

**How society cares for the dead –
a matter of human dignity!**

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Summary

Humans bury their dead. Cultural history stretching over millennia bears witness to this practice, one which is part and parcel of caring for the dead in a manner which respects human dignity. The present text incorporates anthropological considerations, and links them with fundamental ethical and legal reflections. It details methods of caring for the dead which do not come up to the standard of human dignity. The paper will close with recommendations for action.

Death does not erase human dignity, either immediately or completely. The consequences of certain acts of self-determination reach beyond death, and command suitable respect. Human rights are rights accruing to the living; they protect and facilitate life itself. It is only possible to speak of rights of the dead in the sense that some acquired legal rights last beyond death, such as the right to be buried. Caring for the dead in a manner appropriate to human dignity is primarily significant for the next of kin. Denying this right means that the next of kin are prevented from making their peace with the loss of an individual who is close to them. Suitable care for the dead is thus a right of the living.

The contexts of war, migration and violent disappearance reveal that, if the dead are not treated in a suitable manner, this endangers social cohesion, the normatively binding nature of rules, and hence ultimately society's system of values. Practices such as denying respect, ranging through to dehumanisation – for instance preventing burial, desecration of graves or bodies, creating greater uncertainty regarding an individual's fate – are instruments of power aiming to intimidate the living and destabilise social systems. This attaches supreme social relevance to caring for the dead in a manner which respects human dignity.

There is a need to act. It needs to be ensured that the dead are cared for in a manner that is appropriate to human dignity in order to respect the rights of the next of kin, and to avoid placing the normative foundation of society at risk. Along with appeals and recommendations, this need for action is addressed to the international community, national, regional and local authorities, as well as the Church and religious communities.

1. Introduction

All people die, and all people also deserve to be treated with dignity in dying and in death. Yet, inequalities go on after death. Not every person is buried, and this is no trivial matter. The act of burying the dead, and the fact of the dead being buried, is an anthropologically fundamental fact which is rich in normative content: Humans are the only creatures who bury their dead – whatever form this may take, and by whatever ceremony this may be accompanied. This also reveals the humanity of human life as a life lived in relationships – including those between the living and the dead.

The manner in which the dead are cared for is essential to a life of people which is appropriate to their dignity as individuals. This leads directly to the question of appropriate human rights – given that they apply as conditions for the possibility of a life lived in a manner that is appropriate to human dignity. The present paper is devoted to this question. It discusses suitable care for the dead as a question of the rights of the living when it comes to caring for their dead, as well as to potential rights of the dead themselves.

The matter initially seems to be quite simple: Human rights are rights of humans – that is of living people. This is because it is the life of each individual that is to be enabled to be lived, and is to be protected. Legal subjects are people who are able to act, who can demand their rights. And human rights are to particularly enable and protect a dignified life.

Is it not then a contradiction in terms to talk about rights of the dead and caring for the dead?

First of all, there is a need to stress that the question as to rights when it comes to caring for the dead deliberately avoids devaluing or indeed ignoring the question as to the significance of the rights of the living. Firstly, talking about caring for the dead may also draw attention to what was done to people when they were alive. This applies in those cases in which human rights violations have contributed towards death, and have been continued in a treatment of the dead which runs counter to the dignity of human beings. Secondly, however, it indicates largely unanswered questions as to how long human rights apply, and to whom they apply (in combination with other rights).

Commonplace moral intuition can provide important indications here. It appears clear, firstly, that human rights are rights of the living. On the other hand, people have a very pronounced feeling that it is not right to treat the dead like a thing: We do not dispose of the dead “in the trash” – the very idea goes against our moral sensitivities. There is therefore a moral intuition telling us that “something” would be wrong with treating the dead in such a manner. This everyday intuition can be ethically justified, and is also reflected in the law; bodies are for instance not equated with things. Moral intuition is furthermore supported by cultural history stretching back millennia, which addresses the topic of how

to care for the dead in an appropriate manner (e.g. in the ancient tale of Antigone). It is therefore no new question which we are taking up here.

At the same time, the topic is of extremely high practical and theoretical relevance today. Dying and death have virtually disappeared from late modern (Western) societies; some speak of their being subject to a taboo. We are repeatedly and unavoidably confronted with the topic of death and dying, especially in crisis situations such as the coronavirus pandemic, or the Russian war of aggression against Ukraine, so that it is virtually impossible to suppress the topic, even for a moment.

Media reporting on the pandemic meant that death, without being directly visible, nonetheless took on a strong presence, and impacted on many people's real lives, with iconographically-powerful images of coffins and from hospitals. The situation was particularly tragic in many long-term institutional care facilities in those first months: Protection against becoming infected, and hence against an infectious disease which was highly life threatening for this especially vulnerable group, led to extensive isolation measures. This entailed elderly people, for their own protection, not being permitted to receive visitors, sometimes for prolonged periods, and in some cases that they in fact had to die alone. This incisive experience made many people aware that dying and death are part and parcel of life, and that they should be entered into accordingly. And the confrontation with the experience of loneliness made it clear to what degree dying is or should be experienced relationally.

The war in Ukraine has also brought death and dying closer to the awareness of a broader public in our society. It has brought the danger of being killed in a war closer (in geographical terms). People retrieve bodies from war zones, thereby placing themselves in mortal danger, in order for them to be buried and for the next of kin to gain certainty. Others do not have this possibility. This sadly reveals the significance of how the dead are cared for.

These topics have been permanently present in other countries, and continue to do so. For instance, the question of how to treat the dead appropriately in the context of conflicts and of a past burdened by violence arises drastically and in different ways: When the desecration of the dead, or indeed rendering them invisible, is used as an instrument of power in order to weaken and humiliate the population; when people are deliberately left in the dark as to whether their relatives are alive or dead (enforced disappearance) in order to discourage them; when graves are desecrated or memorial sites are destroyed, when they are not accessible, or the dead cannot be buried at all (e.g. displaced persons who have drowned in the Mediterranean); when the suitable care for the dead, consisting for instance in a specific form of burial, is denied as a means of religious discrimination. The question of human rights in caring for the dead poses itself in these and other situations.

These phenomena are linked to a great number of fundamental and conceptual questions, both moral and legal in nature. There is a need to determine how they relate to the

conviction that human rights are rights of the living. There is a need to clarify whose rights we are actually referring to. This exerts an impact on the dignity and rights of the dead themselves, just as those of the next of kin – and at the same time it is always also a matter of a society's human rights standards. But what exactly does this mean? And how does this impact society, as well as individual communities? We need to engage in a debate on this and other questions.

The goal to be achieved is to explain what rights, and whose rights, are at risk, in order to be able to examine at the next stage what legal and political steps need to be taken in order to protect them adequately, or indeed to apply them at all in the first place.

This is necessary because very little attention has been paid to this topic in the past; in fact, there has been no acknowledgement of its significance at all. In this vein, this publication therefore presents a kick-off to further considerations, whilst not attempting to reach conclusions. It aims to continue the ethical debate, and to gain knowledge which may be relevant in terms of action to be taken. There is a need to go beyond the ethical dimension and also discuss legal aspects. This relates to how human rights are respected, protected and safeguarded. What obligations are incumbent on the states and on the community of states? It is therefore explained, on the one hand, what relevant legal provisions exist in this regard, whilst on the other hand there is a need to uncover the underlying perception of the legal subject, and what changes this might have undergone. Religious knowledge is also incorporated, given that it has been the religions above all which have addressed the questions which transcend death since time immemorial. Even if this publication cannot answer the question as to what this means in an increasingly secularised society, there is nonetheless a need to take account of the religious and cultural sensibility for questions related to dying and death in the human rights discussion.

2. Human dignity and human rights in caring for the dead

2.1. On the fundamental link between human dignity and human rights

Human dignity and human rights are closely interrelated, both in our daily usage of words, and at the level of justification. Human rights constitute fundamental conditions facilitating a life which enables human dignity. Human dignity¹ stands for an absolute value accruing to each individual from nature (“intrinsic”), which stands for his or her “being for the sake of being”, and which is resistant to weighing up (and thus absolute). The direct expression of each person’s being for the sake of being is the right to be able to lend to himself or herself, that is to his or her personal lifestyle, the direction-giving determination (“self-determination”). At the same time, “human dignity” – as is indicated in particular by new human rights conventions such as the UN Convention on the Rights of Persons with Disabilities (CRPD) – stands for the need for an “enhanced sense of belonging”, that is a strong, resilient experience of belonging to human communities and/or to society as a whole. When they belong so strongly, people can personally experience “being for the sake of being” in the mode of acknowledgement and communicative self-effectiveness. Because this is so, personal freedom is always simultaneously negative and positive freedom in the mode of that communicative freedom which experiences others not merely as the boundary of individual freedom, but above all as a condition of its possibility. In this regard, the freedom of each individual is realised in the fact that “one person experiences others as an enrichment of his or her self, and as a task of his or her own life”². Such communicative freedom as relational freedom is by no means realised only between the presently living, but in anticipation of future generations (“generative freedom”), as well as looking back on the dead, to whom those living both today and tomorrow owe their very existence. Thus the relation with the dead serves as identity-establishing, in personal and individual terms, as well as in the shape of a concrete community, whatever form this might take. Therefore, caring for the dead in an appropriate manner, as a right of both the living and the dead, is an expression of rights to freedom in the sense of communicative freedom.

Human dignity is not a characteristic one “possesses” (like a treasure chest, for instance). Rather, it is a right or, more precisely, the fundamental claim per se in relation to interpersonal and societal interactions. Respect for human dignity is revealed in the protection of life itself, and of concrete human actions. In moral terms, this constitutes the connection between human dignity and human rights: Rights protect and enable those acts, and hence

¹ Cf. on the following also Lob-Hüdepohl, Andreas, *Würde. Zum Verhältnis von Selbstzwecklichkeit, Selbstbestimmung und Zugehörigkeit*, in: Klöcker, Katharina/Laubach, Thomas (eds.), *Ethisches Argumentieren. Reichweite und Grenzen zentraler Denkfiguren* (Jahrbuch Moraltheologie 7), Freiburg 2023, 91–98.

² Huber, Wolfgang, *Folgen christlicher Freiheit. Ethik und Theorie der Kirche im Horizont der Barmer Theologischen Erklärung*, Neukirchen-Vluyn 1983, 118.

the realisation of dignity. They aim to guarantee for each human being a life and a set of actions in accordance with their dignity – in a self-determined manner, and together with others. Hence, they are both rights to freedom and entitlements at the same time. They are universal rights because *all* people are entitled to achieve their potential in actions; this is what these rights protect.

First and foremost, human rights are moral rights; they are to be realised in the political arena, and need to be implemented by the law. In historical terms, they were fought for in political contests, and proclaimed in various declarations such as by the 1948 Universal Declaration of Human Rights (UDHR). The latter clearly shows that human rights are also always a reaction to the experience of suffering and injustice – in this instance referring to the caesura of civilisation constituted by the Holocaust and the Second World War. Because a declaration of intent as constituted by the UDHR is not sufficient, the rights which were formulated therein were translated into treaties, known as the human rights conventions, and these are binding on the countries that have ratified them. Even if these constitute major achievements in historical terms, one nonetheless observes that human rights are repeatedly violated, their universal, inalienable validity is questioned, and the treaties which are concluded in order to safeguard them fall short of this very goal. This is also why the legal and political instruments are being continually refined. If it is therefore evident that certain groups of individuals, or indeed specific dimensions of human life, are not being adequately protected, it may make sense to refine human rights and/or the instruments intended to protect them (as happened for instance with regard to children's rights, rights of migrant workers, etc.). It is this interest that this paper is also to serve, with regard to the question of appropriately caring for the dead, a question to which too little attention has been paid in the past.

2.2. Cultural anthropological, social and Christian aspects

The possibility to say farewell and to grieve, and the knowledge that the dead are cared for and buried in an appropriate manner, is frequently a precondition for many people being able to return to their everyday lives. People do not find peace as long as their dead do not find their rest. Experiences of existential loss require the dead to be taken care of by rituals, as well as by individual forms of burial and saying farewell. Death thus becomes comprehensible as a caesura, and thus more bearable. Respectful conservation of the integrity of the dead serves at the same time as a reverential orientation towards the dignity of life *per se*. Caring for the dead in a dignified manner reflects a desire to treat the living relatives appropriately, given that they have become vulnerable by virtue of having lost a person who was close to them, who was loved, offered protection or was at least present. Desecrations of graves, or even bodies, following on from crimes such as enforced disappearance, torture or murder, are extremely harmful to the living. The peace of the dead

protects the mortal remains of the dead, and hence their integrity. That having been said, it also serves to restore the emotional and spiritual peace of the relatives. From this point of view, the peace of the dead is a right of the next of kin. It does not come as a surprise that we accept for the peace of the dead to be disturbed by archaeologists out of a scientific drive for knowledge: These dead no longer have any relatives, any next of kin, since they died and were buried thousands of years ago.

The dead always have an afterlife which is reflected personally in the communication of the living with the dead. We continue to converse with ‘our’ dead. Along with the thoughts which are circulating around them, the variety of the media that are used is enormous: from tablets, letters, grave markers, collections of stories, framed illustrations or jewellery devoted to remembrance, via songs, photographs, Internet forums or conserved WhatsApp chats, some of which are also continued one-sidedly after death. Rituals of mourning and commemoration always signify communication between the next of kin and their dead, which can lead as far as to evoking the dead within ancestor worship. The dead exert an influence on the living.

At the same time, the disturbance, or indeed the destruction, of the peace of the dead constitutes an attack on the next of kin. These simultaneously attempt to dehumanise the victims. Abductions, torture and murder of people, as well as the subsequent disappearance of their bodies, concealing the circumstances of their death, and denigrating the remembrance of the dead, are crimes which not only impose on the victims a violent, undignified death, but also seek to prevent their dignified burial among their families. These attempts to dehumanise the victims, however, fall back on the perpetrators themselves. Since time immemorial, people have developed a wide variety of forms of a cult of the dead which reveal the underlying motives: With regard to the physical body, the aspects of concealing, locating and transforming are in the foreground; when it comes to the soul and spirit of the dead, this relates to remembrance, preserving and transcending, and with regard to the next of kin, to bearing/coping, overcoming and transforming.

“Burying the dead and comforting the grieving are two services which have always been part of the physical and spiritual works of mercy in the Judeo-Christian understanding.”³⁴

³ The German Bishops 53, *Unsere Sorge um die Toten und die Hinterbliebenen. Bestattungskultur und Begleitung von Trauernden aus christlicher Sicht*, published by the Secretariat of the German Bishops’ Conference, Bonn 1994, 9.

⁴ Quotations from German-language sources were translated into English in this publication in order to improve comprehensibility for non-German-speaking readers.

The development of burial rituals dates from the very dawn of human history. It is appropriate to speak here of an anthropological constant. People of all cultures have taken care of and buried their dead at all times via rituals, with the elements of fire, earth, water and air having always played a central role when it came to the transition. It is a discriminating characteristic of being human: We take care of the dead, attend to them and their final resting places; we remain in constant contact with them in processes of mourning and remembrance, and we imagine them in places or spheres in the afterlife. Central importance attaches here to the question of where the dead go to.

The especial attention that religions attach to dealing with death can be illustrated by taking the example of **Christianity**: Being a creation (as constituting the knowledge that the person does not have himself or herself to thank for his or her existence), hope of resurrection, and relationality, are recurring motifs in dealing with death and the associated rituals.

“From the earth you came, and to the earth you shall return” are the words used in the Catholic burial liturgy when the coffin is lowered into the grave. The Earthly person is finite; he or she has no control of his or her beginning or end. He or she is a creature, and as such is transient. But the second sentence, “The Lord shall awaken you”, conveys that death is nonetheless not the end. The Christian hope is fixed on the resurrection. A Catholic burial therefore generally includes the celebration of Mass: the requiem in which the hope for this is expressed in the community of the faithful. The deceased and the grieving are at the centre of all this. The dignity of the individual requires practices of particular respect, beyond death, and at the same time death, taking leave and mourning are relational in nature.

The first stage of the funeral service traditionally takes place and/or took place at home: The custom exists that neighbours and relatives come to say farewell and to grieve with the close relatives. This practice has largely disappeared in Central Europe, but remains significant elsewhere. (Friends and family in some countries in Latin America come together over a period of three years for a celebratory remembrance on the day of death, or at All Saints.) Death thus takes up a space in people’s everyday lives, and particular expression is given to the closeness to the deceased: He or she is present not only physically, but also in discussions and in remembrance. Some of this takes place today in the funeral service at the cemetery, but it can also be highly significant when friends and family come together

at funeral receptions⁵ or the like. The dead person does not disappear, but lives on in the memory of and in the stories told by the community.

Despite the major changes which have taken place in recent decades, cemeteries are significant places of remembrance: Flowers and plants are frequently visible signs of remembrance and of life which the next of kin place on the graves. Candles indicate the hope of resurrection. In each case, the name that is visibly affixed commemorates the deceased. The name lives on; there is actually no provision for anonymous burial.

When it comes to burials, as well as to various occasions of remembrance in religious services, the words of the prayer are spoken: "Eternal rest grant unto him/her, O Lord", to which the congregation answers: And let perpetual light shine upon him/her. May he/she rest in peace". This suggests that what happens with the deceased is not arbitrary. May he or she rest. But this concept in Christianity (unlike in Judaism or Islam) is not reflected in eternal rest in the grave. Graves can be removed after a period of rest which varies from one region to another (as a rule between 15 and 30 years). The physical peace of the grave is therefore not identical to peace in death in the figurative sense (in eternity). Remembrance and the hope of resurrection (may the eternal light light up his or her path) points beyond the physical boundaries.

That having been said, these Christian traditions and rites have become less significant today; many people no longer find them accessible. "The stocks are almost exhausted. The doctrines and rites are in a state of agony."⁶ This does not mean that there are no means of dealing with death. They remain significant, but they have become more individual, more private.

Caring for the dead is always also a social practice, leading to the emergence of social, cultural and religious dimensions. Burial rituals can be an expression of social cohesion. And they have a structuring function: They offer a foothold to the next of kin in dealing with loss and mourning, and thus at the same time they stabilise a society which is always also affected by a death, and may be destabilised under certain circumstances. This destabilisation is much greater in the case of a violent death, particularly if it is politically motivated. A society therefore needs ways of caring for the dead, and rituals for dealing with death. If they are not available, or if they are made impossible, this has a negative impact on social cohesion and processes. The foundation for a good coexistence starts to shake.

⁵ In the German-speaking world, for example, the tradition of the "Leichenschmaus" is widespread. Following the funeral, the family of the deceased invites the mourners to a meal. The gathering offers the opportunity to share memories of the deceased and is therefore a ritual for saying farewell in community.

⁶ Wils, Jean-Pierre, *Das Nachleben der Toten. Philosophie auf der Grenze*, Paderborn 2019, 12.

At the same time, social practices always have an economic dimension. Burial rituals and the manner in which the dead are cared for also lend expression to social distinction: Who can afford what form of burial? How long is a grave maintained, and who takes care of it? This question is asked by the relatives, but a society is also confronted with the question as to how much it is willing to spend on its burials and other forms of appropriate care for the dead.

2.3. Ethical aspects

Human rights are rights of the living because they protect their very lives. And there is the highly-justified interest on the legal and moral side not to expand the terms “human dignity” and “human rights” to such a degree that the concepts lose precision and critical potential. At the same time, commonplace intuitions, and cultural and religious practices, indicate that the manner in which the dead are cared for is not arbitrary; they give rise to questions that are significant in terms of human rights.

To whom, from when onwards, and how long human dignity and human rights apply is the subject of controversial discussion, particularly in bioethics: In particular, positions contradict one another with regard to the beginning of life, positions as to whether (and to what extent) the unborn embryo has dignity, and concomitantly also rights, or whether this is not the case. Without wishing to discuss this conflict here, these discussions show that the question of the “period of validity” arises at all, and that it is not easy to answer. A thought which Jürgen Habermas introduced into the discussion can be related to our question, and critically developed further. Habermas introduces a kind of intermediary level in order to deescalate the conflict as to whether the unborn have the status of full dignity, or indeed none at all⁷. He uses the term “dignity of pre-personal life”⁸, which needs to be distinguished from the concept of human dignity, to show that there is a *general indisposability* of human life – including prior to birth – which does not rank as individual inviolability, but which nonetheless grants protected status. Such **indisposability**, which also assumes central significance in Christian ethics, can furthermore be presumed to apply to the dead. True, their life has expired, but the end of biological life does not mean that all moral rights have been forfeit.

⁷ Heiner Bielefeldt speaks of the difficult-to-resolve conflict resulting from two contrary fundamental intuitions: On the one hand, there is thus the interest not to arbitrarily exclude anyone from protection of their dignity, and hence also to include antenatal life from the outset, but on the other hand there is the intuition that “consumptive embryo research” and murder should not be treated as the same thing. That both positions could be motivated by categorically defending dignity – and defending it either from overextension or from arbitrary exclusion – makes the problem worse. Cf. Bielefeldt, Heiner, *Auslaufmodell Menschenwürde?*, Freiburg 2011, 60 et seq.

⁸ Habermas, Jürgen, *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?*, Frankfurt 2018, 59.

The concept makes it clear that something may be removed from our disposal for good moral reasons, even if the person concerned does not have the status of a legal entity (or this status has not been clarified). Habermas does not apply the term “dignity” without reservations because he presumes that dignity, unlike indisposability, is bound by symmetry of relationships, that it “may be significant solely in the interpersonal relationships of reciprocal recognition residing in the fact of individuals treating one another equally.”⁹ For him, indisposability refers to vulnerability which manages without those reciprocal relationships, so that we can find: “Beyond the boundary of a strict understanding of a community of moral individuals, there is no grey area in which we may act without consideration and inhibitions in normative terms.”¹⁰ In fact, we are left with an indisposability which is to be respected in all circumstances.

The following considerations precede on the assumption that the vulnerability of the dead goes further still, so that they go further than Habermas. A lack of suitable concepts however makes it more difficult to provide a justification for this. At the same time, it is not appropriate to completely equate such vulnerability with the dignity and rights of the living. One reason for this presumption is that relationships and recognition outlast death – albeit not in a directly reciprocal manner. Respect for an individual, and recognition of their acts, or indeed of their relationship, last beyond death.

The living individual may furthermore take decisions which do not become effective until after their death, such as with regard to the way in which they wish to be buried, any organ donations, etc. This constitutes an act of **self-determination** the effects of which last beyond death. The will of the deceased transcends death¹¹. But **respect** for self-determination must also outlast death. Treating the body in a manner which would certainly go against the will of the deceased violates (socially integrated) self-determination. And in the sense that self-determination is closely linked to dignity, one may also speak of a violation of dignity if this is disrespected.

2.4. Legal aspects

The presumption that effects of self-determination can outlast death also permeates into the law. The right of care for the dead for instance requires the relatives to respect the (presumed or explicitly expressed) will of the dead. Care for the dead, that is the right to dispose of the body, including burial, is not explicitly regulated by law; it is however

⁹ Habermas 2018, 62. It is not possible to enter into a discussion at this juncture as to whether this is sufficient to lend protection status to prenatal life.

¹⁰ Habermas 2018, 68.

¹¹ Similar to the situation of the very seriously ill, the presumed will must also be taken into account: Something which is manifestly not in the interest of the dead person must be avoided.

recognised as an after-effect of the relationship under family law, and today is based on Art. 1 para. 1 as well as Art. 2, 3 and 6 of the German Basic Law (*Grundgesetz* – GG). It is thus typically the immediate relatives, that is the spouse and the relatives first in line, who are entitled to exercise it¹². Various judgments of the German Federal Court of Justice (BGH) underline the significance of the will expressed by the deceased.

Along with self-determination and the will related to it, the **image of the personality** also retains significance beyond death. According to the German Federal Constitutional Court (BVerfG), it would be for instance inconsistent with the

“constitutionally-guaranteed principle of the inviolability of human dignity, which underlies all basic rights, if a human being, who is entitled to dignity by virtue of being a person, could be belittled and denigrated in terms of this general right to respect, including after his or her death. Accordingly, the duty imposed on all state powers under Art. 1 para. 1 of the Basic Law to protect an individual from assaults on his or her human dignity does not end with death.”¹³

The judgment reasons this by referring to the personal image of the deceased in the perception of posterity, which is said to be in need of protection against being belittled or denigrated by third parties. These are therefore particularly grievous encroachments on the right of personality by others. They are also not permissible after death; they are in violation of dignity.

“According to a wider view, the protection of human dignity is ended by death, but at the same time the principle of human dignity is said to continue to apply beyond death as a fundamental principle of the value system of the Basic Law.”¹⁴ This indicates that disrespectful treatment of the dead (also regardless of whether they are accorded dignity or “only” indisposability), encroaches on a society’s normative foundation. The violation of this fundamental principle underlying the social value system endangers the normative binding power of rules, and social cohesion. This reveals the social relevance of these questions, which will be explored in greater detail.

¹² Supreme Reich Court (*Reichsgericht*), judgment of 5 April 1937, – IV 18/37, RGZ 169 (271). Cf. Juraforum, article on care for the dead, www.juraforum.de/lexikon/totenfuersorge [30 October 2023]. A certain degree of protection exists under criminal law, whilst burial is regulated by the law of the respective Federal *Land*.

¹³ Order of the First Senate of 24 February 1971, Decisions of the Federal Constitutional Court (BVerfGE) 30, 173 (194). The so-called “Mephisto judgment” however refers to a case constellation which is not at the centre of these considerations, i.e. to what degree a novel (“Mephisto” by Klaus Mann) breaches the right of personality of a dead person (Gustaf Gründgens).

¹⁴ German Bundestag, Research Services, *Die postmortale Schutzwirkung der Menschenwürde*, Berlin 2018, 5, <https://www.bundestag.de/resource/blob/590006/06be329f5e98a5foda17ec858426e7a4/WD-3-384-18-pdf-data.pdf> [30 October 2023].

It is therefore possible to justify not being denigrated after death. The intensity of this protective effect nonetheless fades without it being possible to make any absolute determination with regard to the duration.

The question as to the validity of rights beyond death is more difficult still. Also in the view held by the Federal Constitutional Court, only a living person can be a holder of fundamental rights under Art. 2 para. 1 of the Basic Law¹⁵, whilst at the same time a certain (gradually fading) legal protection is also presumed to exist here.

The aspect of *relationality* has already been mentioned in various regards. Subjectivity forms via intersubjective relationships with others¹⁶. The next of kin are to respect the will of the deceased. And the *image of the personality* is also of necessity intersubjective and relational. It indicates the significance of the deceased for the next of kin. This now requires, firstly, the aspect of relationality to be enhanced, whilst on the other hand necessitating closer inspection of the connection between the dignity of the deceased and legal rights.

On relationality with the rights of the next of kin

There are legal rights which go beyond death. If the right of personality is to be protected beyond death, this gives rise to certain rights (at least in the moral sense), even if there is no longer any reason to protect the development of dignity in actions. By dying, a person who was the subject of obligations and a holder of rights in interactions ceases to “be among people”¹⁷, but does not disappear from these connections immediately and completely. It may be that individual works survive, and it is above all others’ memory of such a person which remains. If the deceased’s personality is not respected after death, for instance as a result of their being denigrated, this might (possibly) be understood as a breach of the right of personality after the fact. This however also impacts on rights of the living, in particular those of the next of kin. (All instances of defamation of the dead do not however harm the rights of those who remember him or her. This too is significant.)

The right to burial also offers indications with regard to this connection between rights of the deceased and those of the living: People have a right to be buried. Residents of a municipality acquire a right during their lives to be buried in the municipal cemetery. “By nature, the dead are unable to exercise this legal interest themselves. It is in fact the relatives who – by virtue of their right to take care of the dead under private law, protected as a

¹⁵ Cf. German Bundestag 2018, 5; as well as Decisions of the Federal Constitutional Court (BVerfGE) 30, 173 (194).

¹⁶ Habermas 2018, 63. One could mention others, esp. recognition theories such as Honneth, but also Butler.

¹⁷ Hannah Arendt explains that life means *inter homines esse*, and dying something like “ceasing to be among people”, Arendt, Hannah, *Vita activa*, Munich 2008, 7th ed., 17.

fundamental right under Art. 2 para. 1 of the Basic Law, thus granting a right of burial via the entitlement to dispose of the body – are also empowered under public law to assert the cemetery utilisation right vis-à-vis the municipality on behalf of the deceased.”¹⁸ Firstly, it is revealed here once more that self-determination is to be respected beyond death. Secondly, it is not disconnected from the next of kin: Others “watch over” the fulfilment of that right. The relationality between and reliance of people on one another reaches beyond death¹⁹.

Because the next of kin remain connected with their dead beyond death in remembrance, the relationality of human rights also reaches beyond the boundary constituted by death. What is more, as was stated above, we remain “in a conversation” with them. Treating a body in a disrespectful manner, or violating the peace of the dead and the like, therefore also harms the relatives. This means, conversely, that these practices may be committed deliberately – be it by individuals, groups or indeed governments – as an insult, or indeed as a violation of the rights of the living. They may be used in order to exert massive pressure, as well as constituting a threat. And these may at times in fact be deliberate dehumanisation practices: Not burying bodies, and prohibiting their burial, is an ancient instrument of power because those exercising it demonstrate their power to withhold from the deceased that to which a person is entitled in all cultures as a minimum of respect. Individuals are made into mere bodies; they are degraded to become a thing with which one may do as one wishes. Enforced disappearance too, which leaves relatives in a state of unbearable ignorance, works as a manifestation of power. Because this means that a society is permeated by uncertainty and fear, this also demonstrates the major societal relevance attaching to the question of human rights in the manner in which the dead are cared for.

What exactly does this relationality of rights mean? Subjective rights are rights of individuals, not of groups. They nonetheless take on an intersubjective dimension, given that the claims of many need to be brought into harmony. We view subjective rights as “normative relational characteristics which grant to their holders a favourable normative position vis-à-vis other individuals”²⁰. The relational character means primarily that a relationship exists between those who have claims, and the others who are to respect them. Along with this, subjective rights are however also relational in the sense that exercising them includes others in different ways. Many rights can only be realised through interaction with others, or

¹⁸ Rixen, Stephan, *Die Bestattung fehlgeborener Kinder als Rechtsproblem*, in: FamRZ 7/1994, 417–425, 419. Since the law on burials is a matter for the Federal States (*Bundesländer*), the individual legal provisions vary widely. This is however merely a fundamental claim.

¹⁹ The inverse question arises here as to who asserts the rights, for instance the right to be buried, if there are no close relatives. A duty of fulfilment is incumbent on the State in this regard.

²⁰ Stepanians, Markus, *Moralische Rechte*, in: Goppel et al. (eds.), *Handbuch Gerechtigkeit*, Wiesbaden 2016, 280–286, 281.

with the support of others²¹. This was made particularly clear in the discussion of the *Convention on the Rights of Persons with Disabilities*, which vehemently calls for respect for the autonomy of people with disabilities. Enabling such self-determination however requires support in many cases, so that assistance from others is no longer regarded as being in opposition to autonomy (in the sense of creating dependence), but as making such autonomy possible. This applies not only to people with disabilities, but also to all people. Other people no longer only constitute a threat to the realisation of autonomy in exercising subjective rights (as in the liberal tradition), but in fact facilitate such autonomy because we rely on them, their work and their support. This is a major paradigm shift. What is more, the realisation of rights to freedom requires a substantive foundation. Such rights are indivisible from economic, social and cultural rights, which can only be understood in relation to the community. It is not only self-determination, but also the rights resulting from it, which therefore have a relational character.

And finally, the right to freedom of religion is also affected. Remembrance and burial of the dead touch on religious questions. Whether one believes in the resurrection or a form of life after death, or indeed rebirth, may in each case be linked to specific ideas of what may happen to a body, and what may not. These religious ideas must be respected. One might carefully conclude that the right to freedom of religion therefore points beyond death.

We see that rights in the manner in which the dead are cared for are also, and indeed primarily, rights of the living, that is of the next of kin. Major relevance attaches within society as to whether they are protected or violated.

2.5. Three levels of impact: the dead, the next of kin and society

The question as to rights in the manner in which the dead are cared for arises at a variety of levels.

It is first of all a matter of the rights of the dead, given that not all rights that are to be respected expire on death. The deceased also remains “indisposable”; human dignity continues to be valid beyond death, even if this presumption still leaves manifold questions unresolved, such as duration, nature of “fading”, etc. One may however only speak of rights (or indeed human rights) of the dead to a very limited degree – for instance with regard to legal rights which were acquired during life (for instance burial). This needs to be

²¹ True, rights to freedom are traditionally understood as rights of defence – vis-à-vis state encroachments or indeed towards third parties –, but at the same time freedom is always realised with others. This has been made clear in recent decades by for instance feminist theories, alterity and intersubjectivity philosophies, for instance Paul Ricoeur, who has demonstrated that relationality to others precedes the exercise of freedom (rights).

lent concrete form in going through the case examples and practical areas. There will also be a need to clarify below how and by what means dignity (and rights) of the dead are violated. Or conversely: What are the characteristics of cultivated care for the dead that is appropriate to human dignity?

At a second level, it is a matter of the rights of the next of kin. It became clear that the manner in which the dead are cared for affects the next of kin. What psychosocial impact is caused if appropriate care for the dead is lacking? It also became clear that, amongst other things as the result of the relational character of rights, rights of the living are violated by the dead not being treated in a suitable manner. This will also need to be lent concrete form by means of experiences and practical areas. There is furthermore a need to ask with regard to the next of kin how their rights can be safeguarded, and how harm is overcome.

Finally, disrespect of the rights of the dead and of the next of kin takes on a social dimension. Protection of the indisposability of people beyond their death is not only significant at individual, but also at pan-societal level. They are therefore also to be protected because they have an objective reason: Subjective rights are binding in nature not only vis-à-vis concrete addressees, but they give rise to normative binding forces between the members of a society. If the dead are not treated appropriately, this impacts the social network. What is more, denial of respect for the dead is frequently intended – as an instrument of power – to particularly impact on the next of kin, and to weaken the social fabric of society. This also reveals the consequences in traversing the practical areas, and will also make it clear what conflicts arise in concrete terms or are amplified, and in what way minorities are affected.

There will be a need to clarify whether one may then speak directly of human rights violations. One may certainly anticipate the erosion of the social structure to make it more difficult to protect human rights in the respective countries. This is joined by the question of how this condition is to be overcome. How can an awareness of human rights violations and the need to overcome them be promoted?

The question therefore arises at all levels as to who has what rights. There is a need to delve deeper into this question in legal terms, and to reveal what obligations are already incumbent on the State, and where these are lacking.

3. The relevant legal foundation in international law

There is as yet no human rights convention explicitly expressing that dignified care for the dead (because of the living) is a principle of human rights which applies in all contexts, and which must be acknowledged. That having been said, different international agreements contain different provisions for individual thematic contexts, giving rise to obligations incumbent on states to ensure that the dead are treated appropriately:

- Such obligations are described in particular detail in **humanitarian international law**, which applies in the context of armed conflicts: The Geneva Conventions contain provisions on caring for dead combatants and military staff (Art. 16 & 17 of the First Geneva Convention), as well as with regard to deaths caused by shipwrecks (Art. 19 & 20 of the Second Geneva Convention), prisoners of war (Art. 120 & 121 of the Third Geneva Convention), and civilian internees (Art. 129 et seqq. of the Fourth Geneva Convention). The rules prescribe that the dead are to be identified and honourably interred (if possible according to the rites of the religion to which they belonged), and that the families are to be informed of the fate of their deceased relatives. Art. 16 of the Fourth Geneva Convention furthermore obliges the parties to the conflict, as far as military considerations allow, to facilitate the steps taken to search for the killed. The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), which, contains even more detailed provisions for the context of the war dead. Section III of Part II (“Missing and dead persons”) of Protocol I is primarily determined by the right of the families to learn of the fate of their relatives. Art. 8 of Additional Protocol II also establishes comparable obligations for non-international armed conflicts. The International Committee of the Red Cross argues that these provisions may be very largely regarded as customary international law²². It can therefore be concluded that the obligations even apply to states which have not ratified the Geneva Conventions. A further provision is contained in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996. Art. 7 I of the Protocol provides that booby-traps may not be placed among dead persons, or in burial or cremation sites or graves.
- Similar obligations can also be found in the UN Guiding Principles on Internal Displacement (which are not legally binding, but do perform an important orientation function). Guiding Principle No. 16 grants to all **internally displaced persons** the right

²² International Committee of the Red Cross, Rules of customary international humanitarian law, 2011, Rules 112-116, <https://ihl-databases.icrc.org/en/customary-ihl/rules> [14 December 2023].

to know the fate and whereabouts of missing relatives, and demands of the authorities concerned to endeavour to collect and identify the mortal remains of the deceased, to prevent their despoliation or mutilation, and to facilitate their return to the next of kin or to dispose of them respectfully. Grave sites of internally displaced persons are furthermore to be protected and respected in all circumstances, and internally displaced persons are to have the right of access to the grave sites of their deceased relatives.

- Another indication is provided by the International Convention for the Protection of All Persons from Enforced Disappearance. The Convention places the States Parties under an obligation to combat the **crime of enforced disappearance** where the victims are not only robbed of their freedom, but their fate and whereabouts – dead or alive – are concealed. Unlike humanitarian international law, the Convention is not restricted to armed conflicts, but also applies in all other contexts in which enforced disappearance takes place (see Art. 1 of the Convention), so that the many such acts committed in autocratic regimes are addressed. In the course of the **right to know the truth** which has been included as a central element in the Convention, along with the disappeared persons also the relatives, as well as all other natural persons who have suffered harm as the direct result of an enforced disappearance, have rights: They have the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person (Art. 24 II). It should however be taken into account here with regard to the search for connections to a human right to appropriate care for the dead that the principle fundamentally applies when searching for disappeared persons that it is always presumed when looking for them that they are still alive until the opposite has been proved. Since, in many cases, the disappeared have however been killed, or have died as a result of their detention conditions, Art. 24 III of the Convention formulates an obligation to locate, respect and return the mortal remains, in the event of death. Art. 15 furthermore obliges the States Parties to afford one another the greatest measure of mutual assistance in exhuming and identifying them and returning their remains. Art. 17 III(g) furthermore obliges the States Parties to compile official documentation of the circumstances and of the cause of death and the destination of the remains, information which, in accordance with Art. 18 I(g), must be made accessible to any person with a legitimate interest. Furthermore, in the Guiding Principles on seeking disappeared persons, the UN Committee on Enforced Disappearances has set up further, more specific recommendations on caring for remains (including their identification) and rights for family members to participate and to obtain information.

In other contexts, obligations constituting a human right to appropriate care for the dead are not explicitly worded in human rights agreements, but are derived from the consequences of other human rights:

- For the context of **displacement and migration**, an analysis carried out by the project by the name of Mediterranean Missing, a co-operation project between the International Organization for Migration (IOM), the University of York and the City University of London, for instance derives from the right to life a responsibility to investigate deaths in order to prevent future deaths. One might also derive from the right to respect for his private and family life, as set out for instance in Art. 8 of the European Convention on Human Rights, specific rights of the relatives, as well as a right to receive information on the whereabouts of the dead, and to have a voice with regard to burial. All in all, the international provisions on human rights in relation to dignified care for migrants who have died is however still assessed as undeveloped and incomplete²³.
- Obligations can also be derived from **freedom of religion or belief** with regard to appropriate care for the dead. Finally, access to places of remembrance and burial, mourning rituals, the form of burial and respect for the peace of the dead are highly significant for many people due to their personal beliefs, and hence for the free exercise of religion.
- The international human rights agreements on the protection of the rights of indigenous peoples, such as the Indigenous and Tribal Peoples Convention, as well as the United Nations Declaration on the Rights of Indigenous Peoples, do not specifically mention the protection of graves and (spiritual) places of remembrance for the ancestors who died from **land grabbing**. Such an obligation is however highly likely to emerge from the provisions on land rights and on protecting the spirituality of the indigenous population. More concrete obligations are stipulated in some national legislation. For instance, the Native American Graves Protection and Repatriation Act was adopted in the United States in 1990.

It comes to note that specific obligations constituting a human right to appropriate care for the dead have been accepted over a variety of areas, in almost identical wording, or at least derived from other human rights. Particularly the need to bury the dead in a dignified manner, and rights of the next of kin to obtain information and to participate, are a recurring element, so that the question can be asked as to whether these are principles which

²³ Grant, Stefanie, Dead and Missing Migrants: The Obligations of European States under International Human Rights Law, IHRL Briefing, 2016, <https://missingmigrants.iom.int/sitreps/dead-and-missing-migrants-the-obligations-european-states-under-international-human-rights-law-ihrl-briefing> [30 October 2023].

lend expression to a lasting legal view, regardless of context, which gives rise to customary international law which is also to be applied in other areas.

Whilst there are significant indications of a corresponding human right in the shape of legal rights for the living, despite ongoing debates on the significance of the postmortal protective effect of the guarantee of human dignity²⁴, one may assume in general that the dead – unlike living individuals – are not right-holders able to assert human rights. It is however worth noting a shifting of emphasis away from this contained in a judgment of the German Federal Court of Justice (*Bundesgerichtshof - BGH*) of 27 July 2017. The Court assesses in the judgment the terms “human being” (*Mensch*) and “person” (*Person*) as having the same meaning, hence also applying the term “person” to dead human beings, and using this expansion in order to designate the failure to comply with obligations under humanitarian international law with regard to the manner in which the dead are cared for as war crimes/crimes against humanity, and to sanction them (BGH 3 StR 57/17).

²⁴ Cf. German Bundestag 2018.

4. Breaches of appropriate care for the dead and their significance – contexts

4.1. War

Whilst the burial and remembrance of the dead constitutes an anthropological constant, concern for those who have *died* in war, and remembrance of them, is a development of modern times which later also includes civilians who have died in war. The “political cult of the dead” (R. Koselleck), which justifies a violent death – in particular in the context of military conflicts, but also in major disasters or accidents – and lends it a higher meaning, becomes a major part of the political culture of modern systems, be they monarchies, republics or dictatorships, and can take on religious or secular forms.

Public tributes afforded for instance by war memorials, state funerals, memorial services and the like however typically entail a process of instrumentalisation. It is therefore not equivalent to the unconditional concern for the individual dead or the personal mourning and interests of the relatives. Public and private compassion may well act in amplifying one another, but may also enter into a state of tension the weaker the ideological unifying power and meaningfulness of the war is, and the worse the conflict parties deal in concrete terms with the dead and their families²⁵.

Humanitarian protection and juridification

Alongside this, however, an increasingly humanitarian approach came to the fore from the mid-19th Century onwards, which aims to provide human dignity, also and particularly in violent contexts. It refers this – in a reciprocal understanding – both to the dead and to the living and the survivors, regardless of their backgrounds, affiliation or conduct during the conflict.

The rules apply today under customary (international) law not only to state stakeholders, but also to non-governmental and civil ones. They are implemented in further protocols, guidelines and directives, as well as in binational war graves agreements and national legislation, and were recently brought together by the International Committee of the Red Cross (ICRC) in the “Guiding Principles for Dignified Management of the Dead”²⁶. They are also applied in cases of disasters or major accidents. They must be complied with as far as is possible in the individual case, which is however subject to interpretation particularly in

²⁵ Ulrich, Bernd/Fuhrmeister, Christian/Hettling, Manfred/Kruse, Wolfgang, Volksbund Deutsche Kriegsgräberfürsorge. *Entwicklungslinien und Probleme*, Berlin 2019, 9 et seq.

²⁶ International Committee of the Red Cross, *Guiding Principles for Dignified Management of the Dead in Humanitarian Emergencies and to Prevent them Becoming Missing Persons*, ref. 4586, 2021.

the heat of the battle, and is frequently contested. The most important principles are as follows:

- to first search for and recover missing persons and their personal effects
- then to manage the body and the personal effects of the dead
- to identify and document their identity and the circumstances of their death, along with securing and investigating the place where they were killed or found, to preserve items of evidence and examine the body. Inappropriate handling of the dead and their belongings, or inappropriate interactions with their families and communities must be avoided.
- If dead persons cannot be identified, they should be safely stored, or buried temporarily in a manner that facilitates their traceability; cremation of unidentified and unclaimed bodies should be avoided
- to ensure that families are fully informed and involved immediately, continuously and with respect
- to establish, preserve, mark and permanently maintain dignified resting places. These resting places need to be accessible to the families, and communities as appropriate.
- to ensure a dignified burial (where appropriate also only provisionally until repatriation) in accordance with religious and cultural practices and personal beliefs.
- to respect the dignity of the dead, their families and communities at all stages and at all times.

There is no question that this development constitutes considerable progress in humanitarian terms, both legally and practically. One might however criticise that a war merely tamed in humanitarian terms by such means may encourage the warring parties to engage in war in an even more intensive manner, since – particularly in democracies – soldiers and their relatives are more likely to be mobilised en masse and for a longer period where there is a promise of minimum humanitarian standards being applied.

Violations and boundaries of humanitarian protection in conflicts

The particular consideration for the dead (as well as for prisoners and missing persons) is by no means a matter of course down to the present day given the ever-present conditions of war, entailing danger, chaos and a lack of resources, and particularly given the mass suffering and death, as well as the propagandistic mobilisation in modern wars. It in fact requires the parties to the war to exercise a considerable degree of circumspection, discipline and effort – not only at leadership level, but particularly also reaching down to the level of the soldiers deployed and the local population. Humanitarian helpers, independent

observers and investigators can provide support in this regard, but they often do not have unrestricted access.

This care becomes all the more precarious where it is also to include combatants or civilians of opposing parties, although conversely this in particular also promises protection of one's own victims who are in enemy hands. As a consequence, it was and is family members in particular, along with humanitarian organisations, who repeatedly call on their own state and military leadership to ensure that all soldiers, that is also enemy prisoners of war and dead, are treated well because they hope that this will help improve the situation of their loved ones if they fall into the hands of the enemy.

There is frequently not even provision for the protection of one's own dead. They too mean an effort for the conflict parties, potential pension entitlements on the part of the relatives, but above all the admission of and enquiries regarding own losses. The number and circumstances of their deaths may provide indications of internal inadequacies in how they wage war, or vis-à-vis their own troops or civilians. War propaganda thus minimises one's own losses and maximises those of the enemy. This may go so far as to systematically conceal or falsify the circumstances of death.

This points to a further interrelationship in caring for one's own and the opposing combatants: The more (un)dignified and (in)transparent the treatment of one's own soldiers and civilians is, the more, or less, there is a risk of attacks on persons on the other side, be they living or dead. What is more, the more (un)dignified the treatment of the living, the more this will also apply to the treatment of the dead and missing persons, and vice versa. In the vast majority of cases, attacks on war dead are also accompanied, or preceded, by crimes against living persons. If, in turn, bodies are placed on display, mutilated, etc., this indicates in most cases such a degree of brutalisation in a conflict that further serious crimes against both the living and the dead will follow.

Such concealment and ignoring of breaches of international law are most likely to be prevented by a critical public and by rule-of-law safeguards. That having been said, knowledge of this is able to motivate strategies, in some cases (such as the US drone war in Yemen) in order to permit only a minimum of public attention and critical observation.

A lack of transparency, propaganda and independent verification

The humanitarian obligations are therefore frequently de facto neglected or deliberately violated when dealing with war dead, as well as with the families. In most cases, this already starts with evidence, documentation and identification of missing persons and the dead being inadequately secured or deliberately falsified, as well as inadequate transparency and cooperation vis-à-vis humanitarian organisations, families and the media, with the latter frequently taking place for propagandistic reasons. The weaker the safeguards that

are put in place by parliaments, the judiciary, the media and a critical civil society, the more likely it is that there will be violations in this regard.

Soviet dead who came back from the war in Afghanistan in tightly-sealed zinc coffins were nicknamed “zinc boys” in the Soviet Union: This meant that their families were unable to be sure or to verify whether the official cause of death was correct, or whether it was the right body at all²⁷ (s. Alexeyevich 1992). This intransparent treatment of one’s own dead, and certainly of the enemy’s war dead, continued in both Chechen wars²⁸.

Informal participation by Russia in Eastern Ukraine from 2014 onwards led to increased indications of the illegal deployment of up to 5-digit numbers of regular Russian troops on the side of the “People’s Republics”, and of thousands of members of these groups having died. There are several documented cases in which the war dead were buried as unknown (in some cases not until later) under no name at all, or under a false name or with misleading information relating to the circumstances of death. Families, journalists and a local politician who reported on the actual deployment of the dead were intimidated. At the same time, large numbers of cases of illegal arrests, abductions, torture and sexualised violence, as well as instances of blackmail and kidnappings of Ukrainian civilians to Russia, have been documented since 2014 for the “People’s Republics”²⁹. Moreover, the intransparent kidnapping and forced adoption of Ukrainian minors in Russia leads to a heightened risk of such people being lost to their families, at the latest in the event of their death.

The very failure to investigate, and spreading disinformation regarding missing persons and the dead, may constitute a major crime of psychological warfare: To this end, the killings or attacks in question do not all have to have taken place in individual cases. In order to demoralise not only families, but also entire communities, it is sufficient for conflict parties to act in a manner that is intransparent in caring for war dead, not to investigate rumours, or indeed to deliberately foment them. The fact that rumours circulate again and again in the context of grievous war crimes and ethnic displacements (e.g. in the context of the wars of destruction mounted by the National Socialists, as well as their massacres against the civilian population to suppress partisan uprisings, or the Yugoslavian wars)

²⁷ Alexijewitsch, Swetlana, *Zinkjungen. Afghanistan und die Folgen*, Frankfurt am Main 1992.

²⁸ Politkovskaja, Anna, *Chechenya. Die Wahrheit über den Krieg*, Cologne 2003.

²⁹ United Nations High Commissioner for Human Rights, *Conflict-Related Sexual Violence in Ukraine*, Country Report, 16 February 2017, https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Report-CRSV_EN.pdf [9 January 2023].

United Nations High Commissioner for Human Rights, *Human rights violations and abuses and international humanitarian law violations committed in the context of the Ilovaisk events in August 2014*, 1 August 2018, https://www.ohchr.org/sites/default/files/Documents/Countries/UA/ReportOnIlovaisk_EN.pdf [9 January 2023].

regarding serious and particularly shameful desecration of corpses, for instance of the bodies of pregnant women or children, points to their potential for social disruption over generations.

This is revealed in the Ukraine war by the reports of mobile crematoria which were allegedly intended by the Russian military leadership to conceal the number and the circumstances of the deaths of Ukrainian civilians, amongst other places in Mariupol, but also of Russia's own losses. Whilst there is no evidence of the former, there are indications that Russian soldiers were already cremated in the Chechen wars.

As a result of the wars in Afghanistan and Chechnia, families came together in well-known networks such as the *Union of the Committees of Soldiers' Mothers of Russia* in order to obtain information regarding the fates of their relatives who had been conscripted, as well as access and any pension or invalidity benefits that might be available. The tightening up of the law in Russia now means that even researching simple facts such as the number of the dead is rigorously prosecuted, and that families are shy of sending enquiries to the authorities, or are even forced to make false statements. Russian and international NGOs and media have nonetheless been able to document via their own research anonymous gravesites and higher losses than those which were officially announced.

A counter development is however shown in the relationship between the Ukrainian Army and civilian society: It too is an institution which is post-Soviet in nature, for which, particularly prior to the beginning of the war, but also after that, cases of corruption, neglect and attacks towards its own soldiers are documented. But there was critical public discussion of the irregularities in the Army, which at the time was badly prepared for the Russian attack. Soldiers and whole units were already equipped and supported at that time by civilian society and industry, a phenomenon which has become much more prevalent still since 2022. At the same time, families' initiatives have been formed which used the growing public awareness to bring about improved conditions for the soldiers deployed and greater efforts to bring about exchanges of prisoners of war.

Such differences between the two parties when it comes to caring for war dead are also revealed in their approach towards independent humanitarian investigation and observation missions. The Ukrainian side for instance granted international investigation teams from the UN, the International Criminal Court (ICC) and humanitarian organisations free access to and support in for instance investigating the attacks in Bucha, whilst Russia has for example continued to the present day to prevent the investigation of the fire in a Russian prisoner-of-war camp in which some 50 Ukrainians died in the town of Olenivka in July 2022, despite assurances to the contrary. Independent experts also presume here that cases of torture and executions have been concealed.

Violations and crimes in caring for the bodies of war dead

Even carelessness or overtaxing may lead to major violations in caring for the war dead, for instance if (perhaps large numbers of) war dead (occurring over a short period) are recovered, identified and buried inadequately or belatedly. Even in classical, well-organised parties to war, never mind when it comes to the informal players in “New wars”, there are times where the skills (for instance in forensics) or capacities are insufficient to recover and appropriately treat all war dead along with their belongings and evidence quickly, properly and comprehensively, at all times. What is more, everyday army life requires not only appropriate guidelines and orders, but in particular also training and an active culture of respect for both the living and the dead, so that the stipulations are complied with by the implementing levels, even in a serious case of more difficult war conditions. That having been said, the parties to the conflict are obliged to provide and implement all necessary structures and measures, particularly also when it comes to the challenging conditions pertaining in a war.

Furthermore, individual soldiers regularly commit isolated transgressions in the course of a conflict which contradict the actual orders given and the practice of a party to the conflict, such as happened with several soldiers of the German Federal Armed Forces in Afghanistan in 2003, who posed with a skull (of an older body not connected to the current conflict), and were disciplined for doing so. Escalative group dynamics at the level of individual units may also lead to direct crimes being committed subsequent to serious own losses, or to attacks that they themselves have suffered or which are rumoured to have taken place. Such attacks can quickly become the norm if they are not sanctioned, and failing external verification.

It may also form part of a targeted war strategy, in breach of international law, to systematically place war dead on display, to ridicule them, to steal from them and to misuse them for propaganda purposes, going so far as to mutilate and commit sexualised violence on bodies (cf. victims of the summary courts of the National Socialists who were hanged in public with propaganda messages, attacks on bodies of both parties in the Vietnam war, or the propaganda of cruelty of the so-called “Islamic State”). This takes place less frequently on the basis of corresponding orders, but mostly in the shape of a form of informal judgment at command level.

There are also many images of bodies of both parties to the conflict in the Ukraine war circulating in social networks in violation of the principle of protection against insult and public curiosity. An information portal operated by Ukrainian authorities containing images of alleged Russian war dead, enabling them to be identified by their families and with digital methods, is also partly in breach of this principle, and was furthermore criticised as constituting political instrumentalisation, given that it is the bilateral contact points and the

International Committee of the Red Cross (ICRC) which are responsible for transmitting such sensitive information via confidential channels.

Independent investigations in Bucha in the spring of 2022 confirmed that 458 bodies were found lying openly in the streets or hidden in buildings and wells weeks later. 419 of them showed signs that the individuals had been shot, tortured or struck dead. Some of the bodies had also been burned, possibly in order to destroy evidence. Some of the dead had been taken away from their families immediately before they were killed, providing no information or giving false information to their families³⁰. More than 400 unsecured, unlabelled graves were discovered in Isjum near Charkiv in September 2022 after the Russian withdrawal. Many of the bodies showed signs of torture and arbitrary executions. There have been similar reports from other places such as Mariupol or the region around Charkiv³¹, in addition to reports and video recordings under the Russian occupation, independently verified in some cases, of mutilated bodies that had been put on show, as well as some cases of booby-trapped bodies.

These attacks aim to create insecurity and intimidation among enemy combatants and civilians in the area immediately affected by the war, but also among families further away and in the public. Similar to sexualised violence, particular taboos attach to the disparagement and mutilation of the dead. Frequent, open attacks observed by defenceless civilians or also imprisoned soldiers threaten to demoralise not only those concerned, but indeed whole communities. They are therefore frequently part of ethnic cleansing and genocidal crimes.

4.2. Enforced disappearance

“Disappearance is worse than death; it’s more painful, believe me.”³²

The mother from the Mexican State of Guanajuato who said this knows what she is talking about. Her other son died seven years previously in an accident, and she thought at the time that it was the worst thing that could happen to her in her life.

We, as outsiders, even as advisors offering solidarity, are not entitled to judge comparatively on the severity of different human rights crimes, be they torture, murder, enforced

³⁰ United Nations General Assembly, Independent International Commission of Inquiry on Ukraine – Note by the Secretary-General, A/77/533, 18 October 2022, <https://documents-dds-ny.un.org/doc/UN-DOC/GEN/N22/637/72/PDF/N2263772.pdf?OpenElement> [9 January 2023].

³¹ United Nations High Commissioner for Human Rights, Killings of civilians: summary executions and attacks on individual civilians in Kyiv, Chernihiv, and Sumy regions in the context of the Russian Federation’s armed attack against Ukraine, 7 December 2022, <https://www.ohchr.org/en/documents/country-reports/killings-civilians-summary-executions-and-attacks-individual-civilians> [9 January 2023].

³² “Disappearance is worse than death; it’s more painful, believe me. I know what I’m talking about, my son died in an accident...” (testimony of a mother from: Plataforma por la Paz y la Justicia en Guanajuato, Reencontrarte en la vida, 2021).

disappearance or others. What the mother from Guanajuato says does not however stand alone. The agonising consequences of uncertainty, of not knowing the fate of a “disappeared” person who has been abducted or kidnapped, for the families and others who are close to them, can be heard in all places where enforced disappearance has become a terrible practice. And it was this desperation, this special pain, which refused to heal, even years later, which in some countries, primarily initially in Latin America, led to those concerned also giving the crime a special name. They spoke of the victims as “detained-disappeared”, and of the underlying crime as “enforced disappearance”.

It was the families who not only found a name for the method, which had previously not been known in Latin America at least on so massive a scale, of silencing political opponents and terrorising society as a whole, but also created a place in the public awareness for the fight against enforced disappearance with their unceasing public campaigning and demands of “Where are they?” or “You took them away alive, and we want them back alive!”. And soon there was also a new legal term and there were new human rights standards to combat enforced disappearance. If we take a look at the major human rights documents of the post-War period such as the Universal Declaration of Human Rights, or the Genocide Convention of 1948, but also decades later in the International Covenant on Civil and Political Rights, we will find no mention of enforced disappearance. In fact it was only the mass occurrence of enforced disappearance as a deliberate strategy of state repression from roughly the seventies onwards in Latin America, and the victims’ courageous, unceasing accusations against it, which led courts and international human rights agencies such as the UN to develop a separate legal definition for the phenomenon of enforced disappearance.

The Inter-American Court of Human Rights formulated in 1988 the world’s first judgment on a case of enforced disappearance in which the term (“forced disappearance”) was also explicitly used. Since however such an offence did not yet exist in any legal act, the court described it as a “multiple and continuous violation” of many rights guaranteed in the American Convention on Human Rights, in particular of the right to life, to protection from arbitrary deprivation of liberty, from torture, and from other forms of cruel treatment. The Court hence also found that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being” (Inter-American Court of Human Rights: Case of Velásquez-Rodríguez v. Honduras, Judgment of 29 July 1988, Par. 156).

Resolutions and conventions were adopted in the years that followed this landmark judgment in both the Inter-American system and in the system of international human rights protection which defined the crime of enforced disappearance more precisely, and also

took a closer look at the families of the disappeared. The Working Group on Enforced and Involuntary Disappearances (WGEID), which the UN established as long ago as 1980, was thus also given a foundation on which to work, safeguarded under international law, as also applied with the Inter-American Commission on Human Rights. In 2006, finally, the UN adopted the Convention for the Protection of All Persons from Enforced Disappearance, which came into force in 2010 and – as of May 2024 – has been ratified by 75 states.

A two-fold obligation incumbent on the states which complies with the core demands of the families is already stated in the Velásquez-Rodríguez judgment, and can furthermore be regularly found in the other legal documents on enforced disappearance: ascertaining the fate of the disappeared person, and establishing his or her whereabouts. Art. 24(2) of the UN Convention reads as follows: “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.” The investigation of the individual’s fate therefore logically includes clarifying who is responsible for the enforced disappearance. For the families, this right is frequently not primarily a matter of calling to account these responsible parties under criminal law – this consequence is a matter of course, and is anchored in the Convention, as it is in all other relevant agreements. Investigation of the fate however means more for the families: They also wish to understand how the enforced disappearance could take place, what motivated the perpetrators to commit the crime, whether it might perhaps have been possible to prevent it, and much more besides. These are also such burning issues because the families frequently need to defend themselves against the blatant or latent accusation that the victims themselves were responsible for their fate, or that they had at least contributed towards it. Defending oneself against the stigmatisation which this involves is one of the most important goals of the many organisations of disappeared persons’ family members, as has been documented in a recent study by the Jesuit University of Guadalajara in Mexico³³. It is therefore a major demand that the investigation of the “fate” of the disappeared not be limited to identifying the perpetrators, but that it should be in line with this integral understanding.

The obligation to clarify the whereabouts of the disappeared person is the most important of all for many families. The call of “Where are they?” can be heard everywhere relatives of the disappeared come together. But especially this demand is in most cases the one which is least heard by the states in question. Unfortunately, the legal norms also pay greater attention to the obligation to investigate and punish the perpetrators than to the

³³ Centro Universitario por la Dignidad y la Justicia “Francisco Suárez SJ”, *Nadie merece desaparecer*. Diagnostic of the stigmatisation of victims of disappearance, their families and the organisations guiding them, Guadalajara (ITESO) 2022.

obligation to seek for those who have disappeared. This also applies to the most advanced, most victim-orientated instrument, namely the International Convention of 2006, which lists in detail the obligations incumbent on the states to investigate and punish the crime, whilst the obligation to seek the disappeared persons is mentioned, but is much less systematically developed. The Committee on the Convention (CED) therefore adopted in 2019 “Guiding principles for the search for disappeared persons” (UN Document CED/C/7) which formulate the right of the victims to be searched, and describe in detail the concomitant obligations that are incumbent on the states, including the right of the family members to take part in the search. A major barrier to an effective organised search here is frequently the exclusive orientation of the investigating authorities towards detecting the perpetrators. It is still difficult in many countries to also impose on them an obligation to find the disappeared person, or at least to ascertain his or her fate in detail. At least Mexico for instance now also has supreme court rulings in this vein. The draft of the new Constitution of Chile, which recently unfortunately failed, in fact provided for a constitutional right according to which “each victim of enforced disappearance shall have the right to be sought for and for the State to provide all resources needed to this end.” (Art. 22). Despite the failure of the referendum on this new Constitution, Chile too is currently undertaking renewed efforts, this time more systematic, with a national plan to attempt to establish the whereabouts of hundreds of disappeared persons from the time of the dictatorship for whom the families are still looking in vain. Similar programmes, aiming exclusively to seek the disappeared persons and unconnected with the criminal prosecution authorities, have also been established in recent years in Mexico, Columbia, El Salvador and Peru. They reveal a growing awareness of the urgency of the search, as well as of the State’s obligation to participate.

These institutions for seeking, which are separate from the judiciary, are however only a step in the right direction, and above all they are unable to absolve the judiciary of its obligation for its part to also investigate all circumstances of enforced disappearance, including establishing the whereabouts of the disappeared person. The search commissions are suited above all to remedy a problem occurring in the criminal investigation of enforced disappearance: True, enforced disappearance, as also confirmed by the UN Convention (Art. 8), is to be treated as a crime which continues until the disappeared person has been found, which has consequences amongst other things for the statute of limitations. Proceedings are nonetheless terminated by the criminal prosecution authorities if either a perpetrator is brought before a court, or if they reach the conclusion that any further investigations would be fruitless. The end of the criminal proceedings however also means an end to efforts on the part of the judiciary to seek the disappeared person. This consequence is exactly what is ruled out in the independent search commissions, which are orientated by the tenet contained in UN Guiding principle 7 (“The search is a continuing obligation”).

There is however no systematic reason why this right of the disappeared persons themselves and their family members could not or should not also be guaranteed by the investigating and judicial authorities. There is a need and an opportunity to work on this. One example that this is indeed possible is the Colombian Special Jurisdiction for Peace (Jurisdicción Especial para la Paz – JEP), which works closely with the independent search commission.

Both the investigation of the perpetrators and of their motives, and finding the disappeared person, belong together, as formulated by the Preamble to the UN Convention “Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.” The Convention hence reminds us of the origins of the now well entrenched “right to know the truth” as a very concrete right of the victims of enforced disappearance which was then gradually expanded and made more precise.

4.3. Displacement

The Office of the High Commissioner for Refugees (UNHCR) estimated at the end of June 2023 that 110 million people were displaced. This is more than twice as many as ten years previously. Roughly 36.4 million of them were international refugees. They are particularly vulnerable in many respects, and are subject to multiple dangers: They suffer physical injuries, sexualised violence, psychological traumas, and much more besides. Large numbers of them die on their displacement routes. The precarious position which they had during their lives (with regard to their legal status, among other things) continues beyond death.

This applies to all people who die en route, and this is especially revealed when it comes to the dead in the Mediterranean (and the Atlantic). A place of longing and a holiday destination for many people in Germany, the Mediterranean has become a stage for violence in the present day. The European Union accepts the fact that people drown in the Mediterranean when trying to get to Europe. At the same time, the topic appears to be strangely distanced from the public perception.

The UNHCR estimated that at least 1,940 people died or went missing when trying to cross the Mediterranean or the Atlantic (to the Canary Islands) in 2022; 150,177 reached the countries bordering the Mediterranean. Most crossings take place in overcrowded, unseaworthy (inflatable) boats, many of which capsize or spring leaks. The danger also exists on the

long, dangerous route from West Africa to the Canary Islands that boats come off course and disappear without a trace³⁴.

This situation is a product of European migration policy. It is the other side of the coin of Europeanisation and a borderless Europe on the inside, on which the Schengen Agreement is founded³⁵: As the internal borders were done away with, the external borders became all the more significant, the protection that they provide against irregular crossings is becoming increasingly significant, and considerable effort is being invested in their operation. This effort has also been externalised to some degree, and this process is continuing: West and North African countries have been involved in the management of the external borders since the 1995 Barcelona Process; the most recent agreement of this kind was concluded with Turkey in 2016. There was a short-lasting phase of humanisation in parallel to these externalisation strategies, which shift border controls to the other side of the border. In the mid-2010s, a number of shipwrecks, some of them causing the deaths of hundreds of migrants, attracted media attention. In July 2013, Pope Francis threw a wreath into the sea near Lampedusa in memory of the migrants who had died in accidents on their crossing of the Mediterranean. In particular, a shipwreck off Lampedusa in October 2013, in which at least 366 people died, marked a turning point in the public perception which changed the public debate (temporarily) and placed the focus on saving people's lives in the Mediterranean. In political terms, this phase was expressed in *Mare Nostrum*, an Italian marine operation which ran from October 2013 to October 2014 and prioritised maritime rescues. The late summer of 2015 formed the climax, and at the same time the end, of the phase of humanisation, when large numbers of displaced persons were received in Germany and other countries. This was also not changed by the many shipwrecks which followed, and also not by another accident off Lampedusa in which almost 1,000 people died in 2015.

There has been a further shift in the border regime. The term "securitization" suggests that securing the borders (and hence the promise of security in the countries of the EU) is becoming more significant, and is increasingly exercised by the EU by military means. One example of this is the shift in the debate on maritime rescues, which still appears to be a dictate in the "humanitarian phase", but has been increasingly criminalised in the interim period.

³⁴ Cf. United Nations High Commissioner for Human Rights, *Zahl der Todesfälle bei Meeresüberfahrten steigt dramatisch*, 29 April 2022, <https://www.unhcr.org/dach/de/76575-zahl-der-todesfalle-bei-meeres-uberfahrt-steigt-dramatisch.html> [30 October 2023]. After a peak in the number of crossings and deaths was observed in 2016, both figures fell, but they have been increasing again since 2020.

³⁵ Cf. on the following paragraph: Becka, Michelle/Ulrich, Johannes, *Europa an der Grenze. Zu Ambiguität und Dynamik europäischer Grenzregime*, in: *Concilium* 2/2021, 51–59.

This policy, and the lack of legal opportunities to immigrate – at the same time as considerable pressure to emigrate caused by civil wars or a lack of prospects in life – drives people to embark on the dangerous displacement routes. Their death is accepted.

We are dealing on this route alone – and one might add many other potentially deadly displacement routes – with more than 2,000 people per year whose families often do not know whether they are alive or dead; bodies which are washed up on European islands or on the mainland, most of which cannot be identified; and added to these are the many bodies which are never found. It is impossible for them and their families to receive the rituals and practices involved with death in the life of the community in cultural and religious terms, as well as forms of farewell.

A fundamental problem (which brings others along with it) is anonymity. Most die nameless: It is rare to be able to identify the bodies which have been washed up. The consequence of this is that those who are seeking them are unable to find them. If no name serves as a remembrance of them and the place where they are buried, the bond between them and their families is severed. For this reason, the Italian missing persons authority launched a pilot project after the Lampedusa shipwreck. Together with LABANOF, the University forensic laboratory in Milan, efforts were commenced to identify the 366 dead. The project was led by forensic expert Christina Cattaneo. The work was made more difficult in many respects, for instance by virtue of the fact that it was almost impossible in this case to work with DNA detection: Most of the dead in this accident were from Eritrea. It was difficult, or even impossible, to establish contact with the country to make DNA comparisons: Because emigration is considered undesirable, enquiring of the families would place them in danger. Identification was therefore carried out in a much more difficult manner, by recording as many characteristics as possible. “I don’t know exactly why, but the personal effects shook me even more than the faces. Maybe that has something to do with the fact that they reflect their last acts, their last decisions. Or it has something to do with the fact that a face clearly belongs to someone else, whilst many of the objects could also be ours.”³⁶ It is laborious to identify an individual by these means. It is also made more difficult by the fact that there is no European network. This work needs to be done in order to give people back their names, not to bury them as numbers. “People believe that it is important to give the dead a name out of respect for remembrance. This is part of our DNA. But that’s not all: The dead also need to be identified for the living. This is the right of the living. And this is something which Europeans and also Europe should understand.”³⁷

³⁶ Christina Cattaneo in: Ernst, Sonja, *Die Toten im Mittelmeer. Christina Cattaneo gibt den Menschen ihre Namen zurück*, Deutschlandfunk, 20 July 2020, <https://www.deutschlandfunk.de/die-toten-im-mittelmeer-christina-cattaneo-gibt-den-100.html> [30 October 2023].

³⁷ Cattaneo, ebd.

Considerably more funds would however have to be made available in order to make this possible on a larger scale.

It is not always possible to dispel anonymity. The Italian NGO “Mediterranean Hope” tries to give people their dignity back, even without knowing their names. They try to nonetheless reconstruct their stories and to put together indications of their identity, even when these may frequently be somewhat thin on the ground. And they create places of remembrance which nonetheless raise gravestones out of arbitrariness through art and symbols, even if no names can be named. Death is given a symbolic, ritualised framework; it is placed on a cultural stage; the NGO does this in a kind of proxy position. As with attempts at identification, these efforts are also concerned to view dead bodies as people; people who have a story and families who are seeking them and would at least like to have the opportunity to grieve.

Whilst the initiative of the Italian missing persons authority in collaboration with LABANOF is a positive example of giving people back their names, this is not done in many other cases. It is not possible in some cases to recover the bodies (or even the locations are unknown), whilst in some instances no efforts are even made in this direction. A representative of Mediterranean Hope said in this regard: “If these were white bodies, they would try to recover them.” The work that this NGO is doing for the dead makes it clear what is wrong with the way in which the living, that is migrants, are being treated. Discrimination continues beyond death. Rights which are accorded to some – in this case dignified care of the body and the rights of the families – are denied to others.

Attempts to identify the bodies, or the work of Mediterranean Hope, are an expression of respect, to which all people are equally entitled. They are attempts to afford to the deceased respect for dignity and the right of personality which continues beyond death, and which is being denied them. It is always also the next of kin who are affected here. The uncertainty among the next of kin is similar to that of the families of victims of enforced disappearance. The lack of an opportunity to say farewell, and have a burial, makes it impossible to deal with a death of which there can be no certain knowledge, and which nonetheless poses a burden on the families and on the community.

What is more, there are consequences for society which are rarely discussed, but which are nonetheless far-reaching. This applies, firstly, to those societies from which the people originate, which must live not only with the consequences of emigration, but also with uncertainty as to whether or not those who have emigrated are alive.

This however applies, secondly, to European societies: What does it mean if one’s own security, or rather the promise of security, is built on people’s deaths? It is accepted for people to die in order not to endanger one’s own standard of living, whilst at the same time information on this is suppressed. It also violates the frequently-invoked European values

because these practices reveal that dignity and equality do not apply equally to everyone in practice after all. Accepting displaced people's death as a result of European border policy means that talk of European values rings hollow. And indifference, if not actually as manifest as in the case of enforced disappearance, is also a form of exerting power. Power asymmetries are consolidated if a situation is tolerated in which people cannot even be mourned over. It is in denying the opportunity to mourn that "the others" also deny fundamental recognition as human beings.

5. Systematisation and conclusions

The altered perception of death in our society – as a result of crises and wars – draws greater attention to zones and forms of dying and death which are certainly not new, but which mostly remain in the dark, are kept secret, or are suppressed. The manner in which the dead are cared for shows the degree of humanity or inhumanity of a society: Dignity and the rights of the dead are at stake, as are those of the next of kin – and with them humanity and the legal standards of society. In other words, it is a matter of how the vulnerability of human life is taken into account, how new challenges are perceived and are ethically and legally answered in society in this context.

We find that the normative categories of human dignity and (human) rights with regard to caring for the dead are appropriate, and that this relates to the dignity and rights of different players. **Caring for the dead** in a manner providing for human dignity is important for the next of kin. Denial of care for the dead that is appropriate to dignity – e.g. by means of enforced disappearance, desecration of graves or bodies, enforced uncertainty with regard to a person's fate – violates their integrity, and deprives the next of kin of the possibility to make their peace with the loss of a person close to them. Guaranteeing the peace of the dead and the possibility to remember the dead in rituals, in community and at specific places, are two sides of the same coin – both acknowledge the dead and are at the same time a right of the living.

With regard to the (disputed) **period of validity of the status of dignity** of a person, we presume that human life is generally ethically indisposable. It gives rise to a **right to protection, as well as to respect for deceased human life**, albeit this status is not to be equated with reciprocal rights of protection between living people. This claim is supported by legal rights. Examples are the right to take care of the dead and the protection of an individual's personal image.

The manner in which the dead are cared for is **relational**, and ties the next of kin with their dead, as well as inter se. This becomes particularly clear in religions and rituals, and at the same time is linked to an interpretation of death which takes the integrity of the deceased and the relationships with them beyond physical death by embedding them in the relationship with God – as a guarantor of a life after death.

Caring for the dead in a suitable manner relates to their indisposability, and at the same time to the rights of the living. Social forms of caring for the dead ultimately reflect the moral level of a society, or of those in power there. In a nutshell: The status of dignity and (human) rights in a society is (also) shown in the manner in which the dead are cared for. The relationship between the living and the dead can be misused. By ignoring or denying rights of the dead to be treated in a dignified manner, the relationship between the living

and the dead is disturbed, or even destroyed. The dead individual is degraded to an object of power and arbitrariness: By subjecting him or her to violence, or denying the care due to him or her, he or she is simultaneously misused as an instrument with which to do harm to the living, that is to the next of kin. This undermines mutual respect in society, launching or maintaining a dynamic of dehumanisation.

Concrete form was given to the fundamental considerations in three **fields of action** which investigated in greater detail the experience of the denial of protection of dignity and of the struggle to restore dignity: war, enforced disappearance and displacement. Over and above all the differences, they reveal **inter-contextual problems** in the manner in which the dead are cared for, and agreement as to the question of who has been tackling these problems in the past:

- They reveal **unbearable humanitarian situations** in the politics of the contexts that have been investigated. By disrespecting the minimum standards of humane treatment of war dead (both of dead soldiers and of civilians), they are deliberately made objects of arbitrary violence and demoralisation of the living; by denying due assistance (maritime rescue), and by actively applying force (enforced disappearance), it is accepted that large numbers of people die early, or this is even deliberately brought about.
- They violently create **enforced uncertainty regarding individuals' whereabouts** – be it because of dangerous displacement/migration routes, because of state power, for instance as a result of covering up, concealing, hiding or burning the dead in a war – with the consequence that the dead are not found, or are not identified, their death remains unknown or nameless/anonymous, people cannot bury and mourn their dead or missing relatives, the life of many next of kin is subject to extreme strains as a result of the ongoing uncertainty, and families are destroyed.
- The commitment to the **investigation of such unbearable situations is primarily carried out by relatives and/or non-governmental initiatives, in most cases with a high degree of professionalism**: This applies to the search for the missing/disappeared, to recovering and identifying the dead, to establishing contacts with relatives, to burial if it is impossible to repatriate the bodies, and/or to ensuring a (place of) remembrance.
- The commitment of NGOs is also related to (and is as a rule a precondition for) the **public perception** of the scandalous situation, and ensures that public authorities might take steps where appropriate to restore the dignity of the dead/missing/disappeared persons, as well as that of the next of kin and their supporters. Those with a voluntary commitment hold up a mirror to their own societies and those holding political responsibility there by pointing to circumstances which are unacceptable

in human and human rights terms, and in the most favourable case awaken a willingness to engage in a commitment, and in solidarity and protest.

- **State structures and instruments for the legal processing** of the situations which have been illustrated are frequently **poor**, be it because of the lack of a political will, or due to a lack of resources (for instance forensics in Columbia). Effective action is frequently preceded by pressure emanating from civil society.

These problems show a need to take action. One might summarise that appropriate care for the dead is contingent on respect for the **indisposability** of the dead; the fact that the **relationality** between the dead and the living is taken into account and the rights of the living which can be derived from this are respected; the fact that responsibility within society for ensuring appropriate care for the dead is acknowledged; that their significance is understood as a **yardstick for the humanity** of a society, but also as the basis for peace and reconciliation and integral human development.

Ascertaining the truth, promoting justice, and respect for the following fundamental rules for action, may help resolve the problems:

- recognition of the universality of the human right to appropriate care for the dead;
- respect for the personality of the dead, as well as for the needs of mourners;
- opening up spaces for mourning, remembrance and addressing death and dying.

There is a need to lend concrete shape to these general rules in different fields of action. The following proposals are made to this end.

6. The need for political action

The following section outlines recommendations for measures that should be implemented in order to overcome deficits with regard to the appropriate care for the dead and to promote the appropriate care for the dead. To make the recommendations as specific as possible and to define responsibilities as precisely as possible, the recommendations for action are focused on a single country context: the context of the Federal Republic of Germany. The development of comparable recommendations for other country contexts in the future would be desirable.

We can see an urgent need to create an awareness of the topic as a political task, and to call for the implementation of existing standards of (international) law. We consider it to be necessary both at the level of national policies in the respective countries, in bilateral international cooperation, at the levels of the European Union, and in the international community, to safeguard the concrete conditions for caring for the dead in a manner which reliably respects dignity, and to step up efforts to guarantee these conditions in practical terms.

6.1. Forming awareness

As Christians, we are obliged to respect human life. This includes taking care of the dead in a dignified manner. Because this connection cannot be taken for granted, and because we are convinced that people of faith and the Christian community of faith are particularly called upon to enforce this right to receive respect, the authors would like to make a contribution with this publication, and over and above this to help create an awareness. We consider that further action needs to be taken in order to create an awareness.

Awareness formation is connected to commitment: Today it is above all actors from civil society who are making a major contribution towards facilitating dignified care for the dead, competent care for the next of kin, and an appropriate culture of remembrance: The German War Graves Commission (*Volksbund Deutsche Kriegsgräberfürsorge*) for instance is committed to appropriately caring for the victims of wars. The International Committee of the Red Cross is also committed to identifying the dead and to finding missing persons. Human rights networks such as the Colectivo Sociojurídico Orlando Fals Borda in Columbia and the Centro de Derechos Humanos Miguel Agustín Pro Juárez in Mexico are actively engaged in combatting the crime of enforced disappearance, and support relatives in their search. The church organisation Mediterranean Hope and the Forum Lampedusa Solidale residents' initiative care for deceased displaced persons; the NGO Deathcare ensures that those killed as a result of natural disasters are recovered, and provides support to the families of the dead. Committed individuals also provide assistance in some cases. These and

the many other important initiatives need to receive support and encouragement. Awareness creation needs knowledge. A number of questions require both clarification within society, and more intensive research, such as what psychosocial questions result from inappropriate care for the dead.

The media can help ensure that this important matter receives support. They can produce documentation and discussion contributions on the various facets of the topic and post them prominently in their presentations³⁸. Religious and political education work should also integrate a conversation on the significance of appropriate care for the dead.

6.2. A (human) rights, humanitarian and socio-political desiderata at national level

6.2.1. Burials

The major challenge at national level is to guarantee appropriate care for the dead, also against the background of a changed society. Migration and secularisation have led to greater variety in the spectrum of religious ideas and beliefs. This also needs to be appropriately taken into account when it comes to burials:

- There is a need to take different religious and philosophical ideas (and hence also freedom of religion or belief) into account.
- There is a need for places where the members of different religious communities and beliefs can bury their dead in accordance with their beliefs, and there is a need for cultural sensitivity and awareness among those working with burials.
- It is a task of civil society and of a state based on the rule of law to counter racist, anti-Semitic and Islamophobic attacks on graves.

6.2.2. Socio-political responsibility

The Federation (*Bund*), the Federal States (*Bundesländer*) and the municipalities have a particular responsibility vis-à-vis the next of kin of the victims of violence and people with a displacement or migration background who die far from home (alone):

- It must be ensured that the next of kin of victims of violence receive competent psychosocial care.

³⁸ Examples here include the documentation “#387” (<https://javafilms.fr/film/387/>), the documentation “Namenlose tote Flüchtlinge” (<https://www.arte.tv/de/videos/104430-012-A/re-namenlose-tote-fluechtlinge/>), and the podcast entitled “Die namenlosen Toten vom Evros” (<https://www.ardaudiothek.de/episode/11km-der-tagesschau-podcast/flucht-die-namenlosen-toten-vom-evros/tagesschau/12364623/>) on the manner in which displaced persons who died as displaced persons are treated, and the Tagesschau.de article “Bilder, die nicht mehr aus dem Kopf gehen” about the work of the NGO Deathcare after the major earthquake in Turkey (<https://www.tagesschau.de/ausland/deutsche-helfer-tuerkei-erdbeben-101.html>).

- If people with a displacement or migration background die without any family in Germany, surviving family members abroad should be identified and informed where possible.
- Humanitarian rules should be established with regard to the question of the repatriation of the dead (if the next of kin so desire), and how such repatriations are to be funded.
- There is furthermore a need to ensure that other burials are carried out (including those carried out by public authorities)³⁹ with dignity and without time pressure, for instance if the families do not have money to pay for the burial, or if no relatives attend the burial.

6.2.3. A culture of remembrance

Ensuring that there is an appropriate culture of remembrance, and remembrance work, is a central contribution towards a dignified society. The Federation, the Federal States (*Bundesländer*), the municipalities and civil society bear responsibility here.

- The significance of care for the dead of war and tyranny should continue to be taken into account, particularly in the shape of historical and political education work which investigates the history of violence and the biographies of the dead. The Federal Republic of Germany has a historic responsibility over and above the obligations into which it has entered under international law for all victims of World War II which was launched by National Socialist Germany, and for the crimes committed against personality in Germany and elsewhere.
- Occasions for remembrance such as remembrance days or Holocaust remembrance must continue to play a key role. This requires contemporary formats to be developed which relate to today's society with its very different experience, for instance stories of migration and displacement.
- Political education and human rights education, which creates an awareness of (international) problems with regard to appropriate care for the dead, should be promoted.

³⁹ If no relatives of the deceased are available or can be identified, no funeral arrangements have been made and no one else takes care of the funeral, in Germany a funeral is organised by the public authorities. In German, such funerals are called "*ordnungsbehördliche Bestattungen*".

6.3. The responsibility of the Federal Republic of Germany for (worldwide) respect for human rights

Human rights apply worldwide. The Federal Republic of Germany should also take on a leading role internationally in working for appropriate care for the dead, and against breaches of this right:

- The Federal Republic of Germany should consistently apply existing conventions (such as the Convention on Enforced Disappearance), and take account of the international recommendations (from the Committee on Enforced Disappearances – CED, Universal Periodic Review – UPR, etc.). It should ensure that the investigation is not halted by the lapse of the period of limitations.
- In the context of international relationships, the Federal Government and Members of the German federal parliament (*Deutscher Bundestag*) should specify breaches of appropriate care for the dead (e.g. violent enforced disappearance, deliberate destruction of graves, blocking access to graves) as such, and should condemn them.
- The search for missing persons, as well as processing and preventing appropriate care for the dead, should be promoted in the context of public and church development cooperation. Those governmental institutions should be promoted as part of official development assistance (ODA) which help seek missing persons (forensics, public prosecution office, special search units), and in doing so should comply with the Guiding principles for searching for disappeared persons. Civil society stakeholders who take up a commitment in this field must receive effective support.
- In line with the International Convention for the Protection of All Persons from Enforced Disappearance, enforced disappearance should be included as a separate offence in the German Criminal Code (*Strafgesetzbuch – StGB*).
- The provisions contained in the German Code of Crimes against International Criminal Law (*Völkerstrafgesetzbuch – VStGB*) with regard to enforced disappearance should be adjusted in line with those of the International Convention⁴⁰.

⁴⁰ In particular with regard to the unambiguous principle contained in Art. 12.2, namely that an investigation is also to be undertaken even if there has been no formal complaint, section 7.7 of the Code of Crimes against International Criminal Law should be appropriately adjusted. In the same vein, the definition of the crime contained in the clause “that he or she, with intent to remove him or her from the protection of the law for a prolonged period,” in section 7 should be adjusted in line with the provisions contained in the International Convention. The Convention acknowledges that each enforced disappearance implies withdrawal of the protection of the law, and that no particular intent is needed in this regard, which in any case could hardly be proven via evidence, in order to qualify for the offence. The restriction “for a prolonged period” is also not in line with the Convention, given that the latter does not provide for a time dimension when it defines the crime. On the contrary, the Committee explicitly found in the case of “Yrusta v.

- It should be examined whether an EU Directive can be initiated setting minimum standards for appropriate care for deceased displaced persons.
- Existing (humanitarian) obligations in the context of sea rescue, in particular in the work done by Frontex (cf. Fundamental Rights Strategy, para. 12; Frontex Code of Conduct) should be consistently implemented.
- The legal, political and administrative responsibility for the recovery, identification, repatriation and burial of people who have drowned in the Mediterranean should be clarified.
- The humanitarian obligations vis-à-vis displaced persons in the EU must be implemented. In place of shifting responsibility at the expense of people in need, there is an urgent need for solidarity with the countries bordering the Mediterranean.

The human right to appropriate care for the dead should be acknowledged regardless of context in a Resolution of the UN Human Rights Council.

6.4. Areas of action for the Church

Religious communities, and here the Catholic Church in particular, are also called upon to make a contribution towards appropriate care for the dead:

- The Church in Germany should critically observe problematic tendencies such as the commercialisation of burials and the large number of burials without relatives caring about the deceased (*ordnungsbehördliche Bestattungen*), and should develop solutions aimed at countering these developments.
- Dioceses and parishes, and their leaders, should show interreligious solidarity, and should very sharply condemn anti-Semitic, racist and anti-religious attacks on Jewish and Muslim graves.
- The Churches should demonstrate interreligious solidarity in debates on the reform of the law on burials in order to also enable burials to take place in Germany which do not correspond to a Christian perception of faith (for instance according to the Islamic rite).
- Solidarity can also be expressed by making vacant cemetery space available for use by other religious communities.
- The Church can and should help create an awareness of violations of appropriate care for the dead worldwide. Catholic academies (*Katholische Akademien*), schools,

Argentina” that enforced disappearance is defined in terms of the intention to conceal a person’s whereabouts, but not the duration of the enforced disappearance (CED/C/10/D/1/2013).

adult education and church media, as well as the theological faculties, can play a major role here.

- Qualified pastoral work can not only provide next of kin who are affected by violations of appropriate care for the dead with comfort, but also take away fears, for instance if the next of kin are afraid for the salvation of the dead on the basis of their beliefs because it is impossible to find their bodies whole.

Church development cooperation at international level is already making major contributions, together with other humanitarian aid organisations, in civil society self-organisation (self-organisations of family members, psychosocial support, legal aid and monitoring of state actions and advocacy work to deal with abuses). This should be acknowledged and stepped up.

The Church can help ensure that the violent past is addressed in a constructive manner, and work towards reconciliation. Depending on the context, Church stakeholders may also play a mediatory or supportive role here. This is however contingent on any mistakes and guilt being acknowledged on Her part.

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