.theguardian.com/world/2011/may/02/sea-burial-osama-bin-laden.

101 See Marcia Amidon Lusted, *The Capture and Killing of Osama Bin Laden*, ABDO Publishing, Edina, MN, 2012, p. 81.

102 *Ibid.*

the humanitarian consequences of armed conflicts”,¹⁰³ IHL norms are still far from being popularly known and respected by various segments of society, at least in great parts of the Muslim world. On the other hand, although it emerged over fourteen centuries ago, Islamic law still has an impact on the lives of hundreds of millions of the over 1.7 billion of today’s Muslim population. As shown above, Islamic rules are still being revisited and deliberated by both local and international Islamic law institutions as well as Islamic law experts, and average Muslims are keen to learn about and follow Islamic law. Nonetheless, the legal, technical and specialized forensic expertise that institutions such as the ICRC have developed are indispensable for achieving the protection of dead bodies in contemporary armed conflicts in Muslim contexts. The above discussion has shown that the two legal systems share the same humanitarian value of protecting dead bodies and therefore the management of the dead is an example whereby the two legal systems can cooperate to achieve this common humanitarian objective in specific Muslim contexts. In addition to that, scientific technology and advanced scientific forensic expertise can tackle some of the challenges addressed in this article.

Indeed, investigating the convergences between IHL and earlier legal, cultural and local traditions will lead to universalizing and popularizing modern IHL principles simply because those principles are not in essence in contradiction with preceding attempts by various legal, cultural and local traditions. Therefore, the universality of IHL will be reinforced by, first, explaining that its humanitarian principles and philosophy are universally intuitive and, second, stressing the fact that it is the most comprehensive/specialized and up-to-date legal regime that is capable of humanizing contemporary armed conflicts. This means that earlier legal, cultural and local traditions can play a significant role in enhancing respect for IHL in specific contexts.

103 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, coordinated by Etienne Kuster, ICRC, Geneva, 2016, p. 17.