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IHL Clinic

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Report on the mass grave for Soviet prisoners of war and forced labourers in Oslebhausen on the site of the planned railway workshop

Barry de Vries (Hrsg.)

Mit einem Vorwort von Thilo Marauhn

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Vorbemerkung

Dieses Working Paper geht auf eine Anfrage des Bremer Friedensforums zurück. Laut Recherchen des Friedensforums und der „Bürgerinitiative Bremen-Oslebshausen und umzu“ liegen auf einem Gelände, auf dem eine neue Bahnwerkstatt errichtet werden soll, noch die sterblichen Überreste von sowjetischen Kriegsgefangenen aus den Jahren 1941 bis 1945. In diesem Zusammenhang stellt sich u.a. die Frage, wie das humanitäre Völkerrecht Gräber von Kriegsgefangenen schützt. Das Bremer Friedensforum ist an uns mit der Bitte herangetreten, die damit verbundenen Fragen aufzugreifen und dazu Stellung zu nehmen. In Absprache mit Herrn Ekkehard Lentz, dem Sprecher des Bremer Friedensforums, und im Austausch mit meinem Mitarbeiter Barry de Vries haben wir die Idee entwickelt, Studierende aus unserer „International Humanitarian Law Clinic“ mit dem Thema zu konfrontieren und sie um schriftliche Beantwortung einer Reihe von Detailfragen zu bitten. Wir haben uns entschlossen, diese Bearbeitungen der Studierenden unkommentiert zu veröffentlichen, weil wir gerade darin eine Möglichkeit sehen, einerseits das Thema in die Öffentlichkeit zu tragen, andererseits den Studierenden ein Forum zu bieten, um eine eigenständige Transferleistung vom Erlernten hin zur praktischen Anwendung zu erbringen. Es bedarf keiner weiteren Erläuterung, dass damit auch eine Auseinandersetzung mit der geschichtlichen Aufarbeitung nationalsozialistischen Unrechts verbunden ist – und ein zivilgesellschaftlicher Beitrag zur Arbeit des Bremer Friedensforums und der genannten Bürgerinitiative geleistet werden kann.

Die Regeln des in bewaffneten Konflikten geltenden Rechts zum Umgang mit den sterblichen Überresten von Kombattanten und Kriegsgefangenen laufen immer wieder Gefahr, in Anbetracht anderer aktueller Herausforderungen in der Anwendung des humanitären Völkerrechts in den Hintergrund gedrängt zu werden. Zu Recht hat der Schutz der Zivilbevölkerung an Bedeutung gewonnen. Trotz dieses Bedeutungszuwachses sollte aber der Schutz anderer Personengruppen nicht geringgeschätzt oder gar vergessen werden. Die Gefahr eines solchen Vergessens ist im Fall von Kriegsgräbern besonders groß, obwohl wir uns gerade in Europa der vielen Opfer des Zweiten Weltkriegs immer bewusst geblieben sind. Aber mit der zeitlichen Distanz geht häufig auch ein Vergessen einher.

Deshalb ist es um so bedeutsamer, dass der Schutz von Kriegsgräbern im humanitären Völkerrecht zum einen zeitlich nicht begrenzt ist, zum anderen auch eine über das Erinnern hinausgehende Mahn- und Warnfunktion erfüllt, die in Anbetracht vergangenen Leids künftiges Leid verhindern soll. Immer wieder sprechen die einschlägigen Völkerrechtsnormen, auf die ich hier nur auszugsweise anhand des Ersten Zusatzprotokolls von 1977 eingehen möchte, von „Achtung“ („respect“) im Zusammenhang mit den sterblichen Überresten von Kriegsoffizieren (Art. 34 Abs. 1 ZP I). Diese „Achtung“ wird mit konkreten Maßnahmen verbunden, zu denen etwa die (möglichst durch völkerrechtliche Verträge gesicherte) „dauernde Achtung und Instandhaltung der Grabstätten“ („to protect and maintain such gravesites permanently“) gehören (Art. 34 Abs. 2 ZP I). Der besondere Status von Kriegsgräbern wird auch daran deutlich, dass Umbettungen nur „im zwingenden öffentlichen Interesse“ („public necessity“) und unter Einbeziehung des jeweiligen Heimatstaates des Kriegsoffiziers zulässig sind (Art. 34 Abs. 4 ZP I). Die ausführlichen Bestimmungen des III. (Art. 120-121) und IV. (Art. 129-131) Genfer Abkommens unterstreichen die besondere Bedeutung eines dauerhaften Schutzes auch dadurch, dass sie davon

sprechen, dass solche Gräber „jederzeit“ („always“) (Art. 120 III. GA) wieder auffindbar sein müssen. Der zentrale Korpus dieser vertraglichen Bestimmungen ist auch Bestandteil des Völkergewohnheitsrechts.

In einer kurzen Einleitung lassen sich nicht alle Antworten, die die Teilnehmerinnen und Teilnehmer der International Humanitarian Law Clinic verfasst haben, konzise wiedergeben. Es lässt sich aber unterstreichen, dass die Achtung vor dem Menschen, vor dem Kriegsoffer, Ausdruck menschlichen Respekts ist, geht es doch im humanitären Völkerrecht um die Einhaltung entsprechender Mindeststandards. In diesem Sinne möchte ich zur Lektüre der englischsprachigen Beiträge in diesem kleinen Heft einladen – und zur weiteren Diskussion über die gleichermaßen historischen wie aktuellen Herausforderungen des humanitären Völkerrechts.

Ich danke allen Studierenden für Ihr Engagement. Besonderer Dank gebührt Herrn Barry de Vries für die Betreuung der Studierenden und für die editorischen Arbeiten, die das Erscheinen dieses Working Papers überhaupt erst ermöglicht gemacht haben.

Prof. Dr. Thilo Marauhn

1. Does the "permanent right of rest" end as soon as the decomposition process is completed?

In order to give a detailed answer to the question the main sources of International Humanitarian Law (IHL) need to be addressed, namely the Geneva Conventions of 1949 and their Additional Protocols, as well as customary international law.¹

Both Geneva conventions, as well as customary international humanitarian law speak of the permanent right of rest given to the victims killed in armed conflicts. This notion is explained by customary IHL Rule 115², which states that the dead must be disposed of in a respectful manner and their graves respected and properly maintained. Likewise, Geneva conventions I, III and IV in the respective articles 17³, 120⁴ and 130⁵ emphasise that the combatants, prisoners of war and civilian internees have to be honorably buried and their graves should be respected, maintained and properly marked so that they can always be found (or can be found at any time). Thus, the States are obliged to respect the permanent right of rest of the dead by taking care of the bodies and the graves.

The definition of a war grave is given by the official commentary to the Geneva Conventions. According to it, a grave is understood to be 'a hole dug in the ground to receive a coffin or corpse'. A site is considered to be a grave even if there is only a part of the body or if the body was cremated before. The commentary specifically states that a monument containing bones of a deceased person is also considered to be a grave.⁶

To answer the question if a grave retains its status after the decomposition of a body, we'll have to understand what happens to a body at the end of this process. In medical practice the process of full decomposition is finished by skeletonisation.⁷ When a body is fully decomposed, all the soft tissues disappear. The bones, however, still remain and can be conserved for many years. Consequently, full decomposition cannot give an end to the permanent right of rest, since bare bones are sufficient for a place to constitute a grave.

However, even if we consider the possibility of total disappearance of all the remains, including bones, the permanent right of rest will still be in place. The commentary to the Geneva Conventions and ICRC doctrine stipulate that it is necessary for a grave to have contained the remains at some point in time in order to conserve its status as a protected place.⁸ However, if the grave was empty from the very beginning (like the Cenotaph in Whitehall) or the remains of a temporary grave were removed, it will not be protected by IHL.⁹

¹ Customary IHL database: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

² https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule115.

³ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6E2CC750300A2364C12563CD00519FEC>.

⁴ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=40E27CDD24CF64F3C12563CD0051B4D5>.

⁵ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=1589ACA9E747780C12563CD0051C4EA>.

⁶ On the notion of graves: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3B9DE4D08498C74AC1257F150049F509>.

⁷ The process of decomposition: <https://www.aftermath.com/content/human-decomposition/>.

⁸ A Petrig, 'The war dead and their gravesites' (2009) 91(874) *International Review of the Red Cross* 341–369.

⁹ *Ibid.*

The purpose of such IHL rules on disposal of the dead and maintenance of graves is both to respect the dignity and religion of the dead, and to make sure that the body can be recovered at later stages and, if possible, returned to its homeland or family. The “permanent” right of rest cannot, therefore, be disturbed by the decomposition of the body, in whichever stage it is, as the teleological point of the articles was to ensure the symbolic meaning of a war grave.

This is similar in German law. According to § 1 Law on the preservation of the graves of victims of war and tyranny (Gesetz über die Erhaltung der Gräber der Opfer von Krieg und Gewaltherrschaft, hereafter referred to as GräbG)¹⁰, the purpose of the law is to commemorate the victims of war, but also to remind future generations of the terrible consequences of war. Such graves remain permanently in place according to § 2 GräbG. The respective owner has to tolerate this. There is thus a public burden. It is therefore not apparent from the law that the end of the decomposition process terminates the permanent right of rest. According to § 5 GräbG, the federal states must maintain the graves. However, war deaths do not only include soldiers, but also all people who died in the course of war and its consequences. These include prisoners of war, forced laborers and refugees. The basis of the law is the Geneva Convention for the Treatment of Prisoners of War 1929, which although in the meantime has been surpassed by the Geneva Convention of 1949 was a milestone in terms of humanitarian law on graves.

Therefore, the graves remain permanently even after the bodies have completed the decomposition process.

¹⁰ Gesetz über die Erhaltung der Gräber der Opfer von Krieg und Gewaltherrschaft (Gräbergesetz), BGBl Teil 1, S. 2257; 2019 1 496.

2. Does a war gravesite lose its status as soon as no more mortal remains can be found?

The answer to the second question is closely linked to the answer to the first question. The question of the duration of the special war gravesite status is generally raised in the context of maintenance of graves. By examining Geneva Conventions and Customary IHL a more detailed answer can be found.

Geneva conventions I, III and IV in the respective articles 17, 120 and 130 emphasise that combatants, prisoners of war and civilian internees have to be honorably buried and their graves should be respected, maintained and properly marked so that they can always be found (or can be found at any time). Respect to war graves is also encoded in customary IHL rule 115 from the Customary IHL database.¹¹

The official commentaries to the aforementioned articles give a definition of a war grave. According to it, a grave is understood to be 'a hole dug in the ground to receive a coffin or corpse'. A site is considered to be a grave even if there is only a part of the body or if the body was cremated before. As discussed in the answer to the first question, the protection of a war grave still applies if the body buried there is fully decomposed. The commentary stipulates that it is necessary for a grave to have contained the remains at some point in time.¹² Therefore, graves with completely decomposed remains still conserve their status, even if it is impossible to find any remains.¹³

Consequently, if no mortal remains are found in a war grave, it will still, as principle, conserve its status. Nevertheless, it is still possible for a war grave to lose its status in some other ways.

The first way is closely linked to the question of maintenance of war graves. The aforementioned commentary to the article 17 of Geneva Convention I indicates that the financial burden of the maintenance of the foreign graves does not lie on the State where these graves are located, as the State in question cannot bear the cost of maintenance ad infinitum.¹⁴ This means that if there is a war gravesite in one State with the nationals of another State buried there, the latter is going to be financially responsible for the maintenance of the site.

Article 34(2)(b) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (AP I)¹⁵ further explains that State parties are obliged to conclude agreements on the protection and maintenance of the gravesites as soon as the circumstances permit it. Such agreements have to provide decent treatment, protection and maintenance of the war graves. However, sometimes these agreements are not concluded, which can be because of for example unwillingness or impossibility.

Article 34(3) of AP I suggests a course of action in case of absence of such an agreement. If State A, bearing the burden of cost of maintenance, refuses to conclude an agreement or provide the necessary

¹¹ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule115.

¹² A Petrig, 'The war dead and their gravesites' (2009) 91(874) *International Review of the Red Cross* 341–369.

¹³ On the notion of graves: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3B9DE4D08498C74AC1257F150049F509>.

¹⁴ On maintenance: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=3B9DE4D08498C74AC1257F150049F509>.

¹⁵ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AA52BFEA7C5C5BC3C12563CD0051DAA3>.

funding, the State B hosting the war graves may offer to facilitate the return of the remains. If State A disagrees or takes no action, the hosting State B will bear an obligation to maintain the graves for the following 5 years and after that, upon due notice, start to apply its domestic legislation to the graves in question. Thus, the graves will lose their protection under IHL. Formally, the rule laid out in the article 34(3) of AP I applies only to specific graves listed in the article. Nevertheless, in practice it applies to all protected graves, as it is confirmed by the commentary to Geneva conventions.¹⁶

The second way a grave can lose IHL protection is derived from the notion of a grave given in the commentaries to GC I article 17 and CG III article 120. A grave has to contain mortal remains at some point in time. If the grave was empty from the very beginning, such as a Whitehall Cenotaph, it would not get special protection offered by IHL. The same would be the case of a temporary grave, which contained some mortal remains at some point, which were then transferred to another place.

Neither of these circumstances appear to be applicable in the present context.

The answer to this is also very closely related to the answer to question 1 with regard to German law. According to § 2 GräbG war gravesites exist permanently, even without mortal remains. A war gravesite does not lose its status even if no remains can be found.

To conclude, a war gravesite would not lose its protection if no more mortal remains are found. However, it can lose its status according to article 34 (3) of AP I or in the event if the remains were transported from it and reburied in another place.

¹⁶ Ibid.

3. How can exhumation and reburial be carried out if no remains are found?

Exhumation has not been detailed by IHL provisions. Only several articles of the main IHL sources, the Geneva Conventions and their protocols, mention exhumation and impose some regulations connected with it.

In principle IHL seems to prohibit exhumations, even though numerous provisions of Geneva Conventions on markings of graves and bodies are formulated bearing in mind their possibility. For instance, article 17 of GC I states that the interment procedures have to allow subsequent exhumations. This is especially crucial in cases where there are bodies buried collectively.

Article 34(4) AP I specifically lists the particular conditions when exhumations are allowed. We can see from this article that exhumations are allowed for the following reasons:

- transfer of mortal remains to the home country
- overriding public necessity (including, but not limited to, medical or investigative purposes)

The notion of overriding public necessity might be controversial, though, as it is up to the State to decide, if it is necessary or not to conduct an exhumation in a particular case. Neither the protocol, nor its commentary give any answer to the question as to how exhumation or reburial is to be carried out.

Other sources of IHL, including non-binding rules and doctrine, are also silent on the matter. The ICRC has published a very specific guide “Operational best practices regarding the management of human remains and information on the dead by non-specialists”, which suggests a detailed procedure of an exhumation. However, even here a case of exhumation of a grave with no remains is not foreseen.

Consequently, the suggested situation is not regulated by IHL and is left to the discretion of States, which will still have to apply any other relevant provisions.

Within German law a reburial can only take place if the competent state authority has given its consent in accordance with § 6 I 1 GräbG. This also follows from the General Administrative Regulation for the Law on the preservation of the graves (Allgemeinen Verwaltungsvorschrift zum Gräbergesetz hereafter: GräbVwV): § 3 GräbVwV.¹⁷ In the context of reburial, a protocol must be drawn up and an approval procedure is required beforehand. The German War Graves Commission is responsible for this.

¹⁷ Allgemeine Verwaltungsvorschrift zum Gräbergesetz in der Fassung vom 12. September 2007.

4. Is a handwritten note on personal card 1 sufficient to prove burial in a cemetery.

During World War II thousands of Russians were brought to camps in the German city of Bremen. Approximately 800 Russians died in those camps and were buried in the area of Oslebshausen. Throughout the war Russian soldiers were brought all the way from Russia to the German camps in Bremen. After they had arrived the Germans would take photos, fingerprints, and personal information such as name, nationality and date of arrival from each new prisoner to provide them with a personal card. They assigned each one a number, which was also written down on the personal card. If someone had died, the Germans would write the date, reason of death and place of burial on the personal card. Questionable is whether a handwritten note on a personal card is sufficient to prove burial in a cemetery. This could be problematic, because the personal cards originally did not function as death certificates in the first place. The cards were originally only a way to classify and identify the prisoners while being held captive at prisoner of war camps in Bremen.

If a personal card could be recognised as a death certificate ('Sterbeurkunde' or 'Todesbescheinigung' in German), a personal card could be sufficient to prove burial in a cemetery.

During the Second World War death certificates included or rather needed less information about the deceased than today. In Germany even a list could be recognized as a collective death certificate for multiple people as long as it contained a signature, an official seal as well as the confirmation of the given information by military authorities.¹⁸

Article 120 Geneva Convention III rules that a death certificate must at least contain certain information about the dead such as place, date and cause of death, the place and date of burial and necessary information about how to identify the grave.¹⁹

Nowadays a German death certificate normally includes the given name and surname of the deceased, place and date of birth, their religion, their last residence as well as their marital status. If the deceased was married at moment of death, the name of their partner would be included too. Lastly the place and time of death are noted on the death certificate.²⁰

In the city of Bremen it is mandatory to include name, sex, last residence as well as date and place of birth and death of the deceased person on the death certificate, § 6 Nr. 1-4 Bremen Law on the Funeral Services (Gesetz über das Leichenwesen).

By looking at an example of a personal card²¹ it appears that the personal cards also functioned as death certificates. These cards included the first and surname of the prisoner, place and date of birth and their religion as well as their occupation, nationality, height, hair colour and the names of their

¹⁸ Commentary of 1960, Geneva Convention III 1949, Art. 120 II
<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=F43B90F23B62371BC12563CD00429183>.

¹⁹ Commentary of 1960, Geneva Convention III 1949, Art. 120 II
<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=F43B90F23B62371BC12563CD00429183>.

²⁰ Erbs/Kohlhaas/Wache, 234. EL Januar 2021, PStG § 60.

²¹ Gemeinsame Stellungnahme des Bremer Friedensforums und der Bürgerinitiative Oslebshausen und umzu, 'Vergessenes Relikt der NS-Verbrechen in Oslebshausen: Das Massengrab für sowjetische Kriegsgefangene und ZwangsarbeiterInnen auf dem Areal der geplanten Bahnwerkstatt', 10.

mother and father. Even a name and address of who to contact back at home, the date of their capture and their health condition were noted down too. On the personal card the date and reason of death and place of burial were written by hand or stamped onto the card.

This personal card therefore included most of the required information that is needed for a modern death certificate, especially the more important ones such as date and place of birth and place, date and reason of death as well as name and nationality of the deceased prisoner. By including this necessary information, a personal card could be seen as comparable to a death certificate according to Art. 120(2) Geneva Convention III.²²

According to § 5 I GräbG, Federal States have the obligation to ascertain, where war graves are located and must protect them permanently. In the treaty between the Federal Republic of Germany and the Russian Federation²³, that deals with the care of war graves, it is ruled that in case of locating Russian war dead at a later time, the government of the Federal Republic of Germany must ensure a dignified burial.

Moreover, in § 1 I GräbVwV it is prescribed, that for any grave or burial site a list must be created, that contains certain formalities about the war dead. Precisely, the full names, birth dates and places, their military rank or function (or job, if the affected person was a civilian), as well as the date of death, nationality, and a specific prescription of the grave and its location must be documented. The list must be kept by the local cemeterial administration.

In addition to that, Art. 5 III of the Treaty between the Federal Republic of Germany and the Russian Federation dealing with the war graves commission rules, any reburial of German war dead has to be protocolled. Despite the situation of reburials of Russian war dead is not prescribed in the Treaty, it is to be assumed that this counts for them as well.

To sum up, it is to be assumed that under German federal law, a single handwritten note might not be sufficient to prove burial in a cemetery. Yet, there is no explicit provision on whether or not a handwritten note is sufficient to prove the existence and location of a war grave neither in international humanitarian law, the GräbG, nor in the Russian-German Treaty.

In conclusion, personal cards functioned on the one hand as classification and identification for prisoners while being held captive at the concentration camps and on the other hand as death certificates. Without explicit provisions dealing with this issue, it could therefore be argued that as a personal card fulfils at least all the necessary and main characteristics of a German death certificate as well as all the mandatory information according to Art.120(2) Geneva Convention III, it could be taken as sufficient proof for burial of the Russian war dead in the area of Oslebshausen.

²² Commentary of 1960, Geneva Convention III 1949, Art. 120 II
<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=F43B90F23B62371BC12563CD00429183>.

²³ Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Russischen Föderation über Kriegsgräberfürsorge in der Bundesrepublik Deutschland und in der Russischen Föderation, BGBl Teil 2, S. 599, 1994.

5. Can it still be assumed that the war dead remained in the cemetery if their names and/or other data, such as dates of birth and death, cannot be found on the official register lists of the reburial cemetery?

In the course of the second World War many Russian soldiers and forced labourers died in camps in the German city Bremen. It is known that approximately 800 Russians were buried in the area of Oslebshausen.²⁴ While for the most part the Russian dead were exhumed and reburied at the Osterholz Cemetery, it can be suspected a few war dead are still buried at the so called 'Russen- Friedhof' (Russian Cemetery) in Oslebshausen. Questionable is whether the war dead are to be assumed to remain in the cemetery if they cannot be identified on the official register list of the reburial cemetery. For a solution it is necessary to look at the Geneva Conventions of 1949, the German military manual from 1992 and Customary International Humanitarian Law.

According to the Customary IHL Rule 112 "whenever circumstances permit [...] each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction".²⁵ These obligations were included by the German state in their military manual²⁶, stating "the dead must be collected". But there is no evidence that all the war dead have been collected from the "Russen- Friedhof".

Furthermore, Rule 116 states that "with a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves".²⁷ This also can be found in the German military manual. In this specific case, it cannot be proven that all victims were identified but they did mark the location of the found graves.

In general, the dead can be identified by name, address, date, cause and place of death and further personal information. That information can be taken from personal cards documented by concentration camps or an examination of the remains such as collecting DNA samples like hair, bones or fingerprints should be done by a forensic pathologist to be recognised.²⁸ For graves which are unknown the help of a forensic archaeologist is required for the recognition of the gravesite.²⁹

Even when Rule 115, which declares "the dead must be disposed of in a respectful manner and their graves respected and properly maintained", cannot be found in the German legal system, it still can be applied due to Geneva Convention III. Article 120 Geneva Convention III rules „the detaining authorities shall ensure that prisoners of war who have died in captivity are honourably buried [...] and that their

²⁴ Gemeinsame Stellungnahme des Bremer Friedensforums und der Bürgerinitiative Oslebshausen und umzu, 'Vergessenes Relikt der NS-Verbrechen in Oslebshausen: Das Massengrab für sowjetische Kriegsgefangene und ZwangsarbeiterInnen auf dem Areal der geplanten Bahnwerkstatt'.

²⁵ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112.

²⁶ Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, 2016, Bundesministerium der Verteidigung, which can be found at: <https://www.bmvg.de/de/themen/friedenssicherung/handbuch-humanitaeres-voelkerrecht-in-bewaffneten-konflikten-93608>.

²⁷ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule116.

²⁸ Publication „Operational best practices regarding the management of human remains and information on the dead by non-specialist“, Annex D, Page 29 Number 4. B. And C. and Annex I Page 42 Number 5 F., G, and Number 6 A.

²⁹ Publication „Operational best practices regarding the management of human remains and information on the dead by non-specialist“, Annex C, Page 26 Number 1. A. d.

graves are respected, suitably maintained and marked so as to be found at any time”.³⁰ The bodies, which were found, have been buried respectfully at the Osterholz cemetery. The remaining war dead could have a proper reburial as soon as they are exhumed and identified.

Moreover, Rule 114 is also not located in the German legal system, but it is applicable due to Geneva Convention I. The sixth paragraph of Article 120 Geneva Convention I states “[A]n Official Graves Registration Service [shall be established] to allow... the possible transportation of the remains to the home country [...]”.

As consequence, information and remains of the war dead have to be given to the families and descendants.

In conclusion, it can be assumed the dead, who couldn't be found on the official register list, remained in the original place of burial. Nevertheless, the Geneva Conventions obligates Germany to search and collect³¹, identify³², and bury the dead honourably³³ as well as to inform the victims' families and descendants.³⁴ Nowadays, 80 years after the war, the identification of the dead is problematic due to the decay process of the human body, enormous geographically changes in the infrastructure and development in the surrounding area. On the basis of this information the city of Bremen has the obligation to do further research for remaining victims in the area of Oslebshausen before assuming they have been reburied.

Within the German Gräbergesetz it is questionable, whether war dead remained in the cemetery, if their names and/or other data, such dates of birth and death, cannot be found on the official register lists of the reburial cemetery.

According to the GräbG and the GräbVwV, official register lists of the reburial cemetery or the war grave itself are required. However, if it is not certain whether war dead are reburied or are still located at the original location, one cannot assume that the existence of a war grave is dissolved.

Once there is reason to believe, that not every war dead has actually and officially been reburied, the local authority has to ascertain, whether the war dead remains in the cemetery or not. § 8 GräbG and § 3 GräbVwV rule the procedure of the identification of unknown or unidentifiable dead.

Concluding these points, it cannot be assumed that the war dead are reburied at the reburial cemetery without further information.

³⁰ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=40E27CDD24CF64F3C12563CD0051B4D5>.

³¹ IHL Customary Rule 112: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112.

³² IHL Customary Rule 116: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule116.

³³ IHL Customary Rule 115: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule115.

³⁴ IHL Customary Rule 114: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule114.

6. Is it to be assumed in this respect that war dead whose burial is documented for the cemetery (Question 4.) and whose exhumation and reburial cannot be proven (Question 5.) are still buried at the original site and that they have thus found their final resting place there?

World War II caused the death of millions of civilians and soldiers. Many people died in concentration camps which were often located in Germany. Some of those forced labour camps were built in the German city of Bremen and they led to the death of many forced labourers and Soviet soldiers. In Oslebshausen, a small commune of Bremen, approximately between 500-1000 Russian victims have been buried.³⁵ The exact number is still unknown to this day. The reburial and exhumation of those war dead were ordered by the city Bremen and most of them were transferred to the Osterholz Cemetery nearby. However, it can be assumed that some of the deceased are still buried in Oslebshausen. The question is whether the war dead continue to be buried at the original place when their burial is documented for the original cemetery and their reburial cannot be proven.

First of all, the documentation of the war dead has to be reviewed in order to answer the question. Several war dead were listed in official register lists which provided information on the year of birth, the date of death, and place of burial of the deceased. From those lists, it can be surmised that many of those dead were buried at the original place in Oslebshausen. This information can also be taken from personal cards which were identification cards previously used in concentration camps. The majority of them were exhumed and reburied in the Osterholz Cemetery. Nevertheless, the investigation process showed that the location of more than a hundred deceased could not be determined.

In order to find a solution to the matter, the exact number of exhumed and reburied dead has to be ascertained and the final location of the deceased has to be discovered. However, this process can be affected due to numerous reasons. For example, one of the main problems concerning the localization and identification of war dead is the inhumane burial methods of guards in the Second World War. In the past, the bodies of Soviet soldiers and workers were wrapped in asphalt or oil papers and were pushed into mass graves by German guards. This cruel treatment complicates the identification of the war dead in today's time. Therefore, rules like some of the Customary International Humanitarian Rules were invented to ensure that the dead are not treated inhumanely. Especially, Customary IHL Rule 115³⁶, which states "the dead must be disposed of in a respectful manner and their graves respected and properly maintained", grants the respectful treatment of the dead and led to the properly done reburial of some war dead in the Osterholz Cemetery in Bremen. Another issue leading to the identification problem is the attack on the concentration camps through Allied bombings in May 1945. The explosion of those bombs caused the death of many forced labourers and as a result no information of their identification could be provided.

To solve the difficulty regarding the identification of deceased victims, measures have to be taken to determine the names of the dead. On the one hand, forensic scientists have to collect DNA samples

³⁵Gemeinsame Stellungnahme des Bremer Friedensforums und der Bürgerinitiative Oslebshausen und umzu, 'Vergessenes Relikt der NS-Verbrechen in Oslebshausen: Das Massengrab für sowjetische Kriegsgefangene und ZwangsarbeiterInnen auf dem Areal der geplanten Bahnwerkstatt'.

³⁶https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule115.

like fingerprints and parts of bones of the remaining war dead in order to identify them.³⁷ On the other hand, for unmarked graves archaeologists have to be called in to recognize the grave sites.³⁸ Problematic is that the bodies have already started to decay due to the decomposing process. Especially in humid climate conditions this procedure takes half the time. As a result, the identification procedure could be more challenging but with today's technical devices, it is possible to discover the names and places of burial of the deceased.

Apart from the identification of the victims, measures have to be taken to inform the remaining families and descendants of the war dead. Especially, Customary IHL Rule 114³⁹, which declares “[A]n Official Graves Registration Service [shall be established] to allow... the possible transportation of the remains to the home country[...]”, guarantees to inform the relatives and if possible to send the remains back to their homeland.

Consequently, while it can be suspected that the war dead probably continue to be buried in their original place back in Oslebshausen, to be able to conclusively answer the question, further investigation has to be done. For instance, additional information can be obtained from documents collected by the Bremen Environmental Protection Agency and by further examination of the Memorial database. Moreover, according to the article 5 of the law implementing the treaty between Germany and Russia on the issue, the reburial of the dead has to be recorded in order to collect information and to ensure the maintenance of the graves.⁴⁰ Besides, the Customary IHL Rule 114 ensures that the place of the war dead has to be located in order to inform the descendants of the deceased. Apart from that, Customary IHL Rule 115 clarifies that the dead have to be buried in a respectful manner and therefore, it requires the localization of the deceased as well.

A possible answer is that if war dead whose burial is documented for the cemetery and whose exhumation and reburial cannot be proven, it is to be assumed that they continue to be buried at the original location and that they have thus found their final resting place there. Despite a war gravesite having to be specifically documented and the remaining of the war grave in this specific case is not officially proven, the purpose of International Humanitarian Law in this topic is to protect war graves and the dignity of the war dead. Because of that, war graves should be rather protected instead of ignoring indications of the potential remains of war dead. Therefore, it is to be assumed that the war dead continue to be buried at the war grave or in this case the so-called “Russenfriedhof” and that they have found their final resting place there.

³⁷ Publication „Operational best practices regarding the management of human remains and information on the dead by non-specialist“, Annex D, Page 29 Number 4. B. And C. and Annex I Page 42 Number 5 F., G, and Number 6 A.

³⁸ Publication „Operational best practices regarding the management of human remains and information on the dead by non-specialist“, Annex C, Page 26 Number 1. A. d.

³⁹ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule114.

⁴⁰ Gesetz zu dem Abkommen vom 16. Dezember 1992 zwischen der Regierung der Bundesrepublik Deutschland und der Regierung der Russischen Föderation über Kriegsgräberfürsorge, vom 6. Mai 1994, Artikel 5 paragraph III sentence 1.

7. Does this final resting place (question 6.) still qualify as a war gravesite?

Numerous questions remain regarding these Russian deceased. Questions from legal aspects, including International Humanitarian Law, as well as questions of dignity, respect and morals. The purpose of this article is to discuss the question if the final resting place still qualifies as a war grave site based on International Humanitarian Law and other legal aspects. If the 'Russian cemetery' does not meet those regulations it would lose the protections it has a war gravesite. The corpses would be disposed for hygienic reasons and not for the reason of a ceremonial burial. The main reason to retain its status as a war gravesite is to uphold the dignity of the dead and their relatives.

The term "war grave site" includes not only burial places for soldiers who died while in active service or to disease but also for prisoners of war, civilians and victims who died during military campaigns or operations. According to this definition the "Russian cemetery" would fall within the term "war grave site" as a burial place for forced laborers and prisoners of war during the Second World War. One can find various cemeteries of World War II victims spread in the whole of Europe, of victims who died as well as forced laborers. The legal answer to this specific question about the qualification of a burial place as war grave site must be found as well "regardless of the definition, in various sources of law". In addition to that it must be analyzed if there are any parallels within the different sources of law.

According to Art. 76 of the Convention relative to the Treatment of Prisoners of War Geneva, 27 July 1929 "The belligerents shall ensure that prisoners of war who have died in captivity are honorably buried, and that the graves bear the necessary indications and are treated with respect and suitably maintained."⁴¹ This is ensured likewise in Art. 120 of the Third Geneva Convention which states "The detaining authorities shall ensure that prisoners of war who have died in captivity are honorably buried, if possible, according to the rites of the religion to which they belonged, and that their graves are respected, suitably maintained and marked to be found at any time."⁴² Art. 34 API⁴³ qualifies "graves and, as the case may be, other locations of the remains of persons" as grave sites.

In conclusion international humanitarian law can be interpreted in a way that would qualify such a grave site as a war grave site. The wording of these provisions is broad because it is supposed to qualify the place of every buried body as a grave to capture it under the law and to ensure certain treatment of the grave like the obligation to mark it and to maintain the grave suitably. It is not meant to create a gap in the law in order to avoid those obligations. This grave site is a war grave site according to international humanitarian law, because the IHL should be widely interpreted in this regard.

According to Article 2 f) of the Treaty between the Federal Republic of Germany and the Russian Federation, "Russian war gravesites" are defined as areas in the sovereign territory of Germany, where Russian war dead are buried. Russian war dead are defined in Art. 2 d) of the Treaty as, among others,

⁴¹ Art. 76 Geneva Convention on Prisoners of War 1929 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/305-430077?OpenDocument>.

⁴² <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=40E27CDD24CF64F3C12563CD0051B4D5>.

⁴³ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=AA52BFEA7C5C5BC3C12563CD0051DAA3>.

Russians or Soviets who died during war captivity or from the consequences of war captivity during World War II until 31st March 1952.

If it is to be assumed that war dead continue to be buried at the original location and have thus found their final resting place there, their final resting place would still qualify as a war gravesite. It is the state's obligation to determine the existence of a war grave and to document and protect them.

8. Is the establishment of a railway workshop next to or on the site of a war gravesite compatible with the dignity of this site?

The obligation to respect war grave sites aims on the maintenance, to prevent vandalism and to conserve the area of the grave site. In order to ensure its conservation, the area above the remains of the war deaths should be free from constructions of all kinds.

the maintenance requires that every grave is marked and can be located. This is ensured by Art. 17(3) Geneva Convention I by stating that they should be “properly maintained and marked so that they may always be found”.⁴⁴ It would be impossible to mark the graves under a railway workshop. This leads to the assumption that the obligations under the international humanitarian law cannot be maintained by allowing the construction of the railway workshop on the site because it would restrain the state from marking the graves properly and to ensure the conservation of the graves.

There is also a customary belief that the dead person shall decide about the conditions of his burial and the maintenance of his grave. The buried people did not state and according to the general perception it can be assumed that they would not want to lie under a railway workshop. This means that by allowing the building of this railway workshop the government would infringe the rights of the buried and their relatives, if they also do not want that, which also can be assumed likewise.

§ 1 I GräbG rules that victims of war and tyranny should be commemorated in a special way. § 2 GräbG ensures also that war graves must remain permanently and that war dead’s right of rest is protected. According to that, the site is supposed to be protected and especially not be built with houses, factories, or any kind of building.

In Art. 3 I of the Treaty between Germany and Russia, it is ruled that the government must ensure the protection of war graves and the permanent right of rest. The war gravesite and its surrounding area must be kept free from facilities, that are not compatible with the dignity of the place. Possible facilities that are incompatible, could be those that are excessively loud, or their purpose contradicts to the resting place.

The establishment of a railway workshop on or next to the war gravesite can be assumed as a facility, that is excessively loud indeed and is therefore incompatible with the war graves dignity. Besides the legal documents, one could as well question the compatibility of the establishment of a railway workshop on or next to a gravesite with the dignity of the deceased. As for the specific case, a railway workshop is supposed to be established on a significant part on the area of the “Russenfriedhof”. This plan would be, according to the previously mentioned notes, incompatible with the German federal law.

⁴⁴ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6E2CC750300A2364C12563CD00519FEC>.

Summary

1. Does the “permanent right of rest” end as soon as the decomposition process is completed?

The graves remain permanently even after the bodies have completed the decomposition process, consequently the permanent right of rest does not end.

2. Does a war gravesite lose its status as soon as no more mortal remains can be found?

A war gravesite does not lose its protection if no more mortal remains can be found.

3. How can exhumation and reburial be carried out if no remains are found?

The suggested situation is not regulated by International Humanitarian Law.

4. Is a handwritten note on personal card 1 sufficient to prove burial in a cemetery?

There is no explicit provision on whether or not a handwritten note is sufficient to prove the existence and location of a war grave, neither in international humanitarian law, the pertinent German statute (GräbG), nor in the Russian-German Treaty. It could be argued that, as a personal card fulfils at least all the necessary and main characteristics of a German death certificate as well as all the mandatory information according to Art.120(2) Geneva Convention III, it could be taken as sufficient proof for burial of the Russian war dead in the area of Oslebshausen.

5. Can it still be assumed that the war dead remained in the cemetery if their names and/or other data, such as dates of birth and death, cannot be found on the official register lists of the reburial cemetery?

It cannot be assumed that the war dead are reburied at the reburial cemetery without further information. According to the GräbG and the GräbVwV, official register lists of the reburial cemetery or the war grave itself are required. However, if it is not certain whether war dead are reburied or are still located at the original location, one cannot assume that the existence of a war grave is dissolved.

Once there is reason to believe, that not every war dead has actually and officially been reburied, the local authority has to ascertain, whether the war dead remains in the cemetery or not. § 8 GräbG and § 3 GräbVwV govern the procedure for the identification of unknown or unidentifiable dead.

6. Is it to be assumed that war dead whose burial is documented for the cemetery (Question 4.) and whose exhumation and reburial cannot be proven (Question 5.) continue to be buried at the original location and that they have thus found their final resting place there?

In the case of war dead whose burial is documented for the cemetery and whose exhumation and reburial cannot be proven, it must be assumed that they continue to be buried at the original location and that they have thus found their final resting place there. Although a war gravesite has to be specifically documented and the remaining of the war grave in this specific case is not officially proven, the purpose of International Humanitarian Law in this regard is to protect war graves and the dignity of the war dead. Because of that, war graves should be rather protected instead of ignoring indications of the potential remains of war dead. Therefore, it must be assumed that the war dead continue to be buried at the war grave or in this case the so-called "Russenfriedhof" and that they have found their final resting place there.

7. Does this final resting place (question 6) still qualify as a war gravesite?

Art. 34 API qualifies "graves and, as the case may be, other locations of the remains of persons" as grave sites.

In conclusion international humanitarian law can be interpreted in a way that would qualify such a grave site as a war grave site.

8. Is the establishment of a railway workshop next to or on the site of a war gravesite compatible with the dignity of this site?

The establishment of a railway workshop on or next to the war gravesite can be assumed as a facility, that is excessively loud indeed and is therefore incompatible with the war graves' dignity. Besides the legal documents, one could as well question the compatibility of the establishment of a railway workshop on or next to a gravesite with the dignity of the deceased.

Zusammenfassende Antworten auf die Ausgangsfragen

1. Endet das „dauernde Ruherecht“ sobald der Verwesungsprozess abgeschlossen ist?

Nein, das dauernde Ruherecht bleibt auch nach abgeschlossenem Verwesungsprozess bestehen.

2. Verliert eine Kriegsgräberstätte ihren Status, sobald keine sterblichen Überreste mehr aufzufinden sind?

Nein, eine Kriegsgräberstätte behält ihren Status, auch wenn keine sterblichen Überreste mehr aufzufinden sind.

3. Wie kann eine Exhumierung und Umbettung vorgenommen werden, wenn keine sterblichen Überreste mehr aufzufinden sind?

Das Humanitäre Völkerrecht gibt keine (abschließende) Antwort auf diese Frage.

4. Ist ein handschriftlicher Vermerk auf der Personalkarte 1 hinreichend, um die Bestattung auf einem Friedhof nachzuweisen.

Zwar fehlt es an einer ausdrücklichen Regelung. Allerdings ist ein solcher Vermerk im Lichte der einschlägigen Bestimmungen des GräbG und von Art. 120 Abs. 2 des III. Genfer Abkommens hinreichend.

5. Ist weiterhin davon auszugehen, dass die Kriegstoten auf dem Friedhof verblieben sind, wenn sich deren Namen und/oder andere Daten, wie Geburts- und Sterbedaten nicht auf den offiziellen Registerlisten des Umbettungsfriedhofs finden lassen?

In Ermangelung ausdrücklicher Vorschriften sind hier die lokal zuständigen Behörden einzuschalten, die die Vorschriften des GräbG und der GräbVwV zu beachten haben.

6. Ist insofern davon auszugehen, dass Kriegstote, deren Bestattung für den Friedhof dokumentiert ist (Frage 4.) und deren Exhumierung und Umbettung nicht nachgewiesen werden kann (Frage 5.), weiterhin am ursprünglichen Standort bestattet sind und sie insofern dort ihre letzte Ruhestätte gefunden haben?

Das ist eine zutreffende Einschätzung.

7. Qualifiziert diese letzte Ruhestätte (Frage 6.) weiterhin als Kriegsgräberstätte?

Ja. Dies ergibt sich auch aus Art. 34 ZP I.

8. Ist die Einrichtung einer Bahnwerkstatt neben bzw. auf dem Areal einer Kriegsgräberstätte mit der Würde dieser Stätte vereinbar?

Aus vielerlei Gründen ist die Einrichtung einer Bahnwerkstatt neben bzw. auf dem Areal einer Kriegsgräberstätte nicht mit der in den Genfer Abkommen und den Zusatzprotokollen vorgesehenen Schutzbestimmungen vereinbar.

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