

“How did they die?”: Bridging humanitarian and criminal-justice objectives in forensic science to advance the rights of families of the missing under international humanitarian law

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Abstract

There are thousands of families of missing persons around the world who search for answers as to the fate and whereabouts of their loved ones, hoping to be reunited with them, or in the event that they are deceased, to be able to mourn and grieve their death with dignity. In practice when authorities speak with families to confirm that the missing person is deceased, two initial questions frequently arise. First, families generally want to know, “did you identify the body of my relative?” The second question, once they receive information that their loved one has been positively identified as deceased, is usually, “how did they die?” This article examines whether international humanitarian law requires providing families of the missing, who may know or believe that their relative is deceased, with an answer to this second question of “how did they die?” The article argues that under certain circumstances, it is a requirement of international humanitarian law to provide

some information about the cause, manner and circumstances of death to families. It also argues that the International Red Cross and Red Crescent Movement can strengthen the rights of families of the missing by engaging confidentially (directly or indirectly) with judicial bodies that are charged with both identification of the missing and accountability for violations of international humanitarian law. While this is challenging, it is argued that it is often possible to do so while respecting and adhering to the fundamental principles of the Movement, and, in turn, advancing the fundamental principle of humanity.

Keywords: Treatment of the dead, missing persons, forensic science, forensic humanitarian action, rights of families of the missing, international criminal law, transitional justice.

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Introduction

There are thousands of families of missing persons around the world who search for answers as to the fate and whereabouts of their loved ones, hoping to be reunited with them, or, in the event that they are deceased, to have their loved one's body returned to them to be able to perform dignified last rites, and mourn and grieve their death. Not knowing the fate of their loved ones can be devastating for families and sometimes entire communities, who face an ambiguous loss,¹ and are then "living in limbo, unable to mourn, and in the absence of definite knowledge, constantly tormented by hope – a secret prison, a new life in a foreign land, anything but the finality of death".² Families of those who are forcibly disappeared, presumably killed in conflict, or lost in humanitarian emergencies may spend decades searching for their relatives.

Recognizing the profound impact of this type of loss, international humanitarian law (IHL) requires that in times of armed conflict, all parties take steps to prevent persons from going missing, account for those who do go missing, and inform the families of the fates and whereabouts of their missing relatives. Additionally, related international treaties prohibit enforced disappearances. In the last forty years, forensic science tools have significantly advanced the possibility for families to receive scientific, thus reliable, information about the fate of their relatives. Forensic science processes allow trained experts to locate and recover bodies, as well as scientifically identify the

- 1 The concept of ambiguous loss, first articulated by Pauline Boss, refers to the grief that arises when individuals and families experience a loss that remains in some manner unresolved, such as that of families searching for the fate and whereabouts of missing loved ones. This type of loss prevents individuals from obtaining the closure that may otherwise assist in navigating grief. See Pauline Boss, *Ambiguous Loss; Learning to Live with Unresolved Grief*, Harvard University Press, Cambridge, MA, 1999.
- 2 International Committee of the Red Cross (ICRC), *Accompanying the Families of Missing Persons: A Practical Handbook*, Geneva, 2020, p. 16.

remains, which can be extremely painful for families, while also enabling them to finally receive answers about their loved ones. It has been used accordingly across a broad range of contexts from Argentina to the Central African Republic.

In practice when authorities, forensic science experts, or any relevant stakeholder, speak with families to confirm that the missing person is deceased, two initial questions frequently come up. First, families generally want to know, “did you identify the body of my relative?” The second question, once they receive information that their loved one has been positively identified as deceased, is usually, “how did they die?”

This article examines whether IHL requires providing families of the missing, who may know or believe that their relative is deceased, with an answer to their second question, “how did they die?” While of course acknowledging that the responsibility to uphold IHL rests with parties to the conflict, the article explores the extent to which international organizations charged with promoting the advancement of IHL, such as the International Committee of the Red Cross (ICRC), can also support efforts to provide information to families about the manner in which their loved ones died. It argues that under certain circumstances, it is a requirement of IHL to provide some information about the cause, manner and circumstances of death, and that the International Red Cross and Red Crescent Movement (hereinafter the “Movement”) and similar organizations can strengthen the rights of families of the missing by engaging confidentially (directly or indirectly) with judicial bodies that are charged with both identification of the missing and accountability for violations of IHL. Further, I argue that, although challenging, it is often possible to do so while respecting and adhering to the fundamental principles of the Movement, and in turn advancing the fundamental principle of humanity.

In this article, I seek to write from the perspective of both a practitioner and scholar, and to draw upon my own experience of working as part of forensic science teams. In my work, I have undertaken investigations to try to provide families with the possibility to know if their loved ones are dead, and, if so, to identify and return their bodies; as well as to provide them with information about the cause, manner and circumstances of their death. This work is often conducted with multiple objectives – both humanitarian and of criminal justice – and therefore I have had interactions with multiple actors engaged in forensic operations. However, this article is written from the perspective of an outsider to the Movement, not privy to the daily decisions relating to neutrality and impartiality that individuals in the Movement may face. While this article aims to provide overarching suggestions for the reform of existing practices, I am acutely aware that in practice actors are constantly balancing competing objectives, and that each individual case or situation involving forensic science activities will require case-specific analysis and decision-making.

Accordingly, the next section examines the IHL obligations relating to the missing and dead, arguing that the law requires certain actors to provide information about the cause, manner and circumstances of death. Following this is a section which analyses the practical challenges that humanitarian

organizations face in collecting and providing information about the cause, manner and circumstances of death. I then explore the false dichotomy between the humanitarian and criminal-justice objectives of forensic activities in practice; then, before concluding, I discuss three areas of criminal law where greater involvement by humanitarian forensic actors would advance the rights of families.

IHL obligations relating to the missing and dead and the work of humanitarian organizations such as the ICRC

IHL contains strong rules requiring parties to the conflict to take actions relating to the dead and the missing in the context of armed conflict. Article 32 of Additional Protocol I of the Geneva Conventions codifies “the right of families to know the fate of their relatives”.³ This principle was argued as being crucial among the sponsors of the provisions relating to the missing and the dead during the drafting of Additional Protocol I, who saw “mitigating the suffering of the families of those who disappeared in war by removing the uncertainty about their fate and to give them an opportunity to remember their dead” as a “fundamental humanitarian principle”.⁴ Article 33(1) of Additional Protocol I provides that all parties to a conflict have the obligation, “as soon as circumstances permit”, to “search for persons who have been reported missing by an adverse party”.⁵ Additionally, it is a customary IHL rule that “each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.⁶ Furthermore, “practice indicates that this rule is motivated by the right of families to know the fate of their missing relatives”.⁷ It should be noted that “the obligation to account for missing persons is an obligation of means”, meaning that “each party to an armed conflict must use its best efforts in this respect”. “The obligation to provide that information which is available is, however, an obligation of result.”⁸

The Geneva Conventions contain other rules that are relevant to the missing. For example, the Fourth Geneva Convention requires parties to a conflict to enable all persons in the territory of a party to the conflict, or in a territory occupied by it, to give news to members of their families and to receive news from them, as well as to facilitate enquiries made by families dispersed by

3 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 32.

4 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 1196.

5 AP I, above note 3, Art. 33(1).

6 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 117, available at: <https://ihl-databases.icrc.org/customaryihl/eng/docs/v1> (all internet references were accessed in September 2022).

7 *Ibid.*

8 *Ibid.*

conflict.⁹ In that sense, the Geneva Conventions and Additional Protocols indicate the important role of the ICRC’s Central Tracing Agency, to facilitate the transmission of information about persons in the territories of a party to the conflict or in occupied territory and on missing persons, to restore family links, and to collect, centralize and transmit information about protected persons, including civilian internees and prisoners of war, in the hands of the adverse party.¹⁰ The Geneva Conventions also contain rules related to the establishment of National Information Bureaux to collect, centralize and transmit, through the ICRC’s Central Tracing Agency, information about prisoners of war, protected civilians deprived of their liberty and others, including wounded, sick or dead military personnel in the hands of the adverse party.¹¹

For persons believed to be or confirmed to be dead, IHL sets out clear rules governing the conduct of all parties to the conflict. It is worth noting that rules are more specific and detailed for international armed conflicts, although relevant obligations found in customary international law apply to non-international armed conflicts as well. First, where circumstances permit, parties to the conflict must, “without delay, take all possible measures to search for, collect, and evacuate the dead without adverse distinction”.¹² Second, parties must take “all possible measures” to prevent dead bodies from being despoiled, mutilation of dead bodies being prohibited.¹³ Third, parties to international armed conflicts must “endeavour to facilitate the return of the remains of the deceased”, should next of kin or the party to which they belong request it, and must return their personal effects to them.¹⁴ Furthermore, in the context of international armed conflicts, identification information, last wills or other important documents, money, and personal effects of an intrinsic or sentimental value found on the dead, must be transmitted by each party’s National Information Bureau, through the ICRC’s Central Tracing Agency, to the adverse party.¹⁵ Fourth, the dead

9 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 25–6.

10 Moreover, the Central Tracing Agency must receive information concerning persons reported missing by an adverse party (AP I, Art. 33(3)). It must also receive cards on children evacuated (AP I, Art. 78(3)). There are multiple other provisions providing a specific mandate and role to the Central Tracing Agency, including Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 123; and GC IV, Arts 25, 130 and 136–7.

11 For an overview of the law relating to the Central Tracing Agency and National Information Bureaux, see ICRC, *Overview of the Legal Framework Governing National Information Bureaux*, Geneva, 8 April 2022, available at: www.icrc.org/en/publication/4616-overview-legal-framework-governing-national-information-bureaux; Helen Obregón Gieseken and Ximena Londoño, “Looking for Answers: Accountability for the Separated, Missing and Dead in International Armed Conflicts”, *Humanitarian Law & Policy Blog*, 11 April 2022, available at: https://blogs.icrc.org/law-and-policy/2022/04/11/separated-missing-dead-international-armed-conflicts/#_ftn2.

12 J.-M. Henckaerts and L. Doswald-Beck, above note 6, Rule 112.

13 *Ibid.*, Rule 113.

14 *Ibid.*, Rule 114. As explained in the summary to this rule, “State practice establishes the customary nature of this rule in international armed conflicts. In the context of non-international armed conflicts, there is a growing trend towards recognition of the obligation of parties to a conflict to facilitate the return of the remains of the dead to their families upon their request.”

15 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Art. 16; Geneva

must be disposed in a respectful manner, and their graves respected and properly maintained.¹⁶ Finally, with a view to the identification of the dead, each party to the conflict must record all available information prior to their disposal, and mark the location of the graves.¹⁷

Within State practice, the measures envisaged to comply with the obligation to record all available information about the deceased include carrying out activities such as collecting identification cards or disks, collecting information required for identification purposes, carrying out autopsies, issuing death certificates, burying in individual graves, marking graves properly, recording the disposal of the dead, and prohibiting mass graves. Best practice also suggests that the exhumation and post-mortem examinations, including DNA testing, following forensic standards, is an appropriate method of identifying the dead.¹⁸ There have been a plethora of guides and manuals developed to assist parties to the conflict, governments, and humanitarian organizations taking part in the search, collection, and respectful burial or disposal of remains. Guidelines have been developed to assist in managing and in the identification of the dead in armed conflict, other situations of violence, and mass fatalities including specific guides in: the forensic human identification process;¹⁹ the use of DNA analysis for identification;²⁰ disaster victim identification;²¹ accompanying families and psychosocial support;²² conducting autopsies;²³ managing dead bodies;²⁴ and the recovery and analysis of human remains.²⁵ Additionally, there are guidelines for investigating deaths in custody,²⁶ the role of religion in forensic sciences and treatment and

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 19; GC III, Arts 120 and 122; GC IV, Arts 130 and 138-9; AP I, Art. 34(2).

16 J.-M. Henckaerts and L. Doswald-Beck, above note 6, Rule 115.

17 *Ibid.*, Rule 116.

18 *Ibid.*, Rule 116. ICRC, *Missing People, DNA Analysis and Identification of Human Remains: A Guide to Best Practice in Armed Conflicts and Other Situations of Armed Violence*, Geneva, 2009; ICRC, World Health Organization, Pan American Health Organization and International Federation of Red Cross and Red Crescent Societies, *Management of Dead Bodies After Disasters: A Field Manual for First Responders*, Geneva, 2019.

19 ICRC, *Forensic Human Identification: An Integrated Approach*, Geneva, 18 February 2022.

20 ICRC, *Missing People*, above note 18; National Institute of Justice, *Mass Fatality Incidents: A Guide for Human Forensic Identification*, Washington, DC, 2005, available at: www.ojp.gov/pdffiles1/nij/199758.pdf.

21 INTERPOL, "Disaster Victim Identification (DVI)", available at: www.interpol.int/en/How-we-work/Forensics/Disaster-Victim-Identification-DVI.

22 ICRC, above note 2; Susana Navarro, Pau Pérez Sales and Franc Kernjak, *International Consensus on Arbitrary or Extrajudicial Executions Principles and Minimum Standards for Psychological Work in Search Processes and Forensic Investigations*, 2010.

23 United Nations (UN) Office on Drugs and Crime, *Forensic Autopsy: Manual for Forensic Pathologists*, August 2015, available at: www.theapmla.net/files/PEX02_Forensic%20Autopsy%20Manual.opt.pdf.

24 ICRC *et al.*, *Management of Dead Bodies After Disasters*, above note 18.

25 Luis Fondevbrider, *Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains*, Argentine Forensic Anthropology Team, Buenos Aires, 2021, available at: <https://eaaf.org/wp-content/uploads/2020/11/EAAF-Forensic-Guide-for-the-investigation-recovery-and-analysis-of-human-skeletal-remains.pdf>; Melanie Klinkner and Ellie Smith, *The Bournemouth Protocol on Mass Grave Protection and Investigation*, Bournemouth University, Bournemouth, 9 December 2020, available at: https://issuu.com/bournemouthuniversity/docs/the_bournemouth_protocol_on_mass_grave_protection_?fr=sMjc3OTI0MjAyNmZm.

26 ICRC, *Guidelines for Investigating Deaths in Custody*, Geneva, 2013.

identification of the dead,²⁷ country-specific guides and assessments,²⁸ and recommendations for reform of forensic processes, such as integrating the investigation and identification of missing and unidentified persons.²⁹

Organizations such as the ICRC, who seek to assist and protect those affected by armed conflict and promote compliance with IHL, play a crucial role in practice in ensuring respect for the rights of the missing and dead, and their families.³⁰ They do so both in situations of armed conflict, and more generally outside of conflict situations where a neutral, impartial humanitarian actor may be required. A core way in which this is done is through forensic actions, in which the organization promotes forensic best practices around the world. This is achieved by “ensuring the proper management and identification of the dead and ... prevent[ing] and resolv[ing] the tragedy of people unaccounted for because of armed conflict and other situations of armed violence, disasters and migration”.³¹

The ICRC focuses on the strengthening of medico-legal systems and the provision of forensic science tools for “humanitarian” purposes, and has a large forensic science team.³² They carry out activities “building local and regional forensic capacity and fostering regional and international cooperation among forensic practitioners and institutions, especially among countries affected by armed conflict and catastrophes to help prevent and resolve the humanitarian consequences of these events”.³³ It can include assisting authorities working in medico-legal systems to develop proper legal frameworks, procedures, and better facilities for the management and investigations of the dead, including improving how they work with families; working with national Red Cross and Red Crescent societies and other organizations to assist them in the collection and dignified burial of bodies following significant violence or disasters; and supporting

27 ICRC, *Management of the Dead Under Islamic Law*, Geneva, 2020.

28 Soren Blau and Luis Fondebrider, *A Practical Guide for Forensic Investigators in Timor-Leste*, Victorian Institute of Forensic Medicine, Melbourne, Australia, 2011; L. Fondebrider, above note 25; International Commission on Missing Persons, *Assessment of the Scope of the Missing Persons Problem in Libya, Including an Overview of Libya’s Institutional, Legal, and Technical Capacities to Find Missing Persons*, The Hague, 2021, available at: www.icmp.int/wp-content/uploads/2021/04/LibyaReport-English-1.pdf.

29 Mercedes Salado Puerto *et al.*, “The Search Process: Integrating the Investigation and Identification of Missing and Unidentified Persons”, *Forensic Science International: Synergy*, Vol. 3, 2021. Salado Puerto *et al.* highlight the importance of correcting and broadening the “tendency to understand the search only as a ‘body centred’ forensic response” and articulate a concept of the search process as one that “includes the investigation and identification phases of the missing in any state (dead or alive), in any scenario (with or without bodies), with an integrated, multidisciplinary, and multiagency approach for implementation by all actors involved in the investigation and identification phases of missing persons”.

30 See ICRC, “Restoring Family Links”, available at: www.icrc.org/en/what-we-do/restoring-family-links; ICRC, “Protection of the Dead Through Forensic Action”, available at: www.icrc.org/en/what-we-do/forensic-action.

31 ICRC, “Protection of the Dead”, *ibid.*

32 *Ibid.* See, also, Peter Maurer, “Forward”, in Roberto C. Parra, Sara C. Zapico and Douglas H. Ubelaker (eds), *Forensic Science and Humanitarian Action*, Vol. 1, Wiley, Hoboken, NJ, 2020, p. lviii, noting that, as of 2020, the ICRC has more than seventy forensic experts.

33 Morris Tidball Binz and Ute Hoffmeister, “Forensic Archaeology in Humanitarian Contexts: ICRC Action and Recommendations”, in W. J. Mike Groen, Nicholas Márquez-Grant and Robert C. Janaway (eds), *Forensic Archaeology: A Global Perspective*, Wiley, Hoboken, NJ, 2015 (emphasis added).

authorities to scientifically identify the remains of the deceased. However, Morris Tidball Binz and Ute Hofmeister, both leading forensic scientists who at the time were working in senior positions within the forensic science unit of the ICRC, stress that actual forensic work (the actual recovery and examination of the deceased) is rarely done by the ICRC, and, if so, is “only carried out in exceptional circumstances or via other service providers”.³⁴ Both also argue that IHL includes a broad requirement for the parties to the conflict to take all feasible measures to provide families with any information they have on the fate of their loved ones. This could include information about how someone died as part of a humanitarian approach for which forensic sciences are used. They further argue that Additional Protocol I, Article 32 (which applies in international armed conflicts) “means that families have a right to know whether the missing relative is dead or alive; and if the relative is dead, they have a *right to know something about how the death came about* and the whereabouts of the deceased”.³⁵

The ICRC does not intervene or provide support to forensic actions that concern criminal prosecutions due to its preferred mode of action, which centres on confidentiality. However, it does provide invaluable assistance to strengthening forensic services and medico-legal systems that carry out work around protection and identification of the dead, and clarification of the fate and whereabouts of missing persons. In line with this, the ICRC may collect information on the circumstances of death, and is mindful of the importance of this for the search for individuals, and for identification processes. However, the ICRC usually does not provide information about the cause, manner and circumstance of death to families in the cases in which it does get involved. Instead, this is seen as the domain of international criminal law (ICL), transitional justice, or national accountability processes, and can be de-emphasized in humanitarian practice.

Challenges faced by humanitarian organizations collecting and providing information on cause, manner and circumstances of death

The ICRC and other organizations conducting forensic operations for humanitarian purposes frequently cite certain tensions when deciding not to collect and/or provide information on cause, manner and circumstances of death to families.³⁶

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ “The ICRC is the only organization internationally that has forensic science **solely** for humanitarian purposes.” See Denise Abboud, “How Does ICRC use Forensic Science for Humanitarian Purposes?”, ICRC, 19 May 2022, available at: www.icrc.org/en/document/how-does-icrc-use-forensic-science-humanitarian-purposes. However, national government bodies tasked with disaster management may at times be involved in forensic science for humanitarian purposes, and on occasion international non-governmental organizations specializing in the scientific search, recovery and examination of human remains may undertake forensic activities for humanitarian purposes. For example, the Argentine

In many instances, in order to get warring parties to the table to agree on a missing-persons mechanism, discussions must be moderated by a neutral and impartial party.³⁷ As a result, providing information about cause, manner and circumstances of death may be seen to risk certain fundamental humanitarian principles, especially that of neutrality and impartiality.³⁸ Second, the provision of this information can be in tension with an important method of work of the ICRC and the Movement more broadly: confidentiality. Finally, from an operational and practical perspective for the ICRC specifically, there may be a fear that by supporting efforts that are aimed at providing families with information about the cause, manner and circumstance of death, the ICRC may eventually be asked to testify (in violation of immunities), thus risking harming the credibility of the ICRC as an impartial institution.³⁹ As a result due to the

Forensic Anthropology Team, which advances the search for missing persons for both criminal-justice or truth-seeking purposes and humanitarian purposes, intervenes in support of forensic action for humanitarian purposes. This can include in the search for missing migrants, following natural disasters, or as part of humanitarian efforts in conflict. See, generally, Argentine Forensic Anthropology Team, available at: <https://eaaf.org/>.

- 37 See, generally, Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell, “Establishing Mechanisms to Clarify the Fate and Whereabouts of Missing Persons: A Proposed Humanitarian Approach”, Vol. 99, No. 2, 2017.
- 38 For example, the Coordination Mechanism on Persons Unaccounted for in Connection with the Events of the 1992–93 Armed Conflict and After in Abkhazia “does not attempt to attribute responsibility for the deaths of any missing person, nor make any findings as to the cause of such deaths”. M. Crettol *et al.*, *ibid.*, p. 603. The authors note that: “A coordination mechanism bringing Georgian and Abkhaz participants to the table was established at the end of 2010 to clarify the fate of missing persons in relation to the conflict. The ICRC agreed to chair this mechanism.” M. Crettol *et al.*, *ibid.*, p. 603. More generally, the ICRC notes the risk to loss of impartiality that may arise with the provision of confidential information to criminal-justice institutions. See ICRC, “Confidentiality Q&A”, 15 January 2018, available at: www.icrc.org/en/document/confidentiality-q. See, also, ICRC, “The International Committee of the Red Cross’s (ICRC’s) Confidential Approach: Specific Means Employed by the ICRC to Ensure Respect for the Law by State and Non-State Authorities Policy Document. December 2012”, *International Review of the Red Cross*, Vol. 94, No. 887, 2012, available at: <https://international-review.icrc.org/sites/default/files/irrc-887-confidentiality.pdf>.
- 39 The question of the obligation not to testify has arisen before international courts. In the case of *Prosecutor v. Simić and others*, the court ruled that “the ICRC has a right under customary international law to non-disclosure of the Information” that the prosecution was seeking. International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, Case No. IT-95-9, Decision (Trial Chamber), 27 July 1999. While in recent times there have not been legal challenges seeking to compel the ICRC to disclose information collected during humanitarian forensic operations to courts, in a case concerning detainees held at Guantanamo Bay by the United States government, a military court initially ordered the defence in United States of America, Military Commissions Trial Judiciary, Guantanamo Bay, Cuba: *United States of America v. Khalid Shaikh Mohammad et al.*, to allow a one-time inspection of ICRC records from visits to Guantanamo Bay. The ICRC in turn asserted an “absolute right to non-disclosure of the ICRC’s confidential information, including the right not to be compelled to testify in judicial proceedings”. Ultimately the court ruled to uphold the ICRC privilege of non-disclosure. However, one of the judges, issuing a separate opinion in the case, noted that he was not “persuaded that the ICRC’s protection against disclosure was the absolute one which it asserted”, but that concluding on that issue was not necessary to resolve based on the facts of the case. United States of America, Military Commissions Trial Judiciary, Guantanamo Bay, Cuba, *United States of America v. Khalid Shaikh Mohammad et al.*, Order on the Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of Accused’s Conditions of Confinement, AE 013BBB/108T, 6 November 2013, available at: <https://web.archive.org/web/20170518131534/http://media.miamiherald.com/smedia/2013/11/06/16/25/16cpHS.S0.56.pdf>.

concern of causing harm to affected populations by being perceived as partial or not neutral, organizations such as the ICRC, who ordinarily may be supporting States in their forensic actions in the context of armed conflicts, can be reluctant to intervene and support efforts to ensure the identification of the missing and dead when it may be linked in any way to, or pertain to, accountability efforts. Below, the article explores each tension that prevents greater collaboration between humanitarian and criminal-justice forensic stakeholders in more detail.

Threats to neutrality and impartiality

The Movement – which encompasses the ICRC, National Red Cross and Red Crescent Societies, and the International Federation for the Red Cross and Red Crescent societies – all abide by seven fundamental principles, which form the ethical framework and core approach to their work. These principles ensure that assistance and protection are in keeping with this framework, irrespective of who the beneficiaries are and what they believe in, and maintain the independence of the Movement.

The principle of neutrality requires that the Movement does “not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature”.⁴⁰ It can be argued that to the extent to which facilitating the collection of information that can later be used by a tribunal or court proceeding against one side in the hostilities may be perceived as collecting information about crimes committed by one side, and therefore as biased, can be a form of “taking sides”. The ICRC has noted that: “The use of ICRC confidential information in accountability processes regardless of their integrity and legitimacy, could be seen as being involved in controversies of a political, religious or ideological nature, which could erode the perception and trust in the ICRC as a neutral and independent humanitarian actor. This in turn would negatively impact our activities and thus people in need of protection and assistance.”⁴¹

Collecting information about the cause, manner and circumstances of death can at times require understanding how someone was killed, who killed them, and in what conditions. While collecting that information, important linkage information – connecting individual perpetrators to senior commanders – may be obtained. However, the collection of information about the missing and the dead, including how they are killed, need not result in taking sides in hostilities, nor in resulting in a perception of being involved in political, religious or ideological controversies. This is because some of the most important information for prosecutors to take action – such as information about possible perpetrators, which may be the information most likely to result in such

40 ICRC, *The Fundamental Principles of the International Red Cross and Red Crescent Movement: In Brief*, Geneva, August 2015, available at: www.icrc.org/sites/default/files/topic/file_plus_list/4046-the_fundamental_principles_of_the_international_red_cross_and_red_crescent_movement.pdf.

41 Ximena Londoño and Helen Obregón Gieseken, “Sustaining the Momentum: Working to Prevent and Address Enforced Disappearances”, *Humanitarian Law & Policy Blog*, 26 August 2022, available at: <https://blogs.icrc.org/law-and-policy/2021/08/26/sustaining-momentum-enforced-disappearances/>.

perception – need not be collected, analysed or assessed by humanitarian organizations. Therefore, this type of information would not be confidentially shared with families for humanitarian purposes. Taking a broader understanding of the meaning of providing information about the fate of missing loved ones to include the provision of very basic information about cause, manner and circumstances of death (rather than simply information about identity) can ensure that these forensic activities remain under the umbrella of humanitarian action, and that humanitarian organizations assisting in providing families with basic answers about the fate and whereabouts of their loved ones do not participate in prosecutorial activities. As such, they can remain neutral and seek only to serve the interests and rights of families to know the fate of their loved ones.

Second, the principle of impartiality requires the movement to assist all without discrimination of any particular group or identity, “guided solely by their needs” and, therefore, to provide assistance proportionally to where it is most necessary, without individual favouritism.⁴² Similarly, here it can be argued that by collecting evidence of crimes conducted by one side, or assisting one side to the conflict in collecting more information about the crimes committed by their adversaries, the Movement may be in violation of the principle of impartiality. Additionally, this can be argued to be compounded by the uncertainty of knowing in advance who might be buried in a particular location. However, finding ways to maintain impartiality and provide assistance to those who need it most (and to all parties of the conflict) is not a unique concern for forensic actions. Such decisions must be taken by the Movement for all activities that they carry out – protection, the provision of humanitarian aid, and building respect for IHL. With careful planning and significant preliminary preparation prior to any exhumations, it is possible to navigate concerns about impartiality and provide support without discrimination to any particular group or identity.

Confidentiality

A second core tension inhibiting greater support by the Movement to criminal or quasi-criminal-justice processes – for which the use of forensic sciences is essential – is a concern of confidentiality. While not itself a fundamental principle, as a working modality, it is derived from the fundamental principles of neutrality and independence.⁴³ Therefore, for the ICRC, confidentiality is a core tool by which it is able to carry out its work: “to gain access to affected communities, we build trust by holding confidential dialogues with all the parties to an armed conflict or those involved in other situations of violence”.⁴⁴ It is also a key tool in ensuring the safety and security of humanitarian staff and vulnerable persons whom the organization aims to assist.⁴⁵ In general, the ICRC

42 ICRC, above note 40.

43 ICRC, “Confidentiality Q&A”, above note 38. See, also, ICRC, “The International Committee of the Red Cross’s (ICRC’s) Confidential Approach”, above note 38.

44 ICRC, “Confidentiality Q&A”, *ibid.*

takes a very serious approach to confidentiality and extremely rarely speaks out or denounces violations. Using this approach enables the ICRC and the Movement more generally to gain vital access to areas that most other actors may not, and provide lifesaving support to civilians, detainees and vulnerable persons around the world. For example, the ICRC was one of the only organizations in the years following the terrorist attacks of 11 September 2001 permitted to visit the Guantanamo Bay facility where the United States was holding internees suspected to be linked to terrorism.⁴⁶ Key to being able to do so was the policy that “the ICRC does not comment publicly on the situation at Guantanamo Bay”.⁴⁷

One theory may be that the ICRC and other humanitarian organizations fear that supporting forensic activities within mechanisms that concern the provision of information about the cause, manner and circumstances of death (such as judicial or fact-finding mechanisms) to families may violate the confidentiality that the ICRC generally ensures to all parties with which it engages. It would place the ICRC in a position of reporting findings to families that may implicate another actor or party to a conflict, with which the ICRC was engaging. However, in my view, the ICRC could continue to maintain confidentiality (and, as a result, a perception of neutrality and independence) of information provided to it by other parties, and still assist with forensic operations and activities in a limited manner, in which new information would be collected that is independent of what has been provided as part of confidential conversations. In parallel, the ICRC could, where possible, confidentially provide families with information about what happened (cause, manner and circumstance of death) to their loved ones. The ICRC can consider, in the narrow instances where it may choose to engage with judicial organs to advance efforts to identify individuals, requesting judicial organizations to keep their advice or assistance confidential, to minimize possible harm or retaliation by any individuals or organizations. Finally, it should be noted that confidentiality is not absolute, and there may be times when the ICRC would decide to denounce or publicly speak out against violations.⁴⁸

45 Elem Khairullin, “5 Things That Make ICRC Confidential Information Unsuitable for Legal Proceedings”, *Humanitarian Law & Policy Blog*, 31 January 2019, available at: <https://blogs.icrc.org/law-and-policy/2019/01/31/5-things-make-icrc-confidential-information-unsuitable-legal-proceedings/>, noting that the “operational consequences of disclosure of ICRC confidential information – which includes safety and security of ICRC staff and beneficiaries – outweigh the immediate interest in disclosing such information”.

46 ICRC, “Guantanamo Bay: The Work Continues”, 18 July 2003, available at: www.icrc.org/en/doc/resources/documents/update/5g2gt7.htm.

47 *Ibid.*

48 For example, in August 1992 the ICRC denounced the detention and inhumane treatment of innocent civilians in Bosnia-Herzegovina, and in September 1998 issued a public statement related to the Kosovo crisis, drawing attention to the plight of the civilian population. See Jakob Kellenberger, “Speaking Out or Remaining Silent in Humanitarian Work”, *International Review of the Red Cross*, Vol. 86, No. 855, 2004, pp. 599–600.

Privilege to not testify

Finally, a third tension is the ICRC’s privileged exemption from providing evidence and testifying (although this privilege does not apply to other organs of the Movement, such as national Red Cross and Red Crescent societies).⁴⁹ As an international body recognized in treaty law with a mandate to promote respect for IHL, the ICRC can be seen as similar to the United Nations (UN), or other international organizations that have explicit privileges and immunities.⁵⁰ The International Criminal Tribunal for the former Yugoslavia has recognized as customary international law the ICRC’s right to decline to provide evidence.⁵¹ The International Criminal Court Rules of Procedure and Evidence also expressly exempt the ICRC from testifying before it.⁵² Finally, the ICRC has bilateral agreements in many of the countries in which it works, which enable the organization to carry out its mandate and also ensure upholding of the privilege of non-disclosure of confidential information.⁵³

Collecting and providing information about the cause, manner and circumstances of death could open up the possibility of States subpoenaing and suing the ICRC to obtain this information. Additionally, and more importantly, if the ICRC were the only possessor of this information (in the event that this information was collected but not shared), it would mean that families of victims of human rights violations may not be able to ever obtain information about the cause and manner of death, unless the ICRC were to waive its right not to divulge this information or to provide the information through another mechanism.

Although the privilege to not testify and its implications may complicate the decision to provide support to the collection of forensic evidence relating to cause, manner and circumstances of death and involvement in forensic investigations that include prosecutorial objectives, this concern may not be insurmountable. First, the ICRC is not the only organization exempt from testifying to engage in forensic activities. Multiple UN agencies contract third parties or develop forensic teams, especially as they relate to fact-finding missions and commissions of inquiry. In some instances, as with the ICRC, where information from a commission of inquiry is requested by national authorities and UN staff are requested to testify before national or other judicial bodies, they have the ability to decide whether to do so, or to exert their privileges and immunities.⁵⁴

49 ICRC, “Memorandum: The ICRC’s Privilege of Non-Disclosure of Confidential Information”, *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, available at: https://international-review.icrc.org/sites/default/files/irc_97_1-2-18.pdf.

50 The UN derives its privileges and immunities from the Convention on Privileges and Immunities of the United Nations of 1946, and bilateral agreements with States. See note 54.

51 International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Blagoje Simić et al.*, above note 39.

52 International Criminal Court (ICC), Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), Part II.A, Rule 73(4)–(6).

53 ICRC, above note 49, p. 439.

54 Convention on Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946 (entered into force 17 September 1946), specifying the forms of privileges and immunities that apply to representatives of members to the principal and subsidiary

Second, rather than directly conducting forensic activities, it may be possible for the ICRC – and indeed the ICRC already does, in certain contexts – to work alongside intermediary organizations, and to support international, hybrid and national judicial bodies with strengthening their medico-legal systems, forensic institutions or in conducting forensic activities, with a view to advancing humanitarian objectives. The ICRC and similar organizations could thus support these institutions developing methods to provide families with information about the fate and whereabouts of their loved ones, leaving questions such as who was responsible for the death of their loved one and any linkage evidence for the Courts to independently investigate. In practice, it is not often possible to simply distinguish between judicial and humanitarian objectives, which require a more flexible, holistic approach that addresses the totality and complexity of the needs of families of victims. Below, the article outlines certain case studies, and the mixed nature of criminal-justice and humanitarian objectives.

Blurring criminal-justice objectives and humanitarian forensic objectives in practice

For families, and in reality, it can often be very difficult to cleanly demarcate humanitarian from criminal-justice objectives, just as it is often not possible to categorize the wishes of families of victims, which are not static or homogeneous. Instead, it is imperative to try to address both humanitarian and criminal-justice needs in a complementary manner, and to develop processes that advance the dignity of families of the missing and the deceased. Conflict resolution and justice efforts, for instance in the Central African Republic, highlight the difficulty of trying to bifurcate objectives of the operations/investigations.

Conflict in the Central African Republic broke out in 2013. During the peak of violence in December 2013, thousands of persons were killed, with bodies strewn across the capital city Bangui and its surroundings, dumped in wells, buried in shallow pits, and left on the side of the road.⁵⁵ The national Central African Red

organs to the United Nations (Art. IV); UN Officials (Art. V); and experts on mission for the UN (Art. VI). The UN has created a mechanism for cooperation with judicial organs such as the ICC, whereby requests for UN staff to testify are considered by the Office of Legal Affairs, and “the Secretary-General is under an obligation to waive the immunity of United Nations personnel when the immunity would impede the course of justice and can be waived without prejudice to the interests of the Organization”. See UN, *Best Practices Manual for United Nations – International Criminal Court Cooperation Pursuant to The Relationship Agreement Between the United Nations and the International Criminal Court*, 26 September 2016, p. 22, available at: https://legal.un.org/ola/media/UN-ICC_Cooperation/Best%20Practice%20Guidance%20for%20UN-ICC%20cooperation%20-public.docx.pdf.

55 See, for example, Preliminary Report of the Independent Expert on the Situation of Human Rights in the Central African Republic, Marie-Thérèse Keita Bocoum, UN Doc. A/HRC/26/53, 30 May 2014; Amnesty International, “Central African Republic: Time for Accountability”, 10 July 2014, available at: www.amnesty.org/en/documents/afr19/006/2014/en/; UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), *Violations and Abuses of International Human Rights and Humanitarian Law Committed in Bangui, Central African Republic, Between 26 September and 20 October 2015*, Bangui, 2016, available at: https://minusca.unmissions.org/sites/default/files/bangui_report_final_english.pdf.

Cross began organizing an emergency effort to collect bodies from across Bangui, taking them to one of the main morgues in the city and ensuring that they were placed in labelled body bags.⁵⁶ However, the morgues became quickly overwhelmed, with bodies piling up outside the mortuary door. In other parts of the country, there were reports of large-scale killings and creation of mass graves.⁵⁷

In response to this, a transitional government was created, and the International Criminal Court announced the opening of a preliminary investigation to look into the violence, following a referral by the State. Additionally, a hybrid Special Criminal Court was set up, as well a Truth, Justice and Reconciliation Commission. Third, although during the periods of intense hostilities the court houses were all closed, the national judicial system opened within a few years a criminal session, to try suspects linked to the violence. Finally, in 2017, forensic experts were requested by the national judge to investigate and exhume a mass grave alleged to contain the remains of individuals believed to have been killed by international peacekeepers.⁵⁸ The investigation that followed and in which I took part, is an example of the blurring and integration of both humanitarian and criminal-justice objectives. It aimed: (1) to provide families with the opportunity to scientifically identify their loved ones and to know how their loved ones were killed; (2) to provide evidence to tribunals about what happened, in a bid to supplement and provide clarity to statements and information provided by both the victims and alleged perpetrators; and (3) to ensure that the investigation team, which was made up of international organizations, took initial steps to train and transfer expertise to national forensic experts. Each of these aims has elements of both humanitarian and criminal-justice objectives.

In this case, because families of the victims and the judicial system had a dual desire to advance both identification-related and criminal-justice objectives of the case, it was possible to advance both, without privileging either goal. The forensic investigators were able to complete the criminal investigation while also including the perspectives and wishes of the families to a wide extent, providing

56 ICRC, “Central African Republic: ‘We’re Passionately Humanitarian’”, 22 April 2014, available at: www.icrc.org/en/doc/resources/documents/interview/2014/04-22-central-african-republic-red-cross-volunteers.htm; Kim Lewis, “Red Cross: Death Toll Mounts in Central African Republic’s North”, *VOA Africa*, 20 January 2014, available at: www.voanews.com/a/car-violence-bangui-icrc-flee-dead-injuries-hospital-machete-people/1833898.html; ICRC, “Health Care One of the First Casualties of the Conflict”, 26 August 2014, available at: www.icrc.org/en/doc/resources/documents/article/health-care-in-danger/2014-08/hcid-field-focus.htm, noting that: “The 250 Red Cross volunteers are often among the last health-care workers to come back in off the streets, where they evacuate and care for the wounded, recover dead bodies and take them to the morgue for burial.”

57 UN Office of the High Commissioner for Human Rights, *Report of the Mapping Project Documenting Serious Violations of International Human Rights Law and International Humanitarian Law Committed Within the Territory of Central African Republic Between January 2003 and December 2015*, Bangui/Geneva, 30 May 2017, available at: www.ohchr.org/sites/default/files/Documents/Countries/CF/Mapping2003-2015/2017CAR_Mapping_Report_EN.pdf.

58 Columbia Law School Human Rights Clinic, “Major Step Forward for Justice as Experts Exhume and Investigate Mass Grave in the Central African Republic”, New York, 12 December 2017, available at: <https://web.law.columbia.edu/human-rights-institute/news/Central-African-Republic-Boali-Investigation>.

them, for instance, with an opportunity to pray prior to the commencement of the exhumation and further updates on its work. Additionally, the judge in charge of the case decided to request for scientific identification of the remains, and not simply an analysis of the cause, manner and circumstance of the death – despite the fact that for purely the purpose of evidence collection for prosecution of the individuals charged with war crimes in this case, identification processes were not necessary to prove the commission of the crime. It should be noted that it is always the obligation of an autopsy (including the forensic analysis of skeletal remains) to try to seek information as to the identity of the individual, and therefore there should not be a bifurcation of “humanitarian” and “criminal-justice” objectives. However, in practice, judicial bodies investigating international crimes do not always prioritize identifications. While bridging multiple mandates may not be possible in all situations, at times there can be room for creative avenues of collaboration.

In other instances where there may not be the possibility for criminal prosecutions following forensic investigations – for example because the requesting authority is a truth commission or commission of inquiry that is not mandated to prosecute, or because a particular government may be totally unwilling to carry out prosecutions – it is still important to collect basic information about the cause, manner and circumstances of death. First, best efforts should be taken to provide this information – if available – to families of victims, even if in a very basic manner, as part of the right, under Customary IHL Rule 117, for families to know the fate of their loved ones. In my view, knowing the fate should require, in addition to knowing that they are dead, understanding (where it is possible to do so) how they may have died. Second, in situations where for political reasons it may not be possible during conflict or immediately following conflict to proceed with judicial investigations, collecting and preserving the information about both identification and cause, manner and circumstance of death (rather than simply information pertaining to identification) can prevent re-exhuming bodies once more, should the political situation suddenly change and become amenable to judicial processes even after decades. This would maintain the sanctity and dignity of the bodies, and prevent families from having to undergo multiple, emotionally challenging exhumations.

Finally, organizations providing forensic support for humanitarian purposes such as the ICRC should endeavour, where feasible and in line with their principles of neutrality and impartiality, to confidentially engage more often with governmental and intergovernmental organizations and mechanisms involved in the search and recovery of the missing, even if they are part of criminal purposes, on matters of identification of victims. This would strengthen respect for IHL related to the missing and the deceased, and enable the families of the missing and the dead to regain some dignity. In particular, confidentially engaging with institutions working on ICL, transitional justice, and national judicial efforts, and supporting identification efforts (even if indirectly) will aid families to know the fate of their loved ones. The following section argues why it is crucial to engage with each of these areas.

Moving forward: (Properly) incorporating forensics and humanitarian action into criminal and transitional justice investigations

In advancing greater integration of the humanitarian and criminal-justice objectives of forensic science, there are three primary areas in which organizations that currently focus primarily on forensic humanitarian action could have greater involvement: (1) in ICL; (2) in transitional justice efforts; and (3) in support of national judicial efforts. Engaging more closely with each of these fields is likely to better advance the rights of families of the missing, and ensure that identification and return of unidentified human remains to families occurs more frequently.

International criminal law and investigations of the missing and dead

ICL, which seeks to hold those responsible for the most heinous crimes, serves a crucial role in advancing the rights of families of those unlawfully killed or disappeared in conflict, and ensuring that justice for serious violations of IHL and international human rights law is served. Under ICL, States have the obligation to investigate and hold accountable those responsible for crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian and human rights law. With respect to the Rome Statute of the International Criminal Court, which came into force in 2002, the Court has jurisdiction over multiple international crimes, including importantly for the missing and the dead, crimes of genocide, crimes against humanity, including that of murder, and war crimes of wilful killing and outrages upon personal dignity.⁵⁹ The Explanatory Note of the International Criminal Court further specifies that outrages to personal dignity need not apply only to living persons, but can include humiliating, degrading or violating the dignity of dead persons as well.⁶⁰ The International Criminal Court is a court of last resort, and works according to principles of complementarity with States.⁶¹ Today,⁶² the International Criminal Court has seventeen open investigations, and a further three situations under preliminary investigation.⁶³ Additionally, many countries have set up hybrid tribunals, incorporated international law

59 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Arts 6, 7(1)(a), 8(2)(a)(i), 8(2)(b)(xxi) and 8(2)(c)(ii).

60 ICC, *Elements of Crimes*, The Hague, 2008, p. 33, footnote 57, available at: www.icc-cpi.int/sites/default/files/iccdocs/PIDS/docs/ElementsOfCrimesEng.pdf.

61 Paul Seils, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, International Center for Transitional Justice, New York, 2016, available at: www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf. For an overview of relevant documents on complementarity, see ICC, “Complementarity”, available at: <https://asp.icc-cpi.int/complementarity>.

62 As at September 2022.

63 ICC, “Preliminary Investigations”, available at: www.icc-cpi.int/situations-preliminary-examinations.

criminal codes into their national statutes, and have obligations to criminalize certain acts that amount to international crimes.⁶⁴

Organizations and institutions with a humanitarian mandate argue that ICL (as well as international human rights law) partly aims to prevent violations of IHL by prosecuting and punishing parties to the conflict that violate international humanitarian and human rights law. Humanitarian organizations engage with parties to the conflict and seek to prevent harm to civilians by using tactics of “confidential dialogue and persuasion” of State authorities and other parties to the conflict.⁶⁵ As a result, in practice, information about the cause, manner and circumstances of death, as well as perpetrator information, in situations where an international crime may have been committed is seen to be the domain of ICL. By contrast, humanitarian organizations conducting forensic science operations focus mainly on the search and identification of human remains in situations where there are no ongoing international criminal investigations. However, there is a real risk in relying entirely upon ICL to provide information to families about cause of death, as there are tensions between the identification of many victims and the objectives of ICL.⁶⁶

First, the tension between identification of victims and ICL lies to a certain extent in the formulation of the elements of the crimes. A significant number of the crimes under ICL do not require identification of specific individuals who may be missing and killed, and therefore international criminal investigators are not incentivized to take steps to scientifically identify victims. For example, proving the crime of genocide requires understanding the group identity of individuals – and whether they belong to a specific national, ethnical, racial or religious group which is being destroyed.⁶⁷ Evidence of one’s religious group might be

64 See, generally, Howard Varney and Katarzyna Zduńczyk, *Advancing Global Accountability: The Role of Universal Jurisdiction in Prosecuting International Crimes*, International Center for Transitional Justice, New York, December 2020, available at: www.ictj.org/sites/default/files/ICTJ_Report_Universal_Jurisdiction.pdf.

65 See, for example, Anne Marie La-Rosa, “ICRC and ICC: Two Separate but Complementary Approaches to Ensuring Respect for International Humanitarian Law”, *ICRC*, 3 March 2009, available at: www.icrc.org/en/doc/resources/documents/interview/international-criminal-court-interview-101008.htm, noting that: “The work of the ICC and that of the ICRC constitute alternative approaches to preventing IHL violations, approaches we see as complementary. While the ultimate objectives are similar, the tools are quite different. The ICC prosecutes and sanctions, whereas the ICRC promotes respect for IHL through confidential dialogue and persuasion.”

66 This challenge was highlighted by Eric Stover and Rachel Shigekane twenty years ago, and the tensions remain relevant. See Eric Stover and Rachel Shigekane, “The Missing in the Aftermath of War: When do the Needs of Victims’ Families and International War Crimes Tribunals Clash?”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002. Additionally, a recent article explores the possibilities of finding “a middle ground” between international humanitarian aid organizations and international justice goals. See Sarah Craggs, Tiffany Deguzman, Ivey Dyson, Helena von Nagy, Bryce Rosenbower and Eric Stover, “Finding a Middle Ground? International Humanitarian Aid Organizations, Information Sharing, and the Pursuit of International Justice”, *Human Rights Quarterly*, Vol. 44, No. 3, 2022, noting that international humanitarian organizations often collect personal and sensitive information that may be of interest and serve international criminal-justice institutions, and exploring “four issues that affect information sharing between humanitarian organizations and international justice institutions: (1) the right to privacy and justice; (2) mandate requirements; (3) policy requirements; and (4) organizational culture”.

67 Rome Statute, above note 59, Art. 6.

determined by an examination of the artefacts found together with multiple bodies, and not require individual identification. Additionally, proving murder as a crime against humanity requires that the act be performed as part of a “widespread or systematic attack” that is “directed against any civilian population”.⁶⁸ In some instances, proving murder as a crime against humanity may require showing that those killed were civilians, rather than necessarily demonstrating the individual identity of a victim.

Second, ICL is primarily concerned with individual culpability and responsibility for those most responsible for serious crimes. While most of international human rights law and IHL focuses on creating obligations binding upon States (and all parties to the conflict, in the case of IHL), ICL centres on trying to hold individuals accountable. As a result, the latter necessarily focuses on specific individuals who are suspected of the commission of serious violations of IHL and human rights law. The International Criminal Court’s jurisdiction is even narrower, as it is both a court of last resort, and only focused on those most responsible for the commission of these crimes – not junior or lower-level actors who may have committed the crimes.⁶⁹ As a consequence, it is unlikely that ICL can actually provide the tools to identify all those killed in contexts of conflict. Some of those may not be victims of a serious ICL violation. Others who may be victims of crimes that are properly classified under ICL may nonetheless not be victims at the hands of a suspect who is senior enough to be brought to trial under the existing jurisdictions.⁷⁰ This then limits the number of victims for whom ICL tools can provide scientific identification or information about the cause, manner and circumstances of death.

Third, in practice, ICL is hampered by significant challenges in resource allocation. Running a complex investigation to prove particular crimes against a senior leader is not only extremely expensive, but also very challenging. It may require interdisciplinary expertise, including assistance from criminalistics

68 *Ibid.*, Art. 7(1).

69 States have an obligation to uphold international humanitarian and human rights law and investigate, prosecute and punish individuals at all levels who have committed violations that rise to the level of a crime. However, in practice following a major conflict or mass crime it is often extremely difficult, if not impossible, to provide carceral punishment to all those involved, and there may be other goals of reconciliation or social cohesion that may lead States to consider alternative approaches. The field of transitional justice has evolved to address such situations of mass conflict, and in situations of a non-international armed conflict, Article 6(5) of the Second Additional Protocol provides that “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in armed conflict, of those deprived of their liberty for reasons related to the armed conflict”. Note, this amnesty excludes persons suspected or accused of war crimes; see J.-M. Henckaerts and L. Doswald-Beck, above note 6, Rule 159. It is beyond the scope of this article to have a full discussion of the relationship between amnesties and ICL, but it remains a vibrant and dynamic area of study.

70 In addition to the ICC (whose jurisdiction is binding upon parties that have ratified the Rome Statute), following specific conflicts, some States create hybrid courts, many of which also only have jurisdiction to try those more responsible. National criminal courts generally have the authority to investigate and prosecute those involved in the commission of international crimes—and the role of national prosecuting bodies is discussed below. See, also, H. Varney and K. Zduńczyk, above note 64, for a summary of universal jurisdiction.

experts, cybercrime experts, open-source investigators, gender-based violence and sexual violence experts, psychiatrists, witness protection experts and many others. Creating large forensic teams to conduct the search, recovery, examination, identification and analysis of human remains is unlikely to be conducted in all ICL cases. This is especially true if obtaining identification information is not strictly required to prove all of the elements of a specific crime beyond reasonable doubt.

Fourth, while there have been efforts to move away from this, in ICL and especially among prosecutors and investigators, success is typically measured by the outcome and not necessarily by the process. Securing a conviction and bringing a strong case against a suspected perpetrator is seen as a successful outcome. Many prosecutors are much more concerned with the cause and manner of death – which can be obtained by physically examining a body or obtaining an autopsy report – than with supporting the extremely complex process of scientifically identifying an unidentified person.⁷¹ The process – the possibility for families of victims to identify, have a body returned to them, and bury their loved ones with dignity – while extremely important, may not be the central consideration when it comes to ICL.

These tensions result in a concern that in practice, international criminal investigations often deprioritize the important goal of providing scientific identification of victims of crimes in order to provide families with the possibility to know the fate of their loved ones. It is not to suggest that these tensions should exist, or that investigators do not have an obligation to find creative ways around them. Additionally, it is not to abscond those working in ICL of their obligations to scientifically identify and aim to return corpses to families in certain circumstances.⁷² There is tremendous possibility for creative partnerships that bridge the criminal-justice and humanitarian divide, which sometimes exists, that may lead to families having both the possibility to know the identity and the cause of death of their loved ones. It can also be a way for the ICRC and other humanitarian organizations working on such issues to advance their mandate of the promotion and respect for IHL.

Humanitarian organizations such as the ICRC already undertake activities to sensitize ICL organizations on their obligations to uphold and advance IHL as

71 Additionally, there are complications in practice in advancing the search for missing persons, persons presumed dead, and persons who are deceased but for whom the identity of their body is not known. Creating a holistic strategy formed around the search for the missing individual (whether presumed dead or alive) is extremely important, but beyond the scope of this article. See M. Salado Puerto *et al.*, above note 29.

72 See, generally, Office of the UN High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), New York/Geneva, 2017, available at: www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf. The obligation to search for and return the remains of missing and forcibly disappeared persons to their families in international human rights law “has been incrementally recognized and developed by different courts”. Grażyna Baranowska, “Advances and Progress in the Obligation to Return the Remains of Missing and Forcibly Disappeared Persons”, *International Review of the Red Cross*, Vol. 99, No. 2, 2017.

part of their criminal investigations.⁷³ As Anne-Marie La Rosa, legal advisor and focal point for the ICRC on issues related to international criminal justice, notes: “The ICRC’s usual approach to possible violations of IHL is to engage in *critical, confidential dialogue* with those who have the power to improve the situation. Our mission is exclusively humanitarian: to protect the lives and dignity of victims of armed conflicts and other situations of violence and to provide them with assistance.”⁷⁴ It is my argument that as part of these efforts, engaging innovatively and confidentially – and only in situations where the ICRC’s mandate would not be compromised – with judicial actors advancing forensic investigations that can lead to identification of individuals can further improve the ways in which international criminal investigations are conducted. The judicial actors often have the power to provide information that advances the dignity of armed conflicts, and can be sensitized to ensure that they advance humanitarian rights-respecting investigations.

Transitional justice and investigations of the missing and dead

A second vital avenue to ensure that families of the missing and known dead have the possibility to confirm the identity, and learn the whereabouts, and cause of death of their loved ones is through transitional justice mechanisms, which are frequently employed following the end of conflict. Transitional justice processes seek to deal with past injustice, conflict, and widespread human rights and IHL violations. While the origins of transitional justice can be traced back to the Geneva Conventions, as well as the Nuremberg and Tokyo trials, the field first began self-identifying as such in the 1980s following a wave of political changes in both Latin America and Eastern Europe, with the aim to support countries transitioning from conflict toward peace, and support societies moving from autocracy to democracy.⁷⁵ Through instruments such as truth seeking and truth telling, criminal justice, amnesties, reparations, memorialization, institutional reform, and vetting, transitional justice processes aim to contribute to the reform and transformation at the individual, community and societal levels following armed conflicts and other situations of violence. While transitional justice tools and approaches are not used solely in conflict situations, in many instances its mechanisms are used to grapple with, and provide families with, ways to deal with conflicts and with the past.

Institutions providing humanitarian forensic support frequently engage with transitional justice mechanisms. In Colombia, the peace agreement led to

73 A.-M. La Rosa, above note 65, noting that: “The work of the ICC and that of the ICRC constitute alternative approaches to preventing IHL violations, approaches we see as complementary. While the ultimate objectives are similar, the tools are quite different. The ICC prosecutes and sanctions, whereas the ICRC promotes respect for IHL through confidential dialogue and persuasion.”

74 *Ibid.*

75 See, generally, Ruti G. Teitel, *Transitional Justice*, Oxford University Press, New York, 2000; Ruti G. Teitel, “Transitional Justice Genealogies”, *Harvard Human Rights Law Review*, Vol. 16, No. 1, 2003; Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice”, *Human Rights Quarterly*, Vol. 31, No. 2, 2009.

the creation of multiple transitional justice mechanisms, including a Truth, Coexistence and Non-Repetition Commission, a Special Jurisdiction for Peace, as well as a Unit for the Search for Missing Persons.⁷⁶ While these mechanisms have had challenges,⁷⁷ in some ways the Special Jurisdiction for Peace has achieved the greatest success, providing an example of the creative possibility of mixed humanitarian–judicial initiatives.⁷⁸ Forensic experts provided information as part of the Truth and Reconciliation Commission in South Africa, and later a Missing Persons Task Team was created, to investigate and search for persons missing during apartheid. The ICRC and the Argentine Forensic Anthropology Team have provided forensic advice to national experts in Cyprus, to assist them in the recovery of missing persons believed to have been killed during inter-communal fighting. Each of these can be considered to be transitional justice mechanisms, assisting individuals, communities and societies deal with the past.

However, forensic experts working on advancing “humanitarian” goals should pay greater attention to the field of transitional justice. Too few times are the concerns of the families of the missing and deceased accounted for in transitional justice processes, especially in the processes that deal with accountability.⁷⁹ As a result, the concerns of families of the missing are regularly marginalized at the expense of other needs, whereas creative mechanisms and approaches aiming to innovate within the transitional justice field by bringing in interdisciplinary scientific expertise to advance the rights of families are not capitalized upon.

National prosecutions and investigations of the missing and dead

Finally, organizations conducting humanitarian forensic assistance should confidentially engage, directly or indirectly, with organizations and bodies

76 See Truth, Coexistence and Non-Repetition Commission, the Special Jurisdiction for Peace (JEP) and the Unit for the Search for Persons Presumed Disappeared in the context and by reason of the armed conflict (UBPD), *Comprehensive System of Truth, Justice, Reparation, and Non-Repetition (SIVJRNR)*, 2019, available at: www.jep.gov.co/DocumentosJEPWP/4SIVJRNR_EN.pdf; Institute for Integrated Transitions, *The Colombian Peace Talks: Practical Lessons for Negotiators Worldwide*, September 2018, available at: <https://ifit-transitions.org/wp-content/uploads/2021/03/The-Colombian-Peace-Talks-Practical-Lessons-for-Negotiators-Worldwide.pdf>.

77 Andrés Morales, “The Rocky Road to Peace II: Additional Challenges at the Special Jurisdiction for Peace in Colombia”, *EJIL:Talk!*, 12 May 2022, available at: www.ejiltalk.org/the-rocky-road-to-peace-ii-additional-challenges-at-the-special-jurisdiction-for-peace-in-colombia/; VerdadAbierta.com, “Search Unit Still Does Not Fill the Disappearance Gap”, 16 November 2021, available at: <https://tortuosocamino-implementacion.verdadabierta.com/en/search-unit-still-does-not-fill-disappearance-gap/>.

78 For example, in April 2022 eleven persons, including a military general, nine other military officials, and a civilian admitted before the Special Jurisdiction for Peace to committing war crimes and crimes against humanity as part of the killings of at least 120 civilians. See Julie Turkewitz and Sofia Villamil, “Colombian General and 10 Others Admit to Crimes Against Humanity,” *New York Times*, 27 April 2022, available at: www.nytimes.com/2022/04/27/world/americas/colombia-war-crimes.html.

79 Robert Mardini, “Transitional Justice: States Should Include Issue of Missing Persons and their Families in the Process. Statement to the UN Security Council Open Debate on Peacebuilding and Sustaining Peace: Transitional Justice in Conflict and Post-Conflict Situations”, ICRC, 13 February 2020, available at: www.icrc.org/en/document/transitional-justice-states-should-include-issue-missing-persons-and-their-families-process_.

involved in conducting investigations of the missing and dead around efforts to ascertain the fate and whereabouts of missing persons, even if those organizations may have a purpose of eventual prosecutions (such as national courts). This should be prioritized especially in contexts where the complementary pursuit of both humanitarian and justice-related objectives is conducive to responding effectively and comprehensively to the various needs of the families of the missing. While it is the primary duty of States to ensure adequate medico-legal services, frequently countries that have experienced recent armed conflict or significant violence may have medico-legal systems and forensic services that are severely overwhelmed, with a lack of proper regulations, very limited facilities and few trained experts. Many countries may not have the equipment, resources or expertise to carry out advanced scientific approaches, such as integrated identification processes, or extraction and processing of DNA. Additionally, many States may not have incorporated ICL within their domestic statutes, or may choose not to focus on the rights of the missing and deceased.

While humanitarian organizations such as the ICRC already provide vital support to medico-legal systems and national forensic services (and sometimes are the only organizations to do so), it is crucial that this continues to be strengthened. Where possible under existing mandates, these organizations can consider directly or indirectly supporting these services with advice and technical support – to respond comprehensively to the various needs of the missing and their families, including those that are justice-related. Although it is tricky to implement in practice, this can provide families with the closure they need, through information and truth concerning what happened to their loved ones, as well as the possibility to have a body returned to them to carry out last rites. It can also prevent families from being retraumatized and being exposed to the additional pain and grief of inadequate or poorly implemented forensic processes. Merging criminal-justice objectives and humanitarian objectives can lead to the incorporation of a victim-centric approach, which views advancing the rights of families in the process of carrying out criminal investigations as equally important as the outcome, and which centres the dignity of families of victims.

Conclusion

The advancement of forensic science and its application into missing persons investigations has contributed to uphold the dignity of the deceased and enabled families of the missing to obtain crucial information about the fate and whereabouts of their loved ones, facilitating closure even after decades of waiting and searching. Additionally, forensic science processes have supported transparency, stronger, fairer investigations with reliable results, in which the families of those dead or missing may have the opportunity to advance justice and seek redress and reparations. The failure, at times, to simply advance humanitarian and criminal-justice objectives in forensic science, however, hinders efforts to assist families searching for their loved ones. It reduces the possibility

for families to obtain the full truth regarding what happened to their relatives. Additionally, a lack of humanitarian focus and engagement with criminal and judicial mechanisms weakens these instruments, allowing judicial mechanisms to deprioritize identification of victims. By having greater collaboration and blurring the distinction between humanitarian and criminal-justice objectives, the needs of families of the missing and deceased can be significantly advanced.