

International Committee of the Red Cross Missing Persons Project
Draft Guiding Principles for the Dignified Management of the Dead in Humanitarian
Emergencies and to Prevent them Becoming Missing Persons | March 2021

Opinion by Antoon De Baets | 17 April 2021

Dear members of the ICRC Missing Persons Project,

Only recently did the *Guiding Principles for the Dignified Management of the Dead in Humanitarian Emergencies and to Prevent Them Becoming Missing Persons* come to my attention. My apologies for replying so late past the deadline.

In the past quarter of a century, I have published several essays on the duties of the living to the dead and currently I am writing the first chapter of Roberto Parra & Douglas Ubelaker, eds., *Anthropology of Violent Death: Theoretical Foundations for Forensic Humanitarian Action* (Hoboken NJ: Wiley, 2022), entitled *The Posthumous Dignity of Dead Persons*.

Although the following comments are largely philosophical with probably minor impact, if any, on your draft text, I thought they may be of some help to you.

1. In philosophical terms, your central maxim “Respect due to a human being does not cease with death” (Preamble recital 4) means the following: The dead are not human beings or persons, but *past* human beings or *past* persons. This means that the dead have neither full nor residual human rights (and even no rights at all). The fact that the dead do not have (human) rights does not exclude that the living have duties to the dead. The opposite is true for the fundamental reason that the dead possess dignity. This dignity of the dead cannot be human dignity (because the dead are not human beings); it is a cognate form of dignity: posthumous dignity. The posthumous dignity of the dead generates duties of respect and protection for the living.

2. The ICRC and the International Criminal Court and previously the UN Commission on Human Rights, among others, speak of “dead persons”. Strictly speaking, this is less correct than to talk about “past persons” (or “past human beings”). Why? The term “dead persons” suggests that there are two classes of persons – those with the property to live and those with the property to be dead – which is absurd because, by definition, personhood is a property of the living alone. However, despite this problematic logic, the use of “dead persons” also has two considerable advantages. First, as a subcategory of persons, “dead persons” fall – at least symbolically – within the *ratione personae* provisions for persons in general, which increases their legal protection. Second, legal instruments that use the “dead persons” concept also tend to describe “the dignity of the dead” not as “posthumous dignity,” as would be the proper logic, but as “the personal dignity of the dead,” bringing provisions such as “outrages upon personal dignity” within their purview.

3. I also read the comment of the International Council on Archives (ICA) on the Guiding Principles. I endorse its views, including its plea for clearer data protection and privacy criteria. However, the ICA comment speaks about “the rights of the dead” on four occasions, which, for the reason explained in my first comment, is a philosophical impossibility. For my chapter I reviewed about 200 philosophical essays about the dead and I can safely say that the

thesis that the dead have rights is defended by about 10% of the authors: it is a minority position. Most authors depart from the justifiable premise that the living owe duties to the dead.

4. The ICA response also asks for a definition of victim. May I draw your attention to the foundational *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), which gives a definition of “victim” (paragraph 1) and distinguishes two types of victims (paragraph 2): direct victims, namely those suffering harm through crime, including abuse of power, and indirect victims, meaning the immediate family or dependents of the direct victims and those persons who suffered harm while trying to help direct victims [the latter crucially important to the ICRC!]. The Declaration does not specify whether those suffering harm through crime include the dead. It allows, however, to conclude that “the immediate family or dependents of the direct victims” are victims also. The Declaration further stipulates that states have “to provide financial compensation to ... [t]he family, in particular dependants [sic] of persons who have died ... as a result of such victimization.” (paragraph 12b). Paragraph 12b is the only phrase in the Declaration that mentions the dead. This means that the dead are not victims: victimhood is a property of the living (including a characteristic of those who died from crimes until the moment of their deaths). This is in line with my preceding comments.

With deep appreciation for all your work and with best wishes,

Antoon De Baets