

# CORDOBA RESEARCH PAPERS

## The Right to Know the Fate of Missing Persons in Islamic Law and International Humanitarian Law: Summary of Two Academic Papers

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**THE RIGHT TO KNOW THE FATE OF MISSING  
PERSONS IN ISLAMIC LAW AND  
INTERNATIONAL HUMANITARIAN LAW**  
**Summary of Two Academic Papers**

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*Reine Radwan*  
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## **1. Introduction**

Violent conflict, natural disasters, trafficking, forced displacement, and many others lead people to go missing. The profound effects on the victims themselves, their families, friends, and wider community are long-lasting. Loved ones may never know the fate of their missing person, thereby separating families and leaving large swathes of the population unaccounted for. The social, political, and economic implications such as issues with inheritance, determination of civil status, and permission for divorce and re-marriage, as well as the psychological ones, such as the impossibility of mourning and provision of proper burial rites are far-reaching both locally and nationally. Some of the most affected countries are Iraq where 250,000 to 1 million people are recorded as missing, Syria with 100,000, Sri Lanka with 60,000 to 100,000, Argentina with 9,000 to 30,000, Algeria with 7,000 to 18,000, Lebanon with 17,400, and Libya with 10,000 declared missing persons<sup>1</sup>. The issue is an international one.

The International Commission on Missing Persons (ICMP) defines a missing person as follows: “Subjectively, a missing person is anyone whose whereabouts are not known and who is being sought by another person or other persons. The term “missing person” acquires an objective meaning when a person is formally reported as missing, or when an unidentified body is discovered.”<sup>2</sup> The ICMP notes that “humanitarian efforts generally concentrate on alleviating the anguish of relatives and others close to persons who have been reported missing as a consequence of armed conflict. As a result, humanitarian efforts may not concentrate on persons reported missing if their disappearance is not clearly attributable to a specific armed conflict.”<sup>3</sup> The High Commissioner for Human Rights of the United Nations (OHCHR) focuses its activity on the victims of ‘enforced disappearance’. According to OHCHR, “an enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”<sup>4</sup> The UN human rights conventions and mechanisms have progressively been put in place to deal with enforced disappearances, which can be considered a sub-category of missing persons. The International Convention for the Protection of All Persons from Enforced Disappearance<sup>5</sup> and the Declaration on the Protection of All

Persons from Enforced Disappearance<sup>6</sup> proclaim enforced disappearance as an imprescriptible crime against humanity and strive to protect those are victim to it. The Working Group on Enforced or Involuntary Disappearances (WGEID)<sup>7</sup> works to support families in determining the fate or location of their disappeared loved ones based on reports, evidence, and research.

This report summarises the findings of two research papers commissioned by Cordoba Peace Institute – Geneva (CPI) and written by two Iraqi Islamic scholars on the issue of the right to know the fate of missing persons from the perspective of both Islamic Law and International Humanitarian Law (IHL). It first sets out the general context in which these papers were commissioned and discussed. It then provides a summary of the two papers<sup>8</sup>, the arguments they present, and the perspectives they elucidate from both Islamic Law and IHL. Finally, it describes the general mitigations and recommendations proposed by the authors as well as a concise analysis of the socio-economic implications for women and children of missing men in Iraq.

## **2. Context**

A little over six years after the end of the conflict with the Islamic State of Iraq and Syria (ISIS) and twenty years since the United States' invasion, Iraq has one of the highest numbers of missing persons in the world. The International Commission on Missing Persons (ICMP) has estimated that between 250,000 and 1 million people have gone missing between the 1980s and 2017, at the end of ISIS' rule<sup>9</sup>. There are millions of family members who are left in great uncertainty, unable to know the fate of their missing loved ones. Therefore, legislation emphasising the right to know the fate of missing persons is crucial for protecting the rights of those who have disappeared and to support the families and loved ones left behind. By providing legal, operational, and political tools to communities, security forces, and the government, the promotion of reconciliation across all sections of society can lead to the creation of joint initiatives which ultimately lead to a more peaceful and inclusive reconstruction process.

Within this context, CPI has worked with influential local and national actors in order to reach an overriding consensus about the necessity to share information regarding the location and fate of missing persons in Iraq under the project title: "Reconciliation and Political Dialogue in Iraq". A national conference was held on 17-18 December 2021 in Najaf on "National Mechanisms to Know the Fate of the Missing (Challenges &

Solutions)”. It was attended by over 200 participants including religious and community leaders, representatives of the federal governments of Baghdad and Kurdistan, the Iraqi Minister of Justice, Iraqi experts in international humanitarian law, and a representative of the International Committee of the Red Cross (ICRC). It emphasised the word of religious scholars on the ‘right to know’ and concluded with 13 recommendations. Moreover, CPI has mobilized inter-ministerial and international stakeholders to address and implement the recommendations. Additionally, two scholars, Abdullah Dhaiban of the Iraq Higher Scientific Council of Ifta, with a Sunni background, and Khalid Al-Tameemi, a professor from Al-Alamayn Institute of Higher Studies, with a Shi’a background, were commissioned to research and write papers on what Islamic Law says regarding missing persons and the overlap with IHL. These papers were later discussed in a peer-review workshop in Geneva on the 27-28 October 2022.

### **3. Definitions**

Both papers begin with defining “missing persons”. They base themselves on the ICRC definition which states that they are: “individuals of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of armed conflict, whether international or non-international, internal violence, natural disaster or other humanitarian crises.”<sup>10</sup> Similarly, they both refer to the Geneva Conventions on the protection of missing persons of 1949 which urge the need to clarify the fates of missing persons. However, Abdullah Dhaiban clarifies the difference between an absent and a missing person. He notes that an absent person is one who is away from their previously known location but communication with them has not been entirely lost whereas a missing person is one who cannot be reached, and it is unclear whether they will ever return. Therefore, every missing person is absent but not every absent person is missing. Abdullah Dhaiban also provides definitions of missing persons based on the Iraqi Civil Code, which states in Article 36 that a missing person is one who is absent, and it is not known whether he is dead or alive and this has been officially reported by all concerned parties. However, the complexity of the issue of missing persons and the generality of the definition is reflected in both papers. Although the Qur’an and Hadiths do address loss, absence, and the necessity of its non-occurrence, they are more focused on the sanctity of the human soul and therefore the behaviours that govern conflicts and



war. Thus, scholars have had to extrapolate based on these facts and link general statements to that of missing persons to develop these arguments.

#### **4. Implications**

Notably, both Islamic Law and the Iraqi Law on the Care of Minors condition the official ruling on the fate of a missing person with a similar timeframe. It must have been four years since the declaration of a missing person for them to be considered as having passed away. This ruling has socio-economic repercussions. Umar Ibn Al-Khattab and Imam Malik both said that a woman must wait four years after her application to the judge before she can remarry if there has been no conclusive evidence of her husband's passing. Additionally, this person's funds and property may not be divided or distributed until they have been officially declared dead, or their fate has been verified. However, Article 93 of the Iraqi Law for the Care of Minors states that if the missing person was lost in circumstances where his death was very likely then his wife may wait for two years instead of four before dissolving the marriage.

Additionally, both papers note the severe psychosocial and physical implications that families and loved ones suffer due to the disappearance of a missing person as well as the uncertainty it implies. They both quote the Qur'an, referring to the inevitable hurt and loss that not only the family faces but all of society. Moreover, as war is seen as a disliked, rare but sometimes inevitable occasion, they note that Islam and Sharia Law dictate a set of rules and behaviours one should follow in this case. They include many principles including that non-combatants should not be harmed, prisoners should be treated equally and fairly, and that families have a right to be informed of the death or capture of any of their family members by any involved parties. Additionally, Abdullah Dhaiban notes that the psychological damage inflicted upon a prisoner (and therefore potentially a missing person) is more harmful than any physical consequences they may suffer and that this form of torture is punishable by God as He emphasised the necessity of the kind treatment of prisoners. Thus, Islamic Law and IHL are inextricably linked and advocate for the same rights of missing persons and the fair and equal treatment of all under the rules of war.

#### **5. Mitigation**

Both scholars address the root cause of missing persons as being one that is man-made and caused by human intervention in the form of war, mass

violence, kidnappings, displacement, and occupation. Additionally, Abdullah Dhaiban addresses some natural disasters which can cause people to go missing such as earthquakes or volcanic eruptions. Based on this research and the clear overlap between Islamic Law and IHL, both scholars affirm the important and essential need for cooperation between communities, the security forces, the state, and national and international institutions in order to find and determine the fate of missing persons. Khalid Tameemi notes that Islamic Law and IHL not only agree on determining the fate of missing persons but also on the legislative requirements to protect the person's material assets, the need to return people's bodies if they are discovered to their families, the duty to search for a missing person, and the protection of the dead by all parties involved in conflict.

Thus, both authors compiled a similar list of recommendations for the mitigation and prevention of missing persons. The mitigation of the disappearance of people is based on Islamic principles which mostly reappear in IHL which include that:

- Muslims should only engage in combat if they are attacked but not launch an offensive;
- No person who surrenders or is a non-combatant such as the elderly, women, or children may be targeted;
- Certain types of weapons are restricted, or their use is entirely proscribed, such as indiscriminate weapons;
- Entire cities, livelihoods, and agriculture including water supply may not be targeted.

## **6. Recommendations**

The practical recommendations made by the authors for determining the fate of missing persons are summarised in the following thematic groups:

(1) *Information Sharing and Coordination*: A national system of information sharing should be created in order to coordinate the search for missing persons as well as facilitating their identification and upholding their rights and protections under the law. This will also contribute to the encouragement of witnesses to come forward and provide useful information for the search. Furthermore, ensuring accuracy of the information provided is crucial towards maintaining sustainable and useful efforts.

(2) *Engaging with International Organizations:* The ICRC as well as the Red Cross and Red Crescent along with the United Nations play a principal role in the search and rescue of missing persons. Governments and national committees should empower and work closely with these organizations to coordinate efforts to determine the fate of missing persons.

(3) *Developing Committees for Oversight:* Creating national committees focused on the affairs regarding missing persons as well as an international implementation committee which supervises the implementation of programmes to promote security, peace, and human rights. In doing so, national reconciliation efforts are promoted, and peace can be achieved.

(4) *Amending legislation:* Abdullah Dhaiban recommends reducing the law that one must wait four years after the report of the missing person in order to remarry or redistribute their funds. As science and technology have rapidly improved, the search for missing persons has been simplified and therefore, people should be identified and found in a more effective manner.

(5) *Criminalization:* Criminalizing kidnappings, ransoms, and the use of illegal weapons will serve to reduce the number of people who go missing if the perpetrators are held accountable.

(6) *Support:* Ensuring that victims and victim families are adequately supported in terms of psycho-social support while paying attention to their economic, educational, and health situations in order to best advocate for them.

## **7. Conclusion**

The issue of missing persons is one with reverberating effects affecting those who disappear but also those who are left behind to deal with the consequences under laws which do not protect them adequately. The socio-economic implications, in particular on women and children, underscore the necessity for legislative action, as highlighted by the comparative examination of the two papers, revealing the substantial commonalities in thought and principle regarding the fate of missing persons in both the Sunni and Shi'a Islamic traditions. Furthermore, the two research papers demonstrate the important interlinkages between Islamic Law and IHL and the necessity for cooperation and information sharing at the local, national, and international level concerning the issue of missing persons.

The absence of adequate safeguards leaves wives, mothers, and sisters bearing the psychological burden of losing a husband, child, or brother. This, coupled with the financial insecurity of losing the breadwinner of the family, often plunges women into poverty or perpetuates a cycle of dependence on other family members, straining their support networks. This is particularly linked to the fact that the law requires women to wait for four years until they can dissolve the marriage or any dependent women to access the missing person's funds. Moreover, the legal limbo of not being declared a widow or officially divorced diminishes their social standing, leading to isolation from their communities. Therefore, it is imperative that the authors' insights are legislated into official Iraqi Law, providing families and communities with the right to know the fate of missing persons in a country where millions are still left in great uncertainty.

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