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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Extrajudicial, summary or arbitrary executions

Note by the Secretary-General **

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Agnes Callamard, submitted in accordance with Assembly resolution 71/198

Summary

The present report focuses on mass graves, highlighting the multitude of sites of mass killings and unlawful death across history and the world. The Special Rapporteur presents some of the complex normative and practical issues raised by the existence of mass graves and identifies the range of stakeholders and claims in relation to their care and management. She offers a preliminary compendium of human rights standards and possible steps towards the respectful and lawful handling of mass graves. She calls on States with burial sites and the international community to uphold the many rights associated with their existence.

* A/75/150.

** The present report was submitted after the deadline in order to reflect the most recent developments.

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I. Introduction

“... the dead ... on this earth, forming an underground map of atrocity that stretches across the planet's surface”¹

1. This report² was prompted by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions’ concerns that the international community has a responsibility for the protection and proper treatment of mass graves and mass killing sites and in supporting countries and communities where such sites are present. Yet this responsibility is not fully understood, detailed or recognized.

2. On her missions to Iraq, Italy and El Salvador, and in conversations with families of victims of arbitrary killings or enforced disappearances from Syria to Mexico and with civil society organisations seeking to uncover the fate of thousands of persons, reportedly buried in mass graves or lying at the bottom of oceans, the Special Rapporteur was struck by the centrality that sites of violent and unlawful death hold in people’s experience and narrative of their daily life. The emotional, personal, religious, social, legal and historical significance of mass graves cannot be overstated -- for the families of those buried there, for the survivors and their communities, for the countries concerned, for all of humanity. Yet there is limited guidance to navigate the extraordinarily complex landscape of these sites.

3. There are competing demands over the grave itself, distinct from those over individual bodies. Mass graves are sites of evidence that plays a key role in the effective pursuit of formal justice. They are also spaces of intimate sorrow for those whose loved ones are there interred. Many are places of visual record – proof of heinous events that, in the struggle against repetition and regression, must never be forgotten.

4. Despite the significance of mass graves to so many, their multiple dimensions have not received comprehensive human rights attention with the literature and conventions placing priority primarily on excavation for the purposes of identification and investigation. This report does not seek to provide answers to all the complex questions raised by the existence of these sites, but to prompt greater international interest in, and commitment to, considering these questions. While emphasizing the importance of investigation and identification, this report analyses the broader multiplicity of claims, insisting that those too be part of a human rights approach to the respectful and lawful handling of mass graves.

5. At stake are the human rights approaches that could help communities and authorities reconcile these disparate meanings, interests, goals and considerations; human rights methods to support reconciliation efforts across the diverse needs and aspirations of stakeholders both immediately on discovery of a mass grave and over time as resources, claims and conditions change; human rights frameworks to help guard against and respond to mis-steps or to further violations committed against the mass graves and their precious contents.³

II. Mass Graves: Scale and Definition

6. The total number of mass graves around the world has never been established, but it would be no exaggeration to report that the number of sites from the 20th century alone exceed tens of thousands. However, the oldest mass graves date back 10,000 years. During the time it took the Special Rapporteur to research and write this report, a dozen more mass graves were reportedly found in different parts of the world. For instance, in April 2020, two days before the commemoration of the Rwandan genocide, a grave that may contain 30,000 bodies

¹ Adam Rosenblatt, “International Forensic Investigations and the Human Rights of the Dead,” *Human Rights Quarterly* Vol. 32, Nov 2010, page 924.

² See the report of the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence on the memorialization process.

³ The Special Rapporteur thanks Carolyn Horn and Bach Avezdjanov for their invaluable assistance, and the many experts who provided advice and input. Due to Covid19 restrictions, she was unable to travel to countries with diverse experiences in mass grave management as she had originally envisioned.

was discovered in a valley dam.⁴ There is not one region in the world, not one historical period, that has not seen mass graves.

7. Many mass graves, although not all, are associated with conflicts and massive human rights violations. In Cambodia, 19,733 mass graves resulting from the devastation brought by the Khmer Rouge have been identified.⁵ As of 2020, the Truth and Reconciliation Commission in Burundi had uncovered at least 4,000 mass graves dug during conflicts since 1962.⁶ The number of discovered mass graves from the Holocaust in Eastern Europe alone is over 1,500. In Spain, at least 2,000 mass graves linked to the Spanish Civil War have been located, but many more remain unidentified.⁷ In 2018, the UN Assistance Mission for Iraq and the UN Human Rights Office documented the existence of 202 mass graves in the northern and western parts of Iraq, but conceded that there may be many more.⁸ That number is almost as high as the 250 discovered from Saddam Hussein's era.⁹ In 2020, test excavations were performed in Tulsa, Oklahoma, as part of a search for a mass grave of African-American victims of a brutal massacre in 1921.¹⁰

8. There are mass graves that may not be burial sites or final resting places, but which still are places of atrocity or mass death. Under barrage of aerial bombings, Syrian civilian markets, hospitals, schools and homes have been rendered sites of mass killings and burials.¹¹

9. Mass burial sites are also linked to criminal activities. Over the past decade, the Mediterranean Sea is said to have claimed the lives of 20,000 migrants, killed by a deadly combination of human traffickers' violence and greed, and States' failure to protect.¹² Mass graves, said to hold the bodies of migrants, have been discovered in Asia.¹³ Between 2006 and 2016, an independent investigation by Mexican journalists, supported by Quinto Elemento Lab, discovered 1,978 graves in Mexico containing victims of the drug war.¹⁴

10. Despite their historical and contemporary scale, in spite of their global ubiquity, there is no international definition of a mass grave. There is no legal consensus on a mass grave's characteristics including the minimum number of individuals interred. To some, a mass grave is constituted if six or more individuals are buried together,¹⁵ to others, it is simply more than one.¹⁶ Forensic experts define a mass grave as a "burial site containing the remains, often commingled, of numerous persons"¹⁷ with highly varied geometries taking "the forms of a trench, pit, well organized or sectioned and with variable body densities."¹⁸

⁴ <https://apnews.com/92881561cc0fc78dd4cb50842c76e5d0>.

⁵ <http://d.dccam.org/Projects/Maps/MappingKillingField.htm>;
<https://uploads.knightlab.com/storymapjs/c7632c828011060f7d10c4f9f93eb19c/khmer-rouge-final-project/index.html>.

⁶ <https://www.bbc.com/news/world-africa-51112701>.

⁷ José-Paulino Fernández-Álvarez, David Rubio-Meléndia, Antxoka Martínez-Velasco, Jamie K. Pringle, Hector-David Aguilera, "Discovery of a mass grave from the Spanish Civil War using Ground Penetrating Radar and forensic archaeology," *Forensic Science International*, Volume 267, October 2016, Pages e10-e17.

⁸ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23831&LangID=E>.

⁹ <https://2001-2009.state.gov/g/drl/rls/27000.htm>.

¹⁰ <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/14/890785747/excavation-begins-for-possible-mass-grave-from-1921-tulsa-race-massacre>.

¹¹ See the many incidents listed in the Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 28 January 2020, A/HRC/43/57.

¹² Missing Migrants Project, IOM <https://missingmigrants.iom.int/region/mediterranean>.

¹³ <https://www.npr.org/sections/thetwo-way/2015/05/25/409472246/police-malaysia-uncovers-139-mass-graves-believed-to-hold-migrants>.

¹⁴ <https://theintercept.com/2018/12/13/mexico-drug-war-mass-graves/>.

¹⁵ Haglund, William D., Melissa Connor, and Douglas D. Scott. "The Archaeology of Contemporary Mass Graves." *Historical Archaeology* 35, no. 1 (2001): 57-69.

¹⁶ The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 110, 2017.

¹⁷ Pass, Allan D., and Ayn Embar-Seddon. *Forensic Science*. Vol. Second edition, "Mass Graves," Salem Press, 2015.

¹⁸ José-Paulino Fernández-Álvarez, David Rubio-Meléndia, Antxoka Martínez-Velasco, Jamie K. Pringle, Hector-David Aguilera, "Discovery of a mass grave from the Spanish Civil War using

11. For many forensic and human rights experts, a further prerequisite is that the site be linked to mass human rights violations and/or that it triggers an obligation to investigate. Hence a mass grave is a burial site containing remains of two or more victims of extra-judicial, summary or arbitrary executions,¹⁹ and/or is a potential repository of evidence of mass killings of civilians and prisoners of wars during of an armed conflict.²⁰

12. The Special Rapporteur adopts a definition as follows: a mass grave is a burial site where the “circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness.”²¹ This definition focuses on two aspects of mass graves, that otherwise may be neglected or insufficiently highlighted.

13. First, it allows for the inclusion of mass graves established in response to a natural disaster, such as an earthquake or tsunami or in response to a pandemic, both of which trigger the responsibilities of the State and/or of non-State actors. At the time of writing this report, the COVID-19 pandemic had brought about an explosion of mass burials, from Manaus, Brazil²² to New York, USA; some of which may qualify as mass graves.²³

14. Second, independent of the causes and circumstances of death, what distinguishes mass graves from other mass burial sites are violations of “last rights” and of last rites,²⁴ including suppression or even annihilation of individual, cultural or religious identity in death. A distinguishing factor is the treatment of bodies in and after death: the manner of handling of remains including whether and how the remains are concealed.

15. For instance, not all post-disasters and post-pandemic mass burials are the same. At issue is the extent to which people are buried respectfully, even if temporarily, whether individual identification is protected²⁵ as compared to, for example, hundreds of coffins stacked three-high in trenches²⁶, or, worse still, hundreds of bodies bulldozed into pits half-filled with garbage.

16. In the worst-case scenarios, mass graves are sites of multiple violations over time. State authorities may deny their existence or re-write their history. UN Special Procedures have denounced both the reported imprisonment in Iran of people who search for or mention mass graves, and alleged destruction or damaging of mass graves, including by bulldozing them; hiding them beneath new, individual burial plots; constructing concrete slabs, buildings or roads over them; and turning mass grave sites into rubbish dumps.²⁷

17. This overview offers some of the characteristics of mass graves:

- i. Numbers matter. Not recommending a specific number, the Special Rapporteur calls for work to establish more distinction between a mass grave of two to six bodies from those containing remains of hundreds or thousands of persons. This is not to suggest sites containing fewer bodies merit less attention but that the legal, policy,

Ground Penetrating Radar and forensic archaeology,” *Forensic Science International*, Volume 267, October 2016, Pages e10-e17.

¹⁹ A/RES/60/147, E/CN.4/2005/102/Add.1, Minnesota Protocol (2016), Minnesota Protocol, Glossary, Commingled Remains.

²⁰ UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(a) and (b).

²¹ Klinkner, M. and Smith, E. (forthcoming), *Mass Grave Protection and Investigation Guidelines*, project website <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>.

²² <https://www.theguardian.com/world/2020/apr/30/brazil-manaus-coronavirus-mass-graves>.

²³ <https://www.npr.org/sections/coronavirus-live-updates/2020/04/10/831875297/burials-on-new-york-island-are-not-new-but-are-increasing-during-pandemic> The people in mass burials on Hart Island were those who have not been claimed by a family member or loved one.

²⁴ <http://lastrights.net/mytilini/4592828704>.

²⁵ https://www.paho.org/disasters/newsletter/index.php?option=com_content&view=article&id=306:a-disaster-myth-that-just-wont-die-mass-burials-and-the-dignity-of-disaster-victims&catid=153&Itemid=198&lang=enhttps://www.researchgate.net/publication/24205755_Guidelines_for_the_effective_conduct_of_mass_burials_following_mass_disasters_Post-Asian_Tsunami_disaster_experience_in_retrospect.

²⁶ <https://www.theguardian.com/world/2020/apr/30/brazil-manaus-coronavirus-mass-graves>.

²⁷ A/HRC/WGEID/111/; IRN 30/2016; IRN 21/2017; A/72/322. The Islamic Republic of Iran rejects these allegations.

logistical, political and memorialization issues differ from those of sites of large mass burials.

ii. Mass graves evidence commission of massive human rights and humanitarian law violations, including but not only failures to respect the right to life. They may further convey a failure of the State to protect the right to life, including by failing to act with due diligence to prevent or mitigate the effects of a natural disaster, such as a tsunami, or of a pandemic.

iii. Mass graves may amount to violations of “last rights”, including last and burial rites, and respectful handling of remains.

iv. Mass graves conceal the individual identities of those whose remain they contain, violating the right of each victim to an identity in death, and the rights too of victims’ families, who are left not knowing the fate of their loved ones.

v. Mass graves themselves are often concealed. They may later be destroyed and desecrated, and their mere mention be made a potential crime or source of harassment.

vi. All these acts violate the prohibition against enforced disappearances, the obligation to investigate extrajudicial killings, and the right to truth. They may also be an element of the crimes of genocide, ethnic cleansing and related crimes.

18. Mass graves warrant investigations into the circumstances of unlawful death, the causes of death, as well as the manner of disposal of the bodies.²⁸

III. Approaches to Mass Graves: Practices and Themes.

19. The Special Rapporteur considered a range of historical and contemporary approaches, including the Balkans, Cambodia, Colombia, Iraq, Iran, Rwanda, Spain, Vietnam, and the US 9/11 context. Mass graves linked to the Holocaust were also considered. While she also reviewed mass graves in relation to the unlawful deaths of migrants and to the victims of pandemics, the following section focuses largely on mass graves stemming from mass violence.

20. She cautions that her consideration, although augmented by a literature review and interviews with experts, is not an evaluation or a human rights assessment of what has been done. However, she has identified key themes in various treatments of mass graves over time, to highlight. These are:

- Differences in symbolic meanings;
- Diverse, at times competing, objectives, particularly in contexts of resource scarcity;
- Discrimination and inequalities in death;
- Meaningful participation by families, survivors and communities.

A. Differences in Symbolic Meanings

21. In a public cemetery, individual gravesites and equivalent markers recall that persons, although now dead, once lived, loved and labored: perhaps a good life, but if not a good death, they have now a good resting place.²⁹ The mass grave however, signifies an absence of good resting place - an absence both of their right to life and to respect in death. This demands answers from the living.

²⁸ <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>.

²⁹ “Most societies make a distinction between a ‘good’ and ‘bad’ death and between ‘happy’ and ‘unhappy’ dead. ... The anthropological literature from around the world has covered these distinctions extensively ...” Bennett, Caroline (2014) Who knows who we are? Questioning DNA analysis in disaster victim identification. *New Genetics and Society*, 33 (3). pp. 239-256. ISSN 1463-6778.

22. Mass graves and killing sites (they may not be the same places) mean many things to many people. What they symbolize, and to whom, varies in personal, religious, cultural, and historical terms, from site to site, from individual to individual, from community to community, country to country. For instance:

- In **Argentina**, mass graves and bodies of the disappeared took on particular political importance in efforts of some affected families to combat the dictatorship responsible for the killings.
- In **Spain**, after the civil war the mention of mass graves was strictly prohibited by the Franco government. Following democratization, academics reported a “pact of silence”, defined not as an “enforced condition resulting from political repression but as a self- and mutually enforced condition of censorship across the political spectrum. Collective and political representations of the dead were not permitted in this environment.”³⁰
- Believing it was important to use the mass graves to help counter the legacies of the genocide, **Rwanda** displayed bones of some victims in memory sites to combat genocide denials and foster a more unified vision of the country’s future.³¹
- In **Srebrenica**, the bodies exhumed from mass graves were reburied in joint cemeteries, which while being final resting places of far greater dignity, did not replace the original sites. Families visit the sites of the murders and original interments, which are not always accessible to the general public.³²

23. The treatments of mass graves are shaped also by **religious and cultural considerations**, both at the point of their discovery and over the longer term.

- At some **Holocaust** sites, for example, religious authorities reportedly rejected exhumation as a violation of Jewish law while at others different views prevailed, with excavations supported as fulfilling Jewish law. Decisions were complicated by the presence of individuals of other faiths.³³
- In **Cambodia**, some were reported to consider exhumation to be logistically and economically impossible but also incongruent with local belief systems. In some cases, to symbolize their loss, families of the missing were given skulls, knowing that the skulls were not those of their family members. For many families, individual ceremonies, incorporation of sites within their communities, and spiritual commemoration were reportedly more important.³⁴ Thus, for the most part, excavation has not occurred, with the vast majority of graves becoming once again farmland.
- In **Rwanda** it was said that some considered the cleaning of the bones a means for honoring the washing of bodies traditionally practiced in the community.³⁵

³⁰ Renshaw, Layla. *Exhuming Loss: Memory, Materiality and Mass Graves of the Spanish Civil War*, Routledge, 2011, p.15.

³¹ <https://www.nytimes.com/2004/02/26/world/10-years-later-in-rwanda-the-dead-are-ever-present.html>; Laura Major (2015) *Unearthing, untangling and re-articulating genocide corpses in Rwanda*, *Critical African Studies*, 7:2, 164-181.

³² Lara J. Nettelfield and Sarah E. Wagner, *Srebrenica in the Aftermath of Genocide* (New York: Cambridge University Press, 2014).

³³ Caroline Sturdy Colls, “‘Earth conceal not my blood’: forensic and archaeological approaches to locating the remains of Holocaust victims,” in *Human Remains in Society: Curation and Exhibition in the Aftermath of Genocide and Mass Violence*, ed. Jean-Marc Dreyfus and Élisabeth Anstett (Manchester: Manchester University Press, 2016), page 169-70; <https://nationalpost.com/news/world/researchers-find-forgotten-holocaust-graves-without-digging-abiding-by-jewish-law>.

³⁴ Etcheson, C. (2005) *Khmer Rouge prisons and mass graves*. In: *Encyclopedia of Genocide and Crimes against Humanity*, Vol. 2 (ed. D.L. Shelton). Detroit: Macmillan Reference, 613–615.

³⁵ Laura Major (2015) *Unearthing, untangling and re-articulating genocide corpses in Rwanda*, *Critical African Studies*, 7:2, 164-181, <https://www.tandfonline.com/doi/full/10.1080/21681392.2015.1028206>.

- In **Bosnia**, a prominent Imam allegedly played a critical role in allowing women's participation in ceremonies and permitting the interment of partial remains, translating the dictates of Islam to the situation presented.³⁶

24. Other normative perspectives also vary: some argue that the **dead themselves have human rights**, or "**residual human rights**" to be treated with dignity,³⁷ separate from the needs and desires of those who survive them. Others argue for practical steps to redress indignity and provide respect for the dead, but not as a fulfilment of their rights.³⁸ Both perspectives consider the dead themselves have been injured through the indignities committed on their bodies, whether or not an international human right accrues.

25. Of necessity, any attempt at redress must be interpreted and performed by the living. But this may be approached from the perspective of the dead too. Some cultures, such as the Maori's, "see dead ancestors as active participants in the affairs of the living."³⁹ At a minimum, it should be recognised that the living often attempt to interpret what the dead would have wanted, as did some family members after WWII, believing that their loved ones should not be repatriated but should remain instead interred with those who died alongside them.⁴⁰

B. Diverse and Competing Objectives

26. When a mass grave is discovered and/or decisions are to be made about its treatment and management, many, often conflicting, objectives emerge, such as:

- Individuation and identification, requiring exhumation
- Crime scene investigation and collection of evidence
- Memorialization
- (Re)burial

(a) Individuation and identification

27. Under International human rights and humanitarian law, human remains belong to and at their request, should be returned to the family, alongside but distinct from, a criminal investigation. In a number of places, families demand **individuation** and **identification**, which have then proceeded under State initiatives and/or with the support of the international community, through organizations such as the ICMP, the ICRC and the EAFF. At times, such steps have occurred as part of a justice process. In others they did not lead to trials, such as when undertaken many decades later.

28. Positive identification of the dead at its core involves recognition of the anguish of families not knowing the fate of their loved ones. Without identification and legal recognition of death, families of the missing not only are denied dignity in their grief, they encounter often debilitating impediments to their exercise of inheritance rights. Identification is an acknowledgment that, for many reasons, broader society too must know the truth.

29. While individual identification is a prevailing benchmark, the Special Rapporteur is struck by the fact that actual rates of identification from remains are low, particularly in comparison to the vast numbers interred.

- In possibly the single most successful effort to date, 75 per cent of the 30,000 people missing in the **Balkans** conflict and 90 per cent of the Srebrenica victims have been identified, initially through the work of the ICMP, and then increasingly by local organizations. **Croatia** has developed standard operating procedures for

³⁶ Interview, Dr. Élisabeth Anstett. March 20, 2020.

³⁷ C. Moon, "Human rights, human remains: forensic humanitarianism and the human rights of the dead," *International Social Science Journal*, Vol. 65, Issue 215-216, page 59.

³⁸ A. Rosenblatt, "International Forensic Investigations and the Human Rights of the Dead," *Human Rights Quarterly*, Vol. 32, No. 4 (November 2010): 947-950.

³⁹ *Id.* at 932.

⁴⁰ Interview, Dr. Jean-Marc Dreyfus, March 12, 2020.

locating and excavating mass graves from both the 1990s and WWII, erecting memorials for both categories while identifying remains found in sites from the 1990s. Recent funding has enabled more advanced DNA identification.

- The 9/11 attacks on **New York's** twin towers killed 2,753 victims. Only 293 bodies were found intact, but 21,900 human remains were recovered. Approximately 1,100 victims (or near to 40%) still have not been formally identified, despite investment of resources unmatched elsewhere in the world.⁴¹
- In **Cambodia** and **Rwanda**, victims have been named but not generally through excavation, individuation and identification. In many cases, people are assumed to be buried in one particular mass grave because the body of one or more neighbours may have been identified.⁴²
- Few victims found at sites in **Afghanistan, Iraq, Democratic Republic of Congo**, among other countries, appear to have been identified.

30. There exists concern that the prevailing emphasis on identification fails the vast majority of families and may even intensify their pain, “creating almost a secondary trauma” should their hopes be unrealized. More thought should be given up front to methods of cooperation with families to minimise this possibility.⁴³

31. In some instances, forensic investigation of the mass grave may not be necessary: the Guiding Principles for the search for disappeared persons states that a search for the body may be suspended in circumstances when “it is not physically possible to recover the person and once all obtainable information has been exhaustively analysed and all possible scenarios investigated.”⁴⁴ However, “Under no circumstances should ending the search for a disappeared person result in the criminal investigation being closed,” pointing therefore to the possibility of justice being served in the absence of a body. The ICRC too has pointed out while identification of remains is an integral part of many criminal investigations, in a context involving the exhumation of mass graves, the cause of death may already be known or be obvious, and identification may be the most difficult and resource-intensive task.”⁴⁵

(b) Crime Scene Investigation

32. Mass graves are **crime scenes**, depositories of evidence of likely gross human rights violations, invoking thus investigative and formal accountability obligations. The mass grave suggests that remains too were handled unlawfully, intended to obstruct not only repatriation to loved ones but formal justice too. In other words, a mass grave signifies commission of a multiplicity of crimes.

33. Mass graves raise the unique issue of exhumation. When the conditions for effective and respectful exhumation are met, that process can make a powerful contribution to the meeting of human rights obligations. However, there are other ways to pursue justice independent of disrupting grave sites, notably when perpetrators and witnesses are alive and alleged perpetrators already detained.

- For some international criminal prosecutions (Bosnia, Croatia & Kosovo⁴⁶), mass grave evidence has been important not just to establish the base crime and, if

⁴¹ <https://www.cnn.com/2019/06/10/us/september-11-victim-identified/index.html>. In relation to 9/11, the United States had spent over \$80 million, as of 2016, identifying individuals. <https://www.newscientist.com/article/mg23230961-100-picking-up-the-pieces/> The cost of the museum and the memorial plaza commemorating the lives of those killed cost approximately \$700 million and it has an operating budget of approximately \$63 million. <https://www.nbcnews.com/news/us-news/700-million-counting-9-11-museum-opens-money-worries-n106536>. See generally Jay D. Aronson, *Who Owns the Dead?: The Science and Politics of Death at Ground Zero* (Cambridge: Harvard University Press, 2016).

⁴² Interview, September 2020, Rwanda experts.

⁴³ Robin Reinecke, Assistant Research Social Scientist, The Southwest Center, University of Arizona.

⁴⁴ Principle 7; CED/C/7.

⁴⁵ https://www.icrc.org/en/doc/assets/files/other/icrc_themissing_102002_en_3.pdf.

⁴⁶ All references to Kosovo should be understood to be in compliance with Security Council resolution 1244 (1999) and without prejudice to the status of Kosovo.

possible, support links to higher-level perpetrators, but also to counter revisionist ideology, including with regard to victim numbers⁴⁷.

- In Rwanda and Cambodia by contrast, excavation played no major role in the justice process. The mass graves did not provide links to specific perpetrators. The mass killings and the manner in of their commission were not disputed, while the number of victims could be estimated using demographic data.⁴⁸
- Syrian human rights activists in **Raqqa** questioned the need to disrupt the many mass graves in and around the city when there was no capacity to respectfully handle the remains after exhumation, particularly given those allegedly responsible for the mass killings and disappearances were held in Iraqi jails and could be interviewed.⁴⁹

34. Exhumations should be strongly dissuaded unless there is capacity for safekeeping of individual information and dignified reburial i.e. if there is no capacity for storage of human remains and the conduct of appropriate forensic examinations, and absent a database (DNA and otherwise) of possible family members.

35. Families and communities may demand professional exhumation or conduct their own. The Minnesota Protocol requires consultation to the extent possible with family members prior to an autopsy but does not address family involvement in consideration of exhumation.⁵⁰ Forensic organisations, such as the EAFF, typically obtain family consent prior to any exhumation where the family members are known.⁵¹ The ICRC advocates “constant interaction” with family members during excavation and exhumation.⁵² The Special Rapporteur emphasizes that in all circumstances, consultation with families and affected communities is paramount.

(c) **Memorialization, reburial and public display**

36. The future of a mass grave and of their more often unidentified human remains are matters of deep significance - personal, locally, nationally and globally. Families should hold a central place in associated decision-making processes, but there are other - sometimes contrasting if not competing - claims to be considered too, such as those of survivors, affected communities and the authorities.

37. Decisions to place a grave’s human remains and other artifacts on public display are particularly sensitive. Where authorities have rejected calls from families to rebury all remains “with dignity”, the explanation has been that public display of remains is needed to educate the community about then genocide and, it has been argued, that lends dignity to the victims.⁵³ Such claims are made more tenuous in cases when the remains on display are left exposed to the elements or are not otherwise cared for.

38. In **Rwanda**, the government decided against individualizing remains, and some state-funded genocide memorials include human remains in their exhibits.⁵⁴ In **Cambodia**, communities and family members erected stupas containing long bones and crania.⁵⁵ In the

⁴⁷ Interview, Professor Melanie Klinkner.

⁴⁸ Yet another factor that may have played a role in the decision not to excavate was the lack of resources, and the absence of forensic expertise or capacity in the country. See, e.g., Klinkner M., 2008. “Forensic Science for Cambodian Justice.” *International Journal for Transitional Justice*, 2, 227-243.

⁴⁹ Meeting with SR.

⁵⁰ Minnesota Protocol, Section II.D.3, para. 37; Section V.C.

⁵¹ Interview, Luis Fondebrider, March 20, 2020.

⁵² ICRC, *The Missing, Final Report and Outcome* at Section 2.1.1.5(1).

⁵³ *Dignity in Death and Life: Negotiating Agaciro for the Nation in Preservation Practice at Nyamata Genocide Memorial, Rwanda*.

⁵⁴ Erin Jessee, “Promoting Reconciliation through Exhuming and Identifying Victims of the 1994 Rwandan Genocide,” CIGI-Africa Initiative Discussion Paper Series No. 4, July 2012.

⁵⁵ Interview, Dr. Melanie Klinkner, March 25, 2020; see generally Caroline Bennett, “Living with the dead in the killing fields of Cambodia,” *Journal of Southeast Asian Studies*, 29(2), 184-203 (June 2018).

United States, there was extensive debate about how unidentified remains of the dead at the 9/11 site should be stored and memorialized.

39. When forms of tourism have developed around sites or public displays, at times the tensions between objectives of dignified, personal memorialization and those of informing and preventing repetition, have been palpable. Such tensions raise questions about what constitutes *respect* for rather than *exploitation* of mass grave sites and for those buried therein.

40. As sites for memorialization, mass graves are sites of significance potentially to millions and for generations. As such, they should be protected as enduring reminders of evils committed whose repetition must never be allowed.⁵⁶

C. Inequality in Death

41. As in life, the dead too may be treated unequally. Those marginalized in life — the poor, the persecuted, those subjected to discrimination — are also those at greatest risk of never being identified; of their remains never being returned to their families; of never receiving justice. Aspects of this may be explained by differences in available resources. However, much of this pattern has its roots in inequalities among the living and in discriminatory differentials in perceptions of the significance of death:

- It has been reported that in the aftermath of the **2004 Indian Ocean tsunami**, teams from all over the world arrived to identify the bodies of their own nationals,. Identification for victims from the West was pursued through sometimes conflicting methods, while those from Asia were rapidly buried in mass graves.⁵⁷
- Thousands of victims from the **Armenian** genocide lie buried and unidentified in the **Syrian** desert.
- Countries expend millions of dollars to recover, identify and repatriate the bodies of their soldiers or nationals but for other categories of persons within their jurisdiction, such as migrants, may invest little to no effort in finding and identifying individuals or in dignifying their deaths.
- Dental records play a key role in body identification but only if victims could afford routine dental care in life.⁵⁸
- Identification and memorialization are far less likely for victims whose bodies lie at the bottom of oceans such as was the case in **Argentina** and is the case for possibly thousands of migrants lost in the Mediterranean Sea.

D. Meaningful Participation

42. There is a fundamental human rights question to be answered here: What are the rights of families, survivors and affected communities and how are they to be balanced with the interests of the larger society and the international community?

43. The examples reviewed by the Special rapporteur suggest five scenarios typify approaches to date:

- i. A too common approach is for the authorities to foreclose or even prosecute efforts to memorialize mass graves. In such instances, families and others who search

⁵⁶ The extermination camps of the Holocaust are one such reminder. The Nazis may have been unique in their intent to systematically destroy even the corpses, but the sites of these camps, with their unidentifiable ashes, have become the memorials. Interview, Dr. Jean-Marc Dreyfus, March 12, 2020.

⁵⁷ Bennett, Caroline (2014) Who knows who we are? Questioning DNA analysis in disaster victim identification. *New Genetics and Society*, 33 (3). pp. 239-256. ISSN 1463-6778.

⁵⁸ Bones and teeth can reveal – even centuries later – the depth of poverty in which those killed lived, leaving behind irrefutable signs of deep deprivation, as examination of the remains of migrants who died en route has established.

for mass graves and report on their existence are prevented from commemorating the sites and may even be criminalized.

ii. The State may take the lead in securing sites and the remains. It determines and controls how the graves are exposed, remains retrieved and buried, and what steps, if any, are taken for memorialization. Families and survivors are excluded from these top-down decision-making processes. Even if the State has not been responsible for the killings still it may inhibit any or full family participation, or to maintain control over the narrative invite the involvement of certain families only. In other instances, while the families may not be barred from participating, major gaps emerge between the wishes of families and those of national authorities.⁵⁹

iii. In some instances, the international community makes the participation of families and affected communities more difficult. With identification of human remains and returning remains to families secondary goals only, some international criminal justice initiatives targeting sites for forensic examination have done so with limited involvement of affected communities.

iv. In other instances, the process begins with and is driven by the families themselves, whose participation and representation develops organically. In such cases, NGOs play a crucial supporting role. Forensic anthropologists may also consult and involve affected families in the decisions they make.

v. The families and/or the affected communities may take over the management process from the State or work to influence or even disrupt what the State or other actors are seeking to achieve. Where the excavation process is delayed by others or by the State, families may feel they have little choice but to take matters into their own hands by engaging in “**citizen forensics**”. There may further be something deeply innate in the urge to physical participation in recovery of a loved one. As one expert relayed, “*Something that is important are the attempts by the families themselves - low tech, opening up of mass graves with their own hands - no forensics, no data banks - something very human, something to give to others, to your children - individual graves.*”⁶⁰

44. The first of these typical scenarios amounts to violations of the State responsibility to respect a range of human rights. The others highlight why consideration of formulation of minimum standards is needed; standards sensitive to local realities, for engaging families, survivors and affected communities in profoundly important decisions about the treatment and management of mass graves.

IV. A Human Rights Framework for a Respectful and Lawful Approach to Mass Graves

45. This overview of mass graves practices highlights a range of complex normative, religious, cultural and practical questions that cannot be answered through a single approach. A grappling is needed with the full range of human rights issues and options – options that do not undermine the pursuit of justice, but which can help uphold the dignity of the dead, soothe the pain and injury of their loved ones and signify humanity’s commitments to non-repetition.

46. The remainder of the report proposes the rudiments of a human rights framework that recognizes diversity of claims, rights and obligations, and suggests some steps for balancing and addressing them.

⁵⁹ Interview, Luis Fondebrider, March 20, 2020.

⁶⁰ Interview, Dr. Jean-Marc Dreyfus, March 12, 2020.

A. Mass Graves: Compendium of Rights and Obligations

47. What are the State's legal obligations regarding the management of mass graves on its territory, besides those related to investigations and enforced disappearances? While several standards exist, they are dispersed and rarely brought together.⁶¹

(a) Human Rights

48. The creation of mass graves points to the violations of the following rights:

- The right to life,
- Rights linked to enforced disappearances: the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment,
- "Last rights" linked to the dignified treatments of the body in death, largely attached to the family of the deceased, and the product of civil, cultural and religious rights.⁶²

49. There are additional human rights claims to be considered; those attached to the families and society at large, including but not limited to:

- The right to an investigation,
- The right to a remedy and reparation,⁶³
- The right to humane treatment,
- Freedom of religion and belief,
- Freedom of association and expression,
- The right to participate in cultural life.⁶⁴

50. Together, some of these rights found **the right to truth**, which is owed to families and to society, and includes an "inalienable right" to know the truth about past events, a duty to preserve memory, and a victim's right to know.⁶⁵ A core component of the right to reparation also includes "[v]erification of the facts and full and public disclosure of the truth".⁶⁶ The Inter-American Court has "reiterated that every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations."⁶⁷

51. In need of further exploration, are the **rights of future generations** with regard to mass graves, whether integrated in implementation of the above rights, or as stand-alone claims.

⁶¹ Three main legal sources have been considered: International human rights and humanitarian law, along with the emerging international disaster relief/response law.

⁶² <http://lastrights.net/mytilini/4592828704>.

⁶³ A. Sweeney, "The Elusive Right to Truth in Transitional Human Rights Jurisprudence," *International and Comparative Law Quarterly*, Vol 67 (April 2018) at 368-69.

⁶⁴ <https://unesdoc.unesco.org/ark:/48223/pf0000127160>.

⁶⁵ UN Doc E/CN.4/2005/102, Principles 2-4.

⁶⁶ Basic Principles and Guidelines, at para. 22(b).

⁶⁷ *Myrna Mack Chang v. Guatemala*, Inter-American Court of Human Rights (25 November 2003) Series C, No 101, para. 274. See UN Doc. CCPR/C/OP/2 138 (1990), para. 14; UN Doc CCPR/C/107/D/1806/2008 (2013), para. 8.8; See A. Sweeney, "The Elusive Right to Truth in Transitional Human Rights Jurisprudence," at 360-62; M. Klinkner and H. Davis, *The Right to the Truth in International Law: Victims' Rights in Human Rights and International Criminal Law*, Routledge (2020).

(b) Violations and Prohibitions

52. Mass graves reflect and embody a range of violations by States or parties to a conflict, including:

a. **Prohibition of arbitrary killings and other unlawful deaths**, a foundational and universally recognized right, applicable at all times and in all circumstances. No derogation is permissible, including during an armed conflict or other public emergency. A norm of jus cogens, it is protected by international and regional treaties, customary international law and domestic legal systems.⁶⁸

b. **Prohibition of enforced disappearances**: There is by now a long legal history of absolute treaty-based prohibition of enforced disappearance⁶⁹ and of detailed obligations falling upon the State in terms of preventing and responding to this violation.

c. **Prohibition against desecration of the dead**: In addition to the respectful and to the extent possible individualized treatment of the remains highlighted below⁷⁰, international law prohibits despoiling or mutilating the dead.⁷¹ “Outrages upon personal dignity, in particular humiliating and degrading treatment,” which include degrading treatment of the dead⁷² is recognized as a war crime under armed conflicts, and a human rights violation, including violation of personality right, and the right of the family of the deceased.

53. Violations of these obligations may qualify as, or be elements of, the crime of **genocide, crime against humanity** and other international crimes.

(c) Obligations towards the respectful and lawful handling of mass graves

54. **Obligation to investigate**: States “have a procedural and moral obligation to investigate unlawful or suspicious deaths, whether the death occurs at the hands of State actors or private persons or persons unknown, and regardless of whether there is evidence of criminal action requiring investigation and prosecution under criminal law. An investigation is not dependent on a formal complaint or request from a next of kin, rather it should be automatically triggered.”⁷³ Such an obligation to investigate extends to all parties to a conflict under international humanitarian law, focusing on grave breaches of the Geneva Conventions.⁷⁴

55. **Obligation to search and identify**: International law requires all States (and parties to a conflict) to search and identify disappeared and missing persons, return any remains to the family, as well as any personal effects, *or* provide the families with access to the burial site.⁷⁵ Such rights are recognized in times of armed conflict and internal violence⁷⁶, peace time⁷⁷ and in a post-disaster situation⁷⁸. Good practices in investigating disappearances⁷⁹ and searching effectively for disappeared and missing persons⁸⁰ have been consolidated through

⁶⁸ The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (2016).

⁶⁹ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/EnforcedDisappearance.aspx>.

⁷⁰ GC I, Art. 17(3), GC III, Art. 120(4), GC IV, Art. 130(1).

⁷¹ ICRC Study, Rule 113. See also AP II, Art 8.

⁷² GC I-IV, Art. 3(1), AP II, Art. 4(1), 4(2)(b).

⁷³ A/HRC/41/CRP.1, para. 260.

⁷⁴ <https://www.icrc.org/en/document/guidelines-investigating-violations-ihl-law-policy-and-good-practice>.

⁷⁵ ICRC Study, Rule 114.

⁷⁶ https://www.icrc.org/en/doc/assets/files/other/icrc_themissing_012003_en_10.pdf

⁷⁷ CED/7.

⁷⁸ A/72/335, para. 67; https://www.who.int/hac/techguidance/management_of_dead_bodies.pdf; <https://www.cmu.edu/dietrich/ehpp/documents/2011-Recovery-and-Identification-of-the-Missing-after-Disaster.pdf>.

⁷⁹ A/RES/60/147, E/CN.4/2005/102/Add.1, Minnesota Protocol (2016),

⁸⁰ CED/C/7.

Principles and Guidelines. Such searches are not limited to a physical search for remains but includes interviewing witnesses and examining documents to determine their fate.⁸¹

56. **Obligations to respect religious and cultural rights:**⁸² Religious places, sites, shrines and symbols are to be fully respected and protected with additional measures to be taken if vulnerable to desecration or destruction.⁸³ The deceased must be buried in accordance with the rites of religion to which they belonged when circumstances permit under the laws of war,⁸⁴ and at all times otherwise⁸⁵. States must ensure non-discrimination, physical, economic and information accessibility to culture⁸⁶. This encompasses both history and memory,⁸⁷ and includes “the darker side of humanity, the memory of which also needs to be transmitted to future generations”.⁸⁸ The freedoms of individuals to participate, or not, in the creation of culture must be respected including when contesting dominant norms and values within their own and other communities.⁸⁹

57. **Obligations regarding human remains:** Under the Geneva Conventions, burial of the dead should be “carried out individually *as far as circumstances permit*”⁹⁰ a position also reflected in case law⁹¹. Under customary international law, “the dead must be disposed of in a respectful manner and their graves respected and properly maintained”⁹². Similar principles apply under international human rights law: “they are the mortal remains of a person, and not objects.”⁹³ Graves must always be respected, maintained and marked so that they may always be recognized.⁹⁴ These obligations also apply to mass graves: “[t]he fact that ‘other locations of the remains’ of such persons are mentioned in addition to graves is in order to take into account all eventualities, lawful or unlawful, such as, in particular, cremation, collective graves, and even mass graves consequent upon atrocities committed during hostilities.”⁹⁵

58. **Obligations regarding victims’ families:** States must enable the participation of families in investigations into unlawful deaths, and ensure they obtain available information on the circumstances, events and causes of death, and the location and condition of the remains insofar as these have been determined.⁹⁶ The Convention on Enforced Disappearance establishes an express right of family members “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”.⁹⁷ That right encompasses the right to equal and effective access to justice; to adequate, effective and prompt reparation; to recognition of the victim’s status before the law;⁹⁸ and to have access to relevant information concerning violations and accountability mechanisms.⁹⁹

⁸¹ CED/C/7, Principle 11; A. Petrig, “The War Dead and Their Gravesites,” *International Review of the Red Cross*, Vol 91, No. 874 (June 2009), at 346.

⁸² A/HRC/31/59, para. 21.

⁸³ Human Rights Council resolution 6/37.

⁸⁴ GC I, Art. 17(3), GC III, Art. 120(4), GC IV, Art. 130(1).

⁸⁵ CED/C/7, Principle 1, para 4.

⁸⁶ E/C.12/GC/21.

⁸⁷ See for example, A/HRC/25/49/ para. 48.

⁸⁸ A/HRC/17/38, para. 8.

⁸⁹ *Ibid* para. 10.

⁹⁰ Military doctrine permits mass burials when conditions do not permit individual graves or evacuation for burial in a cemetery.

⁹¹ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule115_sectiond.

⁹² https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule115.

⁹³ CED/C/7, Principle 1, para 4.

⁹⁴ ICRC Study, Rule 115.

⁹⁵ Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, p. 370, para 1314; A. Petrig, “The War Dead and their Gravesites,” at 344.

⁹⁶ Minnesota Protocol, 2016.

⁹⁷ ICPED, Article 24(2).

⁹⁸ Art. 24(6) ICPED obliges State Parties to adopt adequate measures such as certificates of absence to regulate the legal status of a disappeared person and his/her relatives in fields such as social welfare, family law and property rights: A/HRC/19/58/Rev.1 (2012), para. 42.

⁹⁹ A/HRC/41/CRP.1, para. 267.

59. **Obligation of non-repetition and prevention:** Lawful and respectful handling of mass graves are major elements of States' obligations to non-repetition and to the rights of victims to reparation; both of which have been elaborated at length in the relevant standards.¹⁰⁰

60. Section II has provided examples of memorialization of mass graves and identified the complex questions raised. And yet, "*Without the memory of the past, there can be no right to truth, justice, reparation, or guarantees of non-recurrence. For this reason, memory processes in connection with serious violations of human rights and international humanitarian law constitute the fifth pillar of transitional justice.*"¹⁰¹

B. An Absolute Obligation of Mass Graves Respect, Protection and Preservation

61. Under no circumstances should the existence of mass graves be denied or covered up. Sites must not be damaged or destroyed, and those searching for or speaking of mass graves must not be imprisoned, threatened or silenced. Such acts amount to multiple human rights violations, including of the prohibition against enforced disappearances, the obligation to investigate extrajudicial killings, the right to truth, the suppression or annihilation of individual identity, as well as of collective cultural, racial, ethnic, religious, political or other identity in death.

62. Governments and parties to a conflict should ensure that mass graves are preserved and protected until, based on an inclusive consultative process, decisions have been made as to their treatment and management. When mass graves are initially reported or uncovered, there are serious risks that they will be damaged either intentionally by State or non-State actors seeking to disguise their implications, or unintentionally by family members wishing to hold on to some evidence of their loved ones' remains. That damage can render fulfilment of rights and obligations enumerated above impossible. Governments therefore should take all necessary measures to immediately protect mass grave sites from erosion, destruction manipulation and looting.¹⁰²

63. Governments, parties to a conflict and/or international actors present in a country or region should provide a list of known locations of mass graves in the country, and proactively search for additional sites, including those that may have been desecrated or further concealed. Safe and confidential processes for individuals to report the existence and location of mass graves should be provided.¹⁰³

64. A range of digital technologies are increasingly contributing to the discovery and management of mass graves. These include satellite imagery, aerial photogrammetry using drones, LiDAR, geospatial analysis, and thermal imagery.¹⁰⁴ In general, these technologies are used to identify grave sites, and sometimes to date them. They also offer the possibility of keeping the discovery of graves confidential to help prevent their being disturbed.¹⁰⁵ In

¹⁰⁰ A/HRC/25/49, para 25-48; A/HRC/45/45, para 25-31; General Assembly Resolution 60/147.

¹⁰¹ A/HRC/45/45, par 21.

¹⁰² The Iraqi Mass Graves Affairs directorate, in principle, is an interesting model, set up to "undertake protecting, looking for, investigating and exploring" mass graves in coordination with relevant authorities". <https://www.icmp.int/wp-content/uploads/2006/01/The-first-amendments-mass-graves-protection-legislation-number.pdf>. In practice, the lack of resources has crippled the initiative. Professionals of the Medico-Legal Institute calculate that it will take over 800 years to complete their task. A/HRC/38/44/Add.1.

¹⁰³ The ICMP provides a confidential online form for reporting the location of potential mass graves. https://oic.icmp.int/index.php?w=rep_grave&l=en.

¹⁰⁴ See, e.g., D. Abate, C. Sturdy Colls, N. Moyssi et al., "Optimizing Search Strategies in Mass Grave Location through the Combination of Digital Technologies," *Forensic Science International: Synergy* (2019) 95-107; Congram D, Kenyhercz M, Green AG. Grave mapping in support of the search for missing persons in conflict contexts. *Forensic Sci Int*. 2017; 278:260-268. doi:10.1016/j.forsciint.2017.07.021.

¹⁰⁵ ICMP Finds Improved Methods for Locating Mass Graves, <https://www.icmp.int/press-releases/icmp-finds-improved-methods-for-locating-mass-graves/>.

using these technologies, practitioners need to protect any personal information that might be revealed and ensure that the information is admissible in court, should that become necessary. New apps, such as eyeWitness, are promising initiatives that allow people on site to collect evidence in ways that confirm its reliability and protect the chain of custody.

65. Technical standards are needed to help strengthen protection and preservation of mass grave sites. The Bournemouth University Mass Grave Protection and Investigation Guidelines, under development at this time, are commendable in this light.¹⁰⁶

(a) The mass graves as legal personhood or legal entity

66. The Special Rapporteur also considered whether recent developments recognizing the legal rights of nature, rivers and forests could be a model for the respectful and lawful management of mass graves. In New Zealand, Te Urewera was transformed from a government-owned national park to “freehold land owned by itself”, a status later also conferred on the Whanganui River. These steps were an effort to translate Maori worldviews, specifically the concept of natural features as having “their own distinct life forces,” into law.¹⁰⁷ Some other countries have followed suit.¹⁰⁸

67. Such an approach may not be appropriately applied to mass grave sites. Unlike rivers or parks, which have an existence apart from humans, mass graves are utterly the product of human behaviours. Unlike rivers or parks, humans cannot be kept at their periphery but are at their core. Therefore, at this stage, the Special Rapporteur is not suggesting attributing legal personhood to mass graves.

68. Instead, she recommends an important administrative step consisting of establishing a legal entity responsible for the oversight of one or more mass graves that would qualify as their legal guardian and which would both manage stakeholders’ diverging claims and ensure that State obligations are implemented. Additionally, the appointment of a mass grave site manager or, if investigation is carried out, a crime scene site manager, may enhance the protection and management of mass graves.

69. In some instances, local communities or the presumed families of the persons interred consider the mass grave itself, given what led up to it and what it contains, as having a life force or spiritual essence. In a process involving all stakeholders and most particularly the affected families and community, the possibility of attributing a special legal status to the mass grave should be at least considered, as part of honoring the dead and respecting the life-force of the site itself.

(b) Including the protection of mass graves in peace treaties and transitional justice

70. In many places, truth and reconciliation commissions have advocated the construction of memorials in relation to commission of massive human rights violations¹⁰⁹ while some peace treaties have provided for the treatment of the dead.¹¹⁰ There are bi-lateral agreements concerning the continued care of war cemeteries and for setting up of mechanisms for clarifying the fate of missing persons.¹¹¹ The Special Rapporteur is recommending that, as a critical step towards transformative justice, the preservation, protection and respectful and lawful handling of mass graves should be a component of all truth and reconciliation processes and peace treaties.

¹⁰⁶ <https://www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice>.

¹⁰⁷ G. Gordon, “Environmental Personhood,” *Columbia Journal of Environmental Law*, Vol. 43:1 (2018), 51-56.

¹⁰⁸ Ecuador changed its constitution in 2008 to recognize nature’s “rights ‘to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution.’” *Id.* at 53-54. Bolivia recognized the “collective public interest” manifested by Mother Earth. *Id.* at 54-55. As in New Zealand, this recognition of nature corresponded with the increased recognition of the rights of indigenous people. The legal status of living entities has been granted to all rivers in Bangladesh, two in India, to name a few.

¹⁰⁹ A/HRC/25/59, para 39-44.

¹¹⁰ Articles 225 and 226 of the Treaty of Versailles of 28 June 1919.

¹¹¹ ICRC, *The Missing and their Families*, 5.3.

(c) Preserving humanity's core sites

71. Of relevance here are UNESCO heritage sites preserving humanity's core artifacts.¹¹² The UNESCO framing and reasoning, and the duties and authority that flow from it, has been extended to mass graves such as at Auschwitz-Birkenau¹¹³ Rwanda has also submitted four genocide memorial sites for inclusion in UNESCO's World Heritage List, a demand which the Special Rapporteur supports.

72. Such recognitions are not only essential to compassionate response to families' deep personal grief but are also more communal steps towards non-forgetfulness, prevention and non-repetition. The Special Rapporteur notes mass graves' importance as sites for memorialization of those lost to grave crimes but also in the larger project of preservation and articulation of "victim-centred", rather than only "victor-dominated", accounts of history. Mass graves, independently of their historical or contextual specificity carry exceptional significance that transcends boundaries and generations.¹¹⁴ Thus, at a minimum, mass graves should be subject to a regularized process of international mapping and recognition.¹¹⁵

73. The UN General Assembly has designated 24 March as the "International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims." Such a commemoration or others like it might be used to trigger States' recognition of mass graves and of the need for robust consideration of their protection and management.

(c) Balancing Rights and Interests; Ensuring Meaningful Participation

74. The Special Rapporteur urges that management of mass graves privilege an inclusive process in which discursive spaces are opened up to affected stakeholders so that more comprehensive representations of mass graves and of the past may emerge. Such a process is invaluable not only to achieve preconceived goals but as a core goal in and of itself. However, it requires skill in understanding and managing tensions – debates, contradictions, even conflicts – between and among family members, survivors, with authorities and international organizations. To be done well, this can build upon the extensive jurisprudence on balancing rights.

75. The standard too of "**free, prior and informed consent**" has resonance for active involvement of communities and their engagement in decisions relating to mass graves. Developed as a principle for protecting the rights of indigenous people¹¹⁶, it requires "not merely informing and obtaining consent" from the affected communities, but their "effective and meaningful participation" in decision-making. There is "no one formula that can be copied and pasted into each community" dealing with the wrenching reality of mass graves. Instead, one must understand each community's individual "political, economic, social, environmental, and ... spiritual factors."¹¹⁷ The appropriate treatment for one mass grave is unlikely to be appropriate for all sites, and the treatment of even one site might change over time.

76. Importantly however, consent should not be presumed and the community must have realistic opportunities for directing the process in accordance with its wishes.¹¹⁸ In setting overall goals for a site, symbolic, cultural and religious meanings must be considered. The community's cultural and religious leaders should be part of the process.

¹¹² <https://www.sitesofconscience.org/en/home/>.

¹¹³ <https://whc.unesco.org/en/list/31/>.

¹¹⁴ Operational Guidelines for the Implementation of the World Heritage Convention 2019, para. 49.

¹¹⁵ This may build on or expand ICMP mapping of the Missing: <https://www.icmp.int/the-missing/where-are-the-missing/>.

¹¹⁶ See International Labour Organization Convention (ILO) 160; UN Declaration on the Rights of Indigenous Peoples, A/RES/61/295, Art. 10, 11(2), 19, 28, 29(2), 30(2), 32(2).

¹¹⁷ <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous>.

¹¹⁸ On the important of family trust, see generally S. E. Wagner, *To Know Where He Lies; DNA Technology and the Search for Srebrenica's Missing*, University of California Press (2008) at 159-165.

77. For the dignity of all directly impacted and out of respect for those killed or disappeared, the process for deciding on the conditions of memorialization and of public display, if any, of human remains should be advanced only once all stakeholders have been given a voice. Through stakeholder consultations, principles to guide management and custodianship of both the site/s and their human remains – now and for the future - should be set out and agreed, with the day-to-day work of preservation being a priority. Such principles should encompass questions of respect for the deceased; personalization for their loved ones, specifically when individuation is not possible; and, memorialization. Those principles should also address the ways in which the events that led up to the mass graves and the sites themselves continue to impact on the daily lives of affected communities.

78. The Special Rapporteur cautions against any notion that history be sacralised. The purpose here is not to advocate for the “preservation in aspic” of a valorised account of history; not when the call of those dead is surely for life to be better lived; not when the deepest purpose of (a more complete) history is not just to record the past but to guide a better – more just, less violent, more humane – future.

79. The goal instead must be to create the conditions for a debate within society on the causes and consequences of these past crime and on the attribution of direct and indirect responsibility, in order to make it more possible to go beyond “completely separate and unreconciled accounts of what had happened,” and to explain a brutal past without justifying it, thereby easing existing tensions and allowing society to live more peacefully with the legacy of past divisions.¹¹⁹

(a) Managed support to local forensic initiatives

80. Under international law, the exhumation of mass graves, their investigation, and the search for the disappeared or the missing is, above all, the obligation of the State and all parties to a conflict. International humanitarian law recognizes that when States fail to act, international organizations should step in.¹²⁰ Civilians can “assist in the search for and collection of the dead”, although this does not relieve States of their obligations.¹²¹ Under disaster relief law, field guides point to the important role played by community members with relevant skills, when professional resources are lacking¹²² and describe basic procedures non-professionals can use to preserve evidence and properly store remains, in the absence of forensic specialists.¹²³

81. While these suggested procedures would be inadequate for a full forensic investigation of the crimes committed in association with a mass grave, they are the types of measures that might serve as models for the development of rudimentary steps that local communities could take, with guidance, in recovering their loved ones, at least when complete forensic evaluation of a mass grave site is practically impossible or unlikely within the lifetimes of the surviving families. Such a process, if considered, could be overseen by the mass grave legal guardians.

¹¹⁹ A/HRC/45/45, para 36-37.

¹²⁰ Id, para. 6.3.

¹²¹ ICRC Study, Rule 112, Interpretation.

¹²² E.g. ICRC, “Management of Dead Bodies after Disasters: A Field Manual for First Responders,” Interpol’s Disaster Victim Identification Guide, Pan American Health Organization and the World Health Organization, Management of Dead Bodies in Disaster Situations, Disaster Manuals and Guidelines Series No. 5.

¹²³ The ICRC field manual recognizes that, “[i]mmediately after a major disaster, identifying and disposing of human remains are often done by local communities. Forensic specialists may not be available or unable to rapidly access the affected area.” Field Manual, Introduction. The manual is specifically designed for non-professionals without forensic training and is intended to preserve evidence for when specialists arrive. Id. at 1. Because of the reduced expertise, families will need “realistic expectations of the process.” Id. at 25.

V. Conclusion

82. As the Special Rapporteur is finalizing this report, the world reverberates with demands for justice from people of African descent and indigenous peoples, and many others who are the targets of arbitrary killings, other human rights violations, and structural injustice across time and the world over. Ours is an history marred by massacres, in which so often, perpetrators not only walk free, but along with their descendants, hold on to the reins of power - statues erected in their memory in front of court houses, government buildings and in public parks. Contrast this with the state of mass graves as evidence of these massacres from long ago and more recent - thousands of which are left uncovered, unprotected or unpreserved when not destroyed or desecrated.

83. We know, as this report highlights, that through appropriate, human rights-based interventions the sites of mass suffering, killings and death may become sites of immense dignity, respect and of deep communal learning. Yet as an international community, our approach to, and handling of, mass graves has too rarely been respectful or lawful, and too often inappropriate, discriminatory, or quite simply, indifferent. We can and must do more and better.

84. The prevalence of mass graves globally and large numbers of persons there interred; the diverse interests and concerns of families, survivors, communities, and society as a whole; the absence of capability for full forensic processing: all these realities argue for a stronger engagement of the full range of human rights norms applicable to mass graves, to the human remains, to the affected families, survivors, communities and nations and to our common humanity, now, over time and across generations.

85. This report has sought to place those issues squarely on the international human rights, humanitarian, conflict and post-conflict agenda. It has offered a preliminary human rights framework for the respectful and lawful handling of mass graves, emphasizing that mass graves invoke a multitude of rights and obligations, which may need balancing.

VI. Recommendations

86. **The Special Rapporteur recommends that Member States i.) build on the human rights framework offered in this report by supporting a multi-stakeholders' development of standards and best practices for the respectful and lawful management of mass graves and ii.) ensure that a human rights framework approach to mass graves is included in transitional justice and peace-making efforts and is resourced accordingly.**

87. **Some of the key principles to guide those processes identified in this report, include the following:**

88. **States, parties to a conflict or humanitarian actors should take all necessary measures to locate, disclose, protect and preserve all mass graves sites. Hiding, damaging or destroying mass graves are strictly prohibited as is the criminalization of those seeking to uncover mass graves. Such acts would constitute a violation of the right of families and society to know the truth about the circumstances behind the existence of the mass graves, including executions and enforced disappearances or failure to protect.**

89. **States should develop legal frameworks governing the management of mass graves, including their identification, preservation and investigation over time and for future generations. This may include establishing a legal entity or legal guardian made up of representatives of the State and local authorities, families and communities concerned, and may include UN agencies representatives.**

90. **The respectful and lawful handling of mass graves should be understood as both procedural by creating the conditions for those affected to articulate their needs and demands, and substantive by balancing divergences, conflicts and tensions. It requires the active, meaningful participation of victims' families and communities upon whose**

land mass graves are located, possibly ensured through such standard as that of “free, prior and informed consent”.

91. The investigation of the multiple violations related to the existence of mass graves, including arbitrary killings and disappearances must be understood as constituting crucial obligations of States and other parties. To date, the human rights perspective on mass graves has centered largely on exhumation and on identification of the remains. Such an approach while understandable is arguably too narrow. Formal retributive justice may be delivered in the absence of exhumation, while restorative justice demands many additional considerations and steps, including in relation to memory.

92. All human communities have adopted rituals and practices to provide degrees of order, predictability and comfort in the midst of the chaos that grief and loss imposes, particularly, when the cause of death is violent, obscured or denied. Many of those customs and rituals accrue as the exercise of human rights such as freedom of religion, belief, or expression. Such norms must be considered and balanced with one another, and against key human rights principles such as non-discrimination, in any action taken with respect to particular mass grave sites.
