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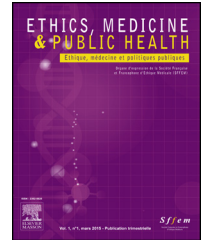
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## ORIGINAL ARTICLE

# The anthropobiological remains of both World Wars: Between ethics, legislation and the duty to remember<sup>☆</sup>

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## KEYWORDS

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## Summary

**Background.** – The remains of soldiers who died during the two World Wars are regularly discovered by chance or during land use planning. In an archaeological, anthropological and genetic analysis of these remains, it is important to provide the most exhaustive information possible on these discoveries in order to fulfill the duty of memory. The legal aspect is a central question when it comes to the place of these human remains.

**Methodology.** – This article proposes a consideration of the situation from a legal point of view and suggests avenues of reflection for a complementary approach from several disciplines.

**Results/Discussion.** – A focus on the term death for France have been proposed. This term is much more than a simple qualifier or a generic expression, it implies economic, patrimonial, but also moral consequences. It should be remembered that the dignity underlying such a status is likely to impact the meaning attached to the duty to remember.

**Conclusion.** – More than anything else, we can see that the study of these contexts requires genuine interdisciplinary research in which the law is not invented but in which jurists and anthropologists have every opportunity to express themselves side by side.

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## Introduction

In France, archaeologists and anthropologists have been interested in both World Wars from an archaeological point of view that considers human remains and surrounding archaeological artefacts for only the last 30 years. Little by little, the study of human remains associated with the study of material or archaeological structures (trenches, rest or prison camps, tanks, or planes) have made it possible to go further in understanding these terrible moments of conflict. Interdisciplinary approaches, from historical archives to biological archives, have made it possible to comprehend other realities of these periods of conflict. For several years, our team has been intervening in funeral contexts related to recent armed conflicts, from the wars of the eighteenth century [1] to the two World Wars [2–4]. We are led to immerse ourselves in the collective history of these periods, and any new study allows us to add to our knowledge of these conflicts [5].

Sometimes, in some specific context, it is possible to go further and enter directly into the individual history of a soldier, of a family, a breath of emotion around the living and the dead. However, even though the two World Wars are covered by specific legislation, the law is still ill-equipped to deal with these contexts.

In the context of this article, which follows a symposium on anthropo-responsibility in January 2021, and through our experience as anthropologists, geneticists and jurists, we wanted to share our view of these particular contexts of recent conflicts, contexts of collective or individual memory.

## Make the bodies talk: from collective to individual approach

Although it is difficult to be precise, the two World Wars resulted in the deaths of 80 to 100 million people, including 35 million military casualties. On Europe's Western Front alone, approximately 3.5 million soldiers died in the First World War (WWI), including 700,000 soldiers whose bodies were never recovered, and an estimated 2.5 million died on this front in the Second World War (WWII).

Some of them were buried after the war, but even today it is not uncommon to find human remains from these armed combats. The discovery and study of these human testify to the harsh reality of these moments. Through an archaeological and anthropological approach, it is possible to comprehend the intention that accompany the burial of these soldiers who fell for their country.

The presence of collective or individual burials, bodies face down or lined up in a mortuary position, the re-use of shell towers or the use of coffins are all clues that allow us to know the intensity of the fighting at the time of death (whether or not there was time to bury the dead) and whether it was the brothers in arms or enemies who carried out the burial (i.e., for an example of WWI burials, see Figs. 1 and 2) [6].

Even if the number of deaths is higher for the WWII than for the WWI, anthropological excavations of this period are rarer but some studies on Luftwaffe soldiers can be cited [2,7].



**Figure 1.** Main de Massiges, January 1915, strong offensive period. Germans soldiers buried quickly in a hole by their brothers in arms (excavation – Y. Desfosses 2014).



**Figure 2.** Main de Massiges, Cernay-en-Dormois, October 1915, lull in offensive. Germans soldiers buried in mass graves with great care (excavation – Y. Desfosses 2010).

Field information and archaeological facts can make it possible to identify a historical context, regardless of the period. Then laboratory studies are carried out. One of the first tasks is to research all the historical archives relating to the period estimated from the field data (from specific material for example). Indeed, one of the peculiarities of these contexts of armed conflict is the presence of very well documented military archives and historical accounts. The study of bone remains, the characterisation of peri-mortem traumas and sometimes the use of genetic tools should be able to provide a precise biological profile. Moreover, the integration of disciplines in the study of human remains from these contexts of conflict makes it possible, in some cases, to find names and attribute an identity to the bodies.

All of these disciplines, which are complementary and necessary, raise a significant number of questions. Indeed, the problem of human remains raises many and varied questions for anthropologists and jurists alike. While these questions may vary according to the needs of each discipline, most of the reflections converge around the possibility of a researcher intervening on a lifeless body.

At first glance, the subject might seem trivial, but in both practical and theoretical senses it is of real importance, particularly because of the imprecision and uncertainty involved.

In fact, anthropologists and jurists agree without difficulty that the management and use of human remains are nebulous. The uncertainties surrounding this observation are all the more significant because they have important moral and ethical consequences. Moreover, the confusion and the absence of clear rules open up the risk of researchers' liability being more easily engaged from a legal point of view.

The fears thus evoked can be explained by the legal situation, which is particularly ambivalent and inconsistent in this area.

## What about the legislation?

One observation can be made: in relation of human remains the law is "ill-equipped". Lawyers who are adept at categories have long distinguished between people and things. As a result, two legal regimes, involving rights and duties, co-exist. In other words, either one is a person and legal principles defined by this category are applied, or, on the contrary, one is in the presence of a thing and other rules apply. Behind this apparent simplicity there are complex cases, situations in which the jurist's binary viewpoint finds its clearest limits. This is the case with human remains, which, like UFOs, can easily be qualified as unidentified legal objects.

To define the limits of the distinction between persons and things, law no. 2008-1350 of 19 December 2008, modified article 16-1-1 of the Civil Code, now states that, "The respect due to human bodies does not cease with death. The remains of deceased persons [...] must be treated with respect, dignity and decency".

The judge draws many consequences from these legal requirements, among which is the fact that, "Any element of the human body in a state of disintegration, which comes from a burial, even if it is abandoned, is worthy of protection". (High court of Lille, order of the high court, 5 December 1996: D. 1997. 376, note Labbée), and that, "a body deposited in a mortuary room, if it is in the hands of justice, does not constitute an object placed under seal" (judgment of the "Cour de cassation Criminelle", 7 June 2017, No. 16-84.120 P).

Judges are often asked to specify the content of the obligations defined in the Civil Code. The legal difficulties concern a wide variety of situations involving both the exhibition of bodies and the restitution of human remains recovered during the colonial period and integrated into museum collections. Despite a general framework, the judge must provide expertise and solutions that respond to the particularities of each situation.

The category of "soldiers" raises other difficulties that again have been widely experienced and are being challenged by the law. For older conflicts (before 1914), bone remains are considered as archaeological "objects", but the applicable rules are those laid down in Article 16-1-1 of the Civil Code.

However, the same cannot be said of the soldiers who died after the start of the First World War (WWI). In a political and social context of recognition of the men who had gone to war, legislators adopted two laws on 2 July 1915 and 2 July 1923, respectively. In them, French law recognised the status of those who died for France, their country. These

laws provide for a special legal status, derogating from the common law for men who died in combat.

These laws, which have a very original look and may seem outdated, remain fully in force and continue to give rise to litigation. Among other things, these laws give victims individual recognition and status that they did not previously have: the right to individual and perpetual burial in a military cemetery at the expense of the State in line with the law of 29 December 1915, the creation of widows' and orphans' associations, a war widow's pension, etc.

The derogatory legislation for soldiers who died after WWI upset the relationship to human remains. But the law was only a reflection of a broader change in mentalities: the soldier wishes that his remains no longer remain anonymous, individual burials replaced collective burials, and families now wanted to recover the deceased.

Bone remains from these contexts are under the authority of the Ministry of Culture and the Ministry of the Armed Forces. Since 1916 and the creation of the ONACVG (National Organisation of Veterans and Victims of War) [8] real attention and recognition have been given to these soldiers who died for France and to a long-term objective of duty of memory. In practice, therefore, anthropologists work in collaboration with the Regional Archaeological Services and the ONACVG. Bone remains are collectively re-interred in military cemeteries near the excavation site, either in individual graves or in ossuary. In 2020, there were 275 national military cemeteries and approximately 800,000 "Dead for France", of whom 88% died during WWI.

## Death for France: the choice of families

When information collected in the field and laboratory study data can be used to identify a soldier individually, a search for descendants is then carried out. In the end, it is the family that decides, today as in the aftermath of the war, where their ancestor should be buried: either with his brothers in arms in a national necropolis or in the familial vault.

Sometimes this confrontation between the living and the dead, this meeting between generations can also have important repercussions. Private Archibald McMilan was returned to his 85-year-old son who never knew him. He was conceived while on leave [9].

Through this example, we can see the responsibility of the people who are in charge of breaking the news to the families. As time goes by, the number of generations between the soldiers found and the potential descendants is increasingly important. This also complicates the search for families connected with the soldier in question. In other cases, confirmation of the identity of the bone remains requires DNA analysis and therefore biological sampling from living descendants [2,4]. This raises other legal and ethical questions. The challenge here is to return the correct remains to the family.

Having to do genetic identification on living organisms requires caution. Indeed, it is crucial to be able to ensure to all persons (once their consent has been obtained) the confidentiality of personal data and the respect of the RGPD rules (General Regulations on Data Protection).

For this reason, a "good practice guide" has been put in place, in collaboration with the INPS (National Institute

of Scientific Police) of Marseille, with whom we have been collaborating for a long time.

## Death for France: who is entitled to this status

At the end of the First World War, France created a legal status, derogating from common law, for soldiers who had died in combat. Several laws concomitant with or subsequent to the Great War (Law of 2 July 1915; Law of 29 December 1915; Law of 2 July 1923, etc.) thus came to ratify rules exclusively applicable to citizens who had given their lives to their country.

To honour the memory of those who fell in battle, legislators created the phrases 'mort pour la France' and 'mort pour la patrie'. The purpose of these qualifiers is not only to initiate new distinctions, or to highlight on tombstones the republican honour of those concerned. They also aim to grant new rights to families and heirs, while creating duties for the Nation.

Independently of the question of the State taking charge of the nation's dependents, of the national aid granted to widows and children (see in particular L. 488 to L. 492 bis of the Code of Military Invalidity Pensions and War Victims), these texts enshrine original rights. One of the original features is article 4 of the law of 2 July 1923, which allows the last holder of a name to provide for the transmission of his family name in the event of his death at the hands of the enemy. This provision being retroactively applicable to soldiers who died during the First World War.

Although simple to grasp *a priori*, this legal status, based on an objective of moral recognition of soldiers who died in wartime, has given rise to much debate. French courts have, for example, been questioned about the application of these specific rules to resistance fighters, collateral victims, and more recently to police officers or civilians killed in terrorist attacks. The question of the scope of the application of these measures is so sensitive and timeless that it has given rise to several disputes, but also to several bills (bill, dated 17 October 2017, relating to the criteria for awarding the "Death for France" label).

The term death for France is much more than a simple qualifier or a generic expression, it implies economic, patrimonial, but also moral consequences. Finally, it should be remembered that the dignity underlying such a status is likely to impact the meaning attached to the duty to remember.

## Conclusion

Obviously in this kind of context, some situations are more complex. Complex because the bodies found are not of French nationality and therefore the legislation is different. For example, in the case of the body of a Russian soldier who fell in 1917 on the *Chemin des Dames*, the excavation site was temporarily "nationalised" as Russian territory and was therefore under the authority of Russian law until the human remains were exhumed. But sometimes the difference in nationality leads to a change of camp and the human remains discovered go from ally to enemy. Complex situations can test the researcher, the professional that we are,

through a questioning of the perception of history, his own perception and thus face these professional responsibilities.

The interdisciplinary study of these anthropo-biological remains leads us to consider our responsibility in this process of the individual and collective duty to remember, but also to look for the right balance between research and ethics. The complementarity of interdisciplinary approaches opens up multiple perspectives. The specificities of national laws, as well as the incompleteness of international law, due in particular to its non-binding character, require an approach in which each context is analysed topically.

Contrary to what is often believed, following the rule of law allows to better define what is possible and desirable or on the contrary forbidden or unthinkable. Rather than militating for a chimerical relaxation of legal rules in States, which would be highly problematic, or relying on a hypothetical international harmonisation of the principles applicable in our fields, let us encourage rapprochement between the legal and anthropological disciplines in order to open up new research horizons.

In our opinion, this necessary interdisciplinary rapprochement should be realised in the years to come in order to develop our knowledge and reinvent ourselves.

## Human and animal rights

The authors declare that the work described has not involved experimentation on humans or animals.

## Informed consent and patient details

The authors declare that the work described does not involve patients or volunteers.

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## Disclosure of interest

The authors declare that they have no competing interest.

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