

Dead Body Management in Armed Conflict: Reflections on Its Position under the Ethiopian Law

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Abstract

One of the fundamental principles of International Humanitarian Law (IHL) is that persons who do not or no longer participate in armed conflict should be maximally protected and, in general, treated humanely. This extends to dead bodies in armed conflict that should be treated with respect and dignity. In many armed conflicts, however, individuals have been separated from their families and died without being identified. Dead bodies are sometimes despoiled, mutilated, and abandoned without any funeral rite. The knowledge that the remains of their loved ones have been properly handled and accorded dignity is a source of solace to the family. This article is, therefore, to examine the position of the Ethiopian legal infrastructure in response to dead body management in armed conflict. To this end, the author employed a doctrinal-based analytical study. Both primary and secondary data sources are utilized and the data retrieved from both sources are analyzed with a normative qualitative approach. The status of the Ethiopian law to do justice to the dead and their families are examined in light of the IHL and FDRE Constitution, Revised Criminal Code, and Defense legislation. Based on this, the article found that the Ethiopian legal regime does not fully recognize dead body management in armed conflict. In particular, though the obligation towards the respectful treatment of the dead bodies, respectful disposal of the dead, and protection of their possessions are recognized, the obligation to search for and collect the body of the dead, return the dead bodies to the family or next of kin, identify and respectfully dispose of the dead is virtually none. Therefore, the Ethiopian legal regime should incorporate the rest obligations to be in line with the international treaty obligations so that effective justice can be done to the dead, their family, and next of kin.

Keywords: Armed Conflict, Dead Body Management, IHL, Posthumous Rights

DOI: 10.7176/IAGS/95-02

Publication date: June 30th 2022

1. Introduction

Dead body management in the context of armed conflict is burgeoning practice for the humanitarian community.¹ When people die in armed conflict their bodies must be handled with dignity and managed properly. Management of the dead in conflict times has been the subject of moral and legal codes since ancient times in our culture.² Although specific rules vary across cultures, almost all cultures do respect the dignity of the dead bodies.³ Burying the dead body is one of the ways of ensuring the dignity and respect of the dead and the family who are in agony and distress as a result of the death. Subsequently, from the mid-nineteenth century, several legally binding humanitarian instruments including the Geneva Conventions of 1949 and their additional protocols of 1977 were framed at the global level.⁴ Several initial infra-legal documents had been developed in response to proper management of the dead in armed conflict.⁵ However, dead body management instruments were only limited to the military component. Where dead body management on the general population or other civilians including humanitarian workers was not indicated.⁶ The concept of management of dead bodies in the context of armed conflict has started to change from an operational-technical approach towards humanity and human needs. Meaning, the focus is respecting and protecting the dignity of the dead and the loved ones.⁷ Whether the conflict is international or non-international, it is immaterial. All rules of humanitarian law regarding dead body management apply to both types of conflicts.⁸

Dead body management in IHL provides for the possibility of a criminal investigation on warfare dead, have identification, and connects to family.⁹ Besides, the guidelines of IHL on dead body treatment can fill a gap on both sides and contribute to the harmonization on a practical level. This inclusive approach using IHL can be

¹ Sandvik, K., Digital Dead Body Management (DDBM): Time to Think it Through, *Journal of Human Rights Practice* (2020), available at <https://doi.org/10.1093/jhuman/huaa002>, at 1-16

² Al-Dawoody, A., Management of the dead from the Islamic law and international humanitarian law perspectives: Considerations for humanitarian forensics (2017) available at doi:10.1017/S1816383118000486, 99 (2)

³Wels, W., Dead body management in armed conflict: paradoxes in trying to do justice to the dead, *The Hague* (2016), at 13

⁴ *Ibid.*

⁵ *Ibid.*, at 7

⁶ *Ibid.*, at 7-9

⁷ *Ibid.*, at 9-10

⁸ *Ibid.*, at 11

⁹ *Supra note 2,*

the best application of the principle of respect for the dead of armed conflict or other situations of violence.¹ Dead body management involves the principle of humanity, family rights, and dignity. The most dominant feature in the current practice of handling the war dead is the exhumation of bodies for identification regarding human rights purposes, or a criminal investigation under a framework of criminal law. This in turn encompasses humanity, family rights, and dignity drive.²

Dead body management, in general, is growing its nature and purpose. The main factor involves the changing political views on law and 'humanness', better forensic technology, and improvements in practice learned, *inter alia*, from the response of wars, sudden population movements, and the investigations, procedural innovations, and the jurisprudence of war crime tribunals.³

In many instances, however, individuals have been separated from their families and died without being identified and the whereabouts of their remains are unknown. Dead bodies are sometimes despoiled, mutilated, abandoned without any funeral rite and a decent burial.⁴ The knowledge that the remains of their loved ones have been properly handled and accorded dignity may also be a source of solace to families.⁵ The Law of armed conflict is a universally applicable and advanced legal regime that tends to regulate the effect of armed conflict. However, the rule of humanitarian law is far from being known and not respected in many societies.⁶ Besides, research in the area of dead body management in the context of armed conflict is scarce.⁷

The very objective of this article is, therefore, to examine the place of dead body management in armed conflict under Ethiopian law. To achieve this objective, the article employed a doctrinal-based analytical study. It would be a discussion-based work with the available sources of law relating to humanitarian law. It is based on both primary and secondary data sources. The domestic laws and international humanitarian laws as regards dead body management in the context of armed conflict include primary sources. Whereas secondary sources include books, journal articles, reliable websites, and other materials on the subject matter. The data retrieved from the stated resources is then analyzed with a normative qualitative approach.

The article has five sections. The first section is introductory. The rights of the dead and dead body management in the context of armed conflict are explained under section two. In the third section, rights and management of the dead in armed conflict and associated normative frameworks are reviewed. The fourth section focuses on dead body management in armed conflict and its place in Ethiopian law. In the fifth section, the conclusion and the ways forward are highlighted.

2. Dead body management in armed conflict: Problems in defining rights of the dead and dead body management

2.1. Problems of defining the right of the dead

The concept of the rights of the dead (posthumous rights) is cause célèbre in the legal, humanitarian, and medical profession.⁸ Legal rights only exist when someone is capable of making choice. By this, the dead body lacks to make significant choices.⁹ In this context, Moon argued that human rights belong to the living through the dead are accorded residual rights of dignity and respect. Residual rights as Moon described referring to the remaining right after the death of the person.¹⁰ The dead, *inter alia*, have no consciousness and free will albeit the living does. Hence, the dead have only the last right i.e. the right to dignity.¹¹

Nevertheless, it does not mean that incapable individuals like the dead are not legal right-holders. The dead should receive the benefit of legal protections, but he would not call these protections legal rights. Granting the dead posthumous rights is in light of controlling the behavior of the living such as the decedent's heirs.¹² In this context, Wels stated that the dead are right holders because the living treats them as though they have rights and dignity. To uphold the care and respect of their bodies, the dead are in need of the living.¹³ In the context of armed conflict, the dead are beneficiaries of duties the living has towards them and those duties are recognized under IHL including in the international customary humanitarian rules.¹⁴ On the contrary, the rules on search and

¹ *Supra note 3*

² *Ibid.*

³ *Supra note 1*

⁴ *Ibid*

⁵ *Ibid*

⁶ *Supra note 2*, at 25

⁷ *Supra note 4*, at 11

⁸ Perreault, K., *Heritage Ethics and Human Rights of the Dead* (2018), available at doi:10.3390/genealogy2030022

⁹ *Ibid.*, at 1; See also *supra note*, at 35

¹⁰ Moon, C., *Human rights, human remains forensic humanitarianism and the human rights of the dead* (2016),

¹¹ *Supra note 3*, at 44

¹² *Ibid.*, at 34-38

¹³ *Ibid.*

¹⁴ *Ibid.*, at 45

collection of the dead body¹, respectful treatment of the dead body², and respectful burial of the body³ directly concern the dead bodies without reference to the living ones. Hence, the dead in this case are direct beneficiaries of the duties.

2.2 Dead body management in the context of armed conflict: Explained

The term dead body management, also known as management of dead bodies, in the context of armed conflict denotes the totality of rules and obligations, processes and activities related to dealing with (mass) death such as search, retrieval, burial, identification, exhumation, and registration of dead bodies.⁴ Another comparable description which is worthy to mention for this article is that dead body management in armed conflict refers to:

*Search and collection; respectful treatment of dead bodies; return of dead bodies and their effects to next of kin; respectful disposal of the dead, including grave maintenance and accounting for the dead including detailed identification and grave registration.*⁵

Management of dead bodies under international humanitarian law mainly refers to the individual identification, restoration of family links, and respect for the deceased and their graves.⁶

3. Normative frameworks on dead body management and accompanying obligations

This section discusses the development of international legal and infra-legal instruments in response to the management of the dead in the context of armed conflict.

Human dignity lies at the core of international human rights laws. In the International Bill of Rights such as the Universal Declaration of Human Rights (UDHR) of 1948, International Conventions on Civil and Political Rights (CCPR) of 1966 and specific area conventions such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 and the regional human rights systems such as the European Convention on Human Rights (ECHR) of 1950, American Convention on Human Rights (ACHR) of the 1969 and the African Charter on Human and Peoples' Rights (ACHPR) of 1986 can be inferred relevant rights vis-à-vis the treatment of the dead body in armed conflict.⁷ Some of the pertinent rights stipulated in the aforementioned human right instruments are the right to life, the protection of human dignity, the right to private and family life, the right to equality, the right to an effective remedy, and the prohibition against cruel, inhuman or degrading treatment or punishment. The human rights conventions, resolutions, and declarations, however, do not in principle, set forth any detailed principle for the management of the dead bodies in international and non-international armed conflicts. In particular issues of burials, registration, principles, and management of the dead in armed conflict are not covered in the human rights instruments.⁸

The core international legal obligations towards the dead and their graves and family, *inter alia*, are searching and collecting the dead bodies; respecting the bodies of the dead; returning the personnel possession of the dead to the family; determining the cause of death; issuing a death certificate; make every effort to locate and notify the relatives of the dead; facilitating the return of the remains of the dead to their relatives otherwise should be disposed of in a dignified and respectful manner. The other obligations include recording the location of the burial, respecting and maintaining gravesites; treating citizens and non-citizens equally in all these actions; and providing special protection for children.⁹ To some extent, this has been addressed in the case-law of international human rights tribunals and court including the *ad hoc* tribunals for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC).¹⁰ Specific rights with relevance in this area include the prohibition of cruel, inhuman, and degrading treatment, the right to equality, the right to family life, and the prohibition of discrimination, property right, and the right to legal personality.¹¹ Following the priorities established by international human rights law, special attention is directed towards the protection of children. These international obligations are complementary to and inform, the rights and obligations regarding the dead and their family are put in applicable national laws.¹²

¹ ICRC, Customary IHL - Practice Relating to Rule 112. Search for and Collection of the Dead (2020)

² ICRC, Customary IHL - Practice Relating to Rule 113. Treatment of the Dead, (2020)

³ *Ibid.*; See also ICRC, 2020, Customary IHL - Practice Relating to Rule 115. Burial the Dead

⁴ *Supra note*, at 13-46

⁵ *Ibid.*, at 19

⁶ *Supra note 2*, at 25

⁷ United Nations General Assembly, Universal Declaration of Human Rights (UDHR). General Assembly Resolution 217 A (III) of 10 December 1948. See art. 6 of the Universal Declaration of Human Rights (UDHR) for example states that every person has the right to be recognized where the principle of "dignity" is of particular interest here. The UDHR "recognizes" (constitutes) "the inherent dignity of all members of the human family."

⁸ *Supra note 3*, at 40

⁹ Geneva Convention (GC I Arts.15(1); GC II Art.18(1); GC IV Art.16(2); AP I Articles 32 and 33; AP II Article 8 and Customary International Law, Volume 1: Rules, ICRC/Cambridge University Press, 2005

¹⁰ *Supra note 3*, at 21

¹¹ *Ibid.*

¹² *Ibid.*, at 3

From the mid-nineteenth century on, a substantial body of legal principles and rules has been developed in response to the treatment of the dead under the threshold of armed conflict and other situations of violence.¹ Preceding this, the initial normative frameworks in response to proper management of the dead in armed conflict were the Paris Declaration (1856), the Lieber Code (1863), the Geneva Resolutions, Conventions, and Additional Articles (1863, 1864, and 1868), the St. Petersburg and Brussels Declarations (1868 and 1874).² These codes laid a foundation to the contemporary humanitarian laws on the proper management of the dead body including the guiding principles of dead body management in the context of armed conflict.³ These are principles of integrity of the dead, principle of identification, principles of sharing of information about the identity of the dead body, and principles of respectful or honorable burial.⁴ The principle of the integrity of the dead in the context of armed conflict is referred to in most of the humanitarian normative frameworks. This principle imposes a positive obligation upon the parties to the conflict. The major obligations include protecting the dead body from mutilation, pillage, and ill-treatment.⁵ This obligation is also reinforced under the Rome Statute that defines the mutilation of a dead body as a war crime under international law.⁶

International humanitarian law, also known as the law of war or law of armed conflicts, *inter alia*, seeks to respect and protect persons who do not or are no longer taking part in hostilities.⁷ The Law of armed conflict establishes important principles applicable to the dead in armed conflict and other situations of violence. It also recognizes and protects the right of families to know the fate of their missing loved ones.⁸ The very detailed body of IHL with regards to the dead body management in armed conflict and other situations of violence is contained in the four Geneva Conventions (GCs) of 1949 and their two Additional Protocols of 1977.⁹ Geneva laws protect all *hors de combat* victims.¹⁰ For this article, some of the major obligations of parties to the conflict towards dead body management will be discussed below.

The management of the dead body in international and non-international conflicts, as noted above, is regulated by international humanitarian law. The law provides legally binding rules as regards the management of the dead in armed conflict.¹¹ These IHL rules and principles of handling dead bodies stretch beyond the end of hostilities. If is possible, parties to the international armed conflict, among other things, are required to take all possible measures to search for, collect, treat, identify, dispose and return without making a distinction between dead bodies.¹² These rules predominantly emanated from the Fourth Hague Convention of 1907, the Geneva Conventions of 1929 and 1949 and Additional Protocols of 1977, and the ICC Statute.¹³

The rules of armed conflict apply the same obligation to certain categories of the living including the obligation to search for and collect the wounded, the sick, and the shipwrecked, and this *mutatis mutandis* applies to the dead bodies.¹⁴ When circumstances allow, parties to an armed conflict are required to search for and collect the dead body without distinction soon after an engagement. This rule applies both to international and non-international armed conflicts.¹⁵ To this end, parties to the armed conflict may seek the help of international organizations including the ICRC and other agencies that have the expertise to conduct the search and collect the dead body.¹⁶ However, in an attempt to do this, compelling the victims to collect the dead bodies of other members of their ethnic group is prohibited.¹⁷

Parties to the armed conflict are expected to respect, dignify and protect the dead from being despoiled. The parties are required to take all possible measures to prevent not despoiling the dead. Mistreatment and mutilation

¹ *Ibid.*

² *Ibid.*

³ Geneva Conventions (GC I-IV) and their additional two additional protocols of 1977 (I and II) and Customary International Humanitarian Law

⁴ *Supra note 3*, at 14-15

⁵ Geneva Convention on the Wounded and Sick (1906), art. 3-4; The Hague Convention on Maritime Warfare (1907), art. 16-17; Oxford Manual on Naval War (1913), art. 85-86; Geneva Convention on the Wounded and the Sick (1929), art. 3-4.

⁶ ICC Statute, Article 8(2)

⁷ Pathak, M., Gupta, S., and Rai, S., Humanitarian Forensic: A Noble Approach towards Mankind, Volume 18, Issue 10 Ser.11 (October, 2019), PP 31-35

⁸ *Ibid.*

⁹ For more on this, see Geneva Conventions 1949 (GC I-IV) and their additional two additional protocols of 1977 (I and II) and Customary International Humanitarian Law.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Geneva Convention I (GC I) Article 15(1), Geneva Convention II (GC II) Article 18(1), Geneva Convention IV (GC IV) Article 16(2), AP I Articles 32-33, AP II Article 8 and Rule 112-117 of the ICRC Customary Law Study.

¹³ *Supra note 19*

¹⁴ *Ibid.*

¹⁵ For international armed conflict see GCI: Art.15 (1); GCII: Art. 18(1); GCIV: Art. 16(2); API: Art. 32-33. See AP II: Art.8 and CIHL Study, Rule 112 for non-international armed conflict

¹⁶ AP I, Article 17(2) and 33(4); See also ICRC(2020), Rule 112. Search for and Collection of the Dead, accessed August 1, 2020, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112>

¹⁷ ICRC Commentary on the First Geneva Convention, 2016 and, in particular, the commentary on common Article 3, para. 639 available at <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>

of dead bodies are prohibited.¹ The Status of the ICC reinforces this prohibition by defining mutilation as a war crime of "committing outrages upon personal dignity."²

Furthermore, identification of the dead body is another obligation of the parties to the armed conflict. With the view to identifying the dead body, parties to an armed conflict shall record all existing information before disposing of the dead body. Identification, in this case, obliges the parties to the conflict to take all possible measures to identify the deceased in the armed conflict.³ Moreover, parties to an international armed conflict are required to prepare and give to each other certificates of death or duly authenticated lists of the dead body with particulars to identify it.⁴ Issues of the dead certificates are prerequisites for the deceased's family to enjoy human rights including the property right and to remarry for the wife.⁵ "Humanitarian potential is pursued through the scientific identification of human remains."⁶ In congruency with this, Moon described that identification has two basic humanitarian aims i.e. protecting the dead and serving the interest of the bereaved. As, scientific identification of human remains, also known as humanitarianism forensics, enables the identification of the dead and the cause of death, it serves as means of legal proving. By this, scientific identification of human remains consolidates the normative and institutional frameworks.⁷ Identification in international criminal law is primary not for family links but search for physical evidence. ICL establishes evidence of a relationship between the deceased and the accused. Identification in international humanitarian law is the search of an individual to identify and respect family restoration. Henceforth, both ICL and IHL are practical and legally complementary.⁸

Parties to the armed conflict shall also have to return the dead body and personal possession of the dead to the family or the beloved one.⁹ Repatriating of the dead and personal effects to those who require are considered as one of the basic humanitarian drives.¹⁰ In particular, parties to the international armed conflict are required to return the personal effects of the deceased in a sealed packet to the people who requested including the deceased's last will, money, and other items.¹¹ This obligation is also covered in the human rights protection given to the right to property.¹² Rules of customary international humanitarian law vis-a-vis dead body management apply both for international and non-international conflicts. However, the obligation to return the dead body to the family cannot be claimed under non-international conflict albeit it may be regulated under national laws.¹³ As Wels mentioned, almost all humanitarian rules of the dead body management apply both for the internal and the international armed conflicts. Conversely, there appears emerging understanding on their recognition in a non-international conflict where there is an application of the right to family life which is nowadays an internationally known obligation.¹⁴ The practice of returning the dead along with their possession is protecting the dignity of the dead and respecting the family.¹⁵

Another obligation of the parties to the armed conflict is burial or cremation of the dead where parties are required to carry out burial in a respectful manner and to maintain and respect their graves well. Unless an inevitable circumstance demands to use collective graves, burial in principle should be in individual graves and all graves should be marked. Before the disposal, parties are required to identify the dead.¹⁶ Wels described this obligation as "The obligation to record and share information on gravesites." Further, the deceased's family has the right to be informed regarding the gravesites and the right to get full access to them.¹⁷ Cremation rule "reflects a general principle of law requiring respect for the dead and their graves."¹⁸

The nonexistence of specific norms concerning dead body management in armed conflict does not mean

¹ GCI: Art. 15(1); GCII: Art.18 (1); GCIV: Art. 16(2); API: Art. 34(1); AP II, Article 8 and CIHL Study, Rule 113). See also GC I-IV, Article 3(1)(c); AP II, Article 4(2)(a)

² ICC Statute, Article 8(2)

³ GC I, Articles 16(1) and 17; GC II, Articles 19(1) and 20; GC III, Article 120(2) and 121; GC IV Articles 129 and 131; CIHL Study, Rule 116). See also *supra* note 39, p.386

⁴ GC I, Article 16(3); GC II, Article 19(3); GC III, Article 120(2); and GC IV, Articles 129(2 and 3) and 138).

⁵ Arimatsu, I., *The Dead, the Missing and the Bereaved at Europe's International Borders Last Rights* (2017), at 3

⁶ *Supra* note 19, at 2

⁷ *Ibid.*

⁸ *Supra* note 3, at 34

⁹ See GC I, Article 17(3); GC III, Article 120(6); GC IV, Article 130(2); AP I, Article 34(2 and 3); CIHL Study, Rule 114).

¹⁰ ICRC Commentary on the First Geneva Convention, 2016 and, in particular, the commentary on Art. 17, para 1645 available at <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt17>

¹¹ See also GC I, Article 16(4); GC II, Article 19(3); GC III, Article 122(9); GC IV, Article 139; and AP I, Article 34(2). Rule 114 of ICRC Customary Law Study.

¹² *Supra* note 30, Art. 17

¹³ *Supra* note 2, at 766

¹⁴ *Supra* note 3, at 34

¹⁵ API: Art. 34(2) (c); Rule 114 of the ICRC Customary Law Study. See also Rule 105 of ICRC Customary Law Study concerning the family life

¹⁶ ICRC, Rule 116 of ICRC Customary Law, Accounting for the Dead.

¹⁷ Louise Arimatsu, *Last Rights, The Dead, the Missing and the Bereaved at Europe's International Borders* 2017, p.15

¹⁸ GC I, Arts. 16-17; GC II, Arts. 19-20; GC III, Arts. 120-121; GC IV, Arts.129-131; API: Art. 34(1); AP II, Art. 8; Rule 115 of the ICRC Customary Law Study. See also *supra* note 19, at 10

that the parties to the conflict can act in a legal vacuum. They are required to respect the general norms of IHL including the prohibition of outrages upon personal dignity, in particular, humiliating and degrading treatment, the prohibition of cruel and inhuman treatment, and the prohibition of collective punishment.¹ As stated above, customary international law might also fill the gap as regards dead body management in conflict times.²

4. Dead body management in armed conflict: Its place under the Ethiopian law

4.1 Introductory remarks

Under this section, Ethiopian legal frameworks are examined in light of the major obligation towards management of the dead in armed conflict namely the obligation to search for and collect the body of the dead, respectful treatment of the dead bodies, return of the dead bodies, and their possessions to their family, identification (accounting) and respectful disposal of the dead. These obligations are mainly assessed in light of pertinent provisions of the FDRE Constitution of 1995, Penal Code of 1957, Revised Criminal Code of 2004, and defense legislations.

4.2 The 1957 Penal Code

The 1957 Penal Code transformed international humanitarian law obligations into criminal legislation. The Code criminalizes violation of the obligation of international humanitarian law and protected institutions' under the "Offences against the Law of Nations."³ Article 287 which deals with dereliction of duty towards the enemy states the following:

Whosoever, in time of war and contrary to public international law and humanitarian convention: ..., mutilates a dead person; lays hands-on or does violence to a wounded, sick or dead enemy on the field of battle, with intent to rob or plunder him; or...is punishable with rigorous imprisonment or, in cases of exceptional gravity, with death.

The article incorporates two main obligations towards the dead bodies in armed conflict. Mutilation of the dead bodies and loot of their personal effects are prohibited. Under both international and non-international armed conflict, IHL requires parties to the conflict to return the body and personal effects of the deceased to the party to which they belong.⁴ As Al-Dawoody (2017) argued protecting the human body is a part of the respect for human dignity, in the context of Islamic law in an armed conflict, hence, mutilation of an enemy body is strictly prohibited.⁵ Additionally, the Code puts outrage on the repose and dignity of the dead under article 487 prohibiting disturbance of funeral procession, violation of resting in the peace of the dead or striking the human corps. In this vein, the general notion of respect involves preventing the dead from being despoiled. It obliges parties to conflict to protect the dignity of persons and the prohibition of outrages upon personal dignity.⁶ Besides, the Code under article 792 regulates burials and cremations. As explained before, the Geneva Conventions require parties to the conflict to bury the dead bodies individually if not in collective graves.⁷ Nonetheless, there is no clear indication that articles 487 and 792 are applicable in conflict times.

4.3 The FDRE Constitution of 1995

Ethiopia is a party to the protection of victims of armed conflicts' conventions including the four Geneva Conventions of 1949⁸ and two Additional Protocols of 1977.⁹ These normative frameworks have a general obligation towards states that require "To respect and to ensure respect" for their provisions.¹⁰ Besides, the conventions oblige the parties to adopt legislation to ensure their enforcement. Parties, in particular, are required

¹ See GC I-IV, Art. 3(1)(c), and AP II, Art. 4(2)(e); GC I-IV, Art. 3(1), and AP II, Art. 4(1) and AP II, Art. 4(2)(b) for detail

² This is possible except Rule 114 of the ICRC Customary Law Study that deals with the return of the dead body and personal possession of the dead; it applies to the non-international conflicts too.

³ The Penal Code of the Empire of Ethiopia of 1957, Proclamation No.158 of 1957 (entered into force on 5 May 1958), Arts.281, and the following.

⁴ See GC I, Art. 16(4); GC II, Art. 19(3); Customary IHL - Practice Relating to Rule 114. Return of the Remains and Personal Effects of the Dead (2020),

⁵ *Supra note 2*

⁶ See GC I, Art.15; GC II, Art. 18(1); GC IV, Art. 16(2); AP II, Art. 8; Customary IHL - Practice Relating to Rule 113. Treatment of the Dead, 2020

⁷ See GC I, Art. 17(1); GC II, Art. 20(1); GC III, Art. 120(5); GC IV, Art. 130(2); See also Customary IHL - Practice Relating to Rule 115. The dead must be disposed of respectfully and their graves respected and properly maintained

⁸ ICRC, Ethiopian entered in 1969 to the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Accessed 14 August 2020, <file:///C:/Users/Administrator/Downloads/IHL_and_other_related_Treaties.pdf>

⁹ ICRC, Ethiopia entered in 1994 to the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 8 June 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Geneva, 8 June 1977.

¹⁰ See Article 1 Common to all four Geneva Conventions and Article 1(1) of Additional Protocol I

to enact "legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of the grave breaches" of the Conventions and the Protocols. These Conventions and Protocols thereto, contain many provisions dealing with the dead and their graves lay down several requirements regarding domestic legislation.

The position of international treaties and their force in Ethiopian law is determined by the Ethiopian Constitution and treaty-making and ratification law.¹ The FDRE Constitution provides a foundation for international treaties ratified by the country and puts it as an integral part of the domestic legislation of Ethiopia.² Of course, the Constitution is not overtly clear on the position of treaty provisions. An international agreement in Ethiopia is concluded by the FDRE Executive organs of the government which must subsequently submit it for ratification by the House of Peoples' Representatives. Under Article 55(12) of the Constitution, the House of Peoples Representatives "shall ratify international agreements concluded by the Executive." Once they are ratified, all international agreements, including human humanitarian instruments, are integral parts of the law of the land.³ Regarding the incorporation of treaties into domestic legislation, different countries adopt different approaches. Some countries adopt a monist approach where there is no need for further procedure after their ratification to have legal effects in the national legal system. Whilst other countries follow a dualist approach which requires parliamentary action, notification law, to incorporate the treaty into the national legal system. The position of Ethiopian laws in this regard is not clear. It shows as if publication in the *Negarit Gazette* is obligatory. On the contrary, mere ratification is sufficient for treaties to have an effect domestically.⁴

Article 9(1) of the Constitution asserts its supremacy of any law including international humanitarian law. Meaning, all ratified treaties are subordinate to the Constitution. In contrast, the Constitution in its article 13(2) states that the fundamental rights and freedoms provided in the third chapter of the Constitution are interpreted in a manner conforming to the UDHR, International Covenants on Human Rights, and International Instruments adopted by Ethiopia.⁵ For this reason, the supremacy of the Constitution over international agreements including international humanitarian law instruments is contentious. The 1955 revised Constitution of Ethiopia explicitly states the supremacy of the Constitution.⁶

The general referral indicated to international law in Article 13(2) and Article 9(4) of the FDRE Constitution is supplemented by other legislation. These include numerous laws adopted in Ethiopia after the entry into force of the Constitution and prior laws which are operative.

Rights enshrined in the Constitution are fundamental rights of people equally applicable in all situations irrespective of armed conflicts or not. The main principle as regards the dead is dignity, which is considered an inherent and inalienable human right. It is basic to the living human that continues to apply posthumously as "An appeal to respect the past humanity of the dead".⁷ Otherwise, it may amount to mutilation of dead bodies to be despoiled and this in turn easily violates the dignity of the dead.

Humiliation, degrading treatment, or other violations of the dignity of persons, including dead persons, can result in the war crime of outrages. This principle of dignity is behind many of the obligations discussed above.⁸ From this, it is possible to infer that prohibition against inhuman treatment, freedom of religion, belief, and opinion, right of family, and property right also extends to the dead and their family.⁹ The obligation to search for and collect the dead under the IHL is expected to be accomplished based on the obligation of respect for every dead. It specifically prohibits despoiling or mutilating the dead bodies in armed conflicts. Hence, this is directly related to the prohibition against inhuman treatment stipulated under Article 18 of the FDRE Constitution. It may also refer to article 28 of the FDRE Constitution. Freedom of religion, belief, and opinion stated under article 27 of the Constitution also extend to as IHL stipulates that the dead should be disposed of in a dignified and respectful manner as well as their graves must also be respected and properly maintained. The dead should be buried in accordance with rites set by the dead body's custom, religion, and beliefs.¹⁰ The practice of returning the dead and their possessions indicates respect for family life.¹¹ Family can ensure this by burying the dead bodies near to them. A similar notion is also indicated in the rules of international customary humanitarian law which asserts family life deserves protection but if conditions allow.¹² Within this rule,

¹ FDRE Constitution, Arts. 9 and 13; Proclamation No. 1024/2017 International Agreements Making and Ratification Procedure Proclamation

² *Supra note* 81, Art.9(4)

³ *Ibid.*, Arts.9(4),51and 52(12)

⁴ *Ibid.*, on this see Arts. 71 and 9(4) respectively

⁵ *Ibid.*, Art.13(2)

⁶ The 1955 Revised Constitution of Ethiopia, Art.122

⁷ *Supra note* 30, preamble.

⁸ *Supra note* 3,

⁹ Based on the discussion under section three of this article see FDRE Constitution, Arts.18,27, 34(2) and 40.

¹⁰ *Supra note* 19,

¹¹ M Cordner, S, and Tidball-Binz, M, Humanitarian forensic action — Its origins and future, available at DOI: 10.1016/j.forsciint (2017)

¹² ICRC (2020), Customary IHL - Rule 105. Respect for Family Life; see also Article 34(2)(c) of API

returning the personal effects or possession of the dead to the family also indicates the protection of the right to property proclaimed under article 40 of the Constitution.¹

As a whole, it can be said that the FDRE Constitution of 1995, save the general clause, has not clearly incorporated obligations of international humanitarian law in general and dead body management in particular. Even though Ethiopia is a party to the four Geneva Conventions and two additional protocols thereto and other pertinent specific area treaties and agreements, the country fails to recognize the mechanism of doing justice for those who died in the name of the country under its fundamental law. However, one can infer few rights of the dead and their families from the limited provision of the Constitution.

4.4 The Revised Criminal Code of 2004

The Revised Criminal Code of the Federal Democratic Republic of Ethiopia (The Criminal Code, 2004) is the other major area of Ethiopian legislation that has been recently revised in conformity with the FDRE constitution. The Code has carried amendments; however, issues regarding the dead body in armed conflict are somehow similar to the Penal Code.²

Criminal provisions in respect of the dead body include dereliction of duty towards enemy including mutilation and robbing of the personal effect of the deceased, abandonment of wounded or killed member, outrage on the repose and dignity of the dead including degrading funeral services, abstraction to the detriment of a deceased person, aggravated theft, regulation of burials and cremations and concealment of a corpse.³ However, dereliction of duty towards the enemy such as mutilation and robbing of the personal effect of the deceased and abandonment of a wounded or killed member are directly relevant to the dead bodies in armed conflict. The Code prohibits mutilation under article 275. Violation of this crime entails either life imprisonment or death penalty. This crime, as discussed above, is against the human dignity of the dead. Above all, any contrary practice against this provision amounts to a violation of the obligation to respect and protect the rights of family members, next-of-kin, and loved ones of the dead, who are in agony and distress due to the death. It is wreaking moral pain and mental suffering on the relatives.⁴ So, prohibiting and punishing those who violate at least help to redress the moral pain and mental suffering of the family or beloved ones.

The Code also covers few violations of obligations towards the dead under IHL. Concerning the military crimes, the Codes under “Crimes against Safety, Morale or Power of Defence Forces” section IV list offenses committed by the members of the Armed Forces of Ethiopia. Article 316 prohibits the abandonment of killed members. It specifically forbids abandonment of the wounded or dead on a battlefield and in the event and these results capture by the enemy, the punishment is punishable with rigorous imprisonment not exceeding ten years.⁵ It is one of the legal measures in the Code that prohibits specific forms of IHL violations but focuses on the defense members only. Besides, the prohibition is for the interest of either the moral of the country or the defense force.⁶ However, respect for the dead requires the decent burial of their bodies without distinction.⁷

As stated above, IHL expressly requires States to facilitate the return of the remains of the deceased and personal effects to the home country.⁸ In situations where the personal possessions of the dead have been collected by the authorities, those items should be returned to the next of kin once there is no legitimate reason to retain them. The retention of such property by the authorities, absence of a legitimate aim, may constitute a violation of the right to property pursuant to article 40 of the FDRE Constitution. This obligation is also found in the human rights protection given to the right to property, set out under article 17 of the UDHR. As human right applies both at peace and conflict times, it extends to the dead body. Article 317 of the Code in this regard asserts as follows:

Any member of the Defence Forces who, with the intent to gain unlawful enrichment, takes public or any other property from a member wounded or killed on the battlefield, is punishable with rigorous imprisonment not exceeding ten years.

It is one of the legal measures in the Criminal Code that criminalizes specific forms of IHL violations. This provision is similar to the serious violations of international humanitarian law under customary humanitarian law.⁹ However, it is a crime committed against members of the Ethiopian Defense Forces only. Besides,

¹ *Ibid.*, see also ICRC (2020), Customary IHL - Rule 114. Return of the Remains and Personal Effects of the Dead and ICRC (2020), Customary IHL - Rule 105. Respect for Family Life

² The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, Art.275

³ *Ibid.*, Arts. 275 (b),316,493,668,669,837 and 841 respectively

⁴ *Supra note* 81, Arts.18 and 34

⁵ *Supra note* 94, Art, 316

⁶ *Ibid.*

⁷ ICRC, Customary IHL - Rule 112. Search for and Collection of the Dead (2020) available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112?

⁸ *Supra note* 61

⁹ ICRC, Definition of War Crimes - Rule 156 (ICRC, 2020), available at <https://ihl->

although the rules of international humanitarian law require the parties to the conflict to return the personal possession of the dead to the family or next of kin, nothing is revealed here to that effect.¹

For the reasons stated, the FDRE Criminal Code fails to provide a comprehensive ground for effective criminal punishment of all IHL violations against dead bodies and their grave and their family. The code partly incorporates the obligations, their violations, and corresponding punishments. It requires several amendments to include all serious violations of IHL to provide an effective criminal regime with appropriate sanctions for violation of prohibited obligations as regards the dead in armed conflict.

4.5 Defense Forces Legislations

Besides provisions in the Constitution and the Criminal Codes, the Defense Forces Proclamation which was promulgated on 19 January 2019, obliges every member of the defense to abide by international humanitarian law. The Proclamation stated, "Every member of the defense force shall have the duty to observe other laws of the country, military laws, rules, directives, and standing orders."² This implies that every member of the military personnel is required to know and strictly observe the international rules governing the conduct of military operations. This, in turn, includes the treatment of the wounded, sick, shipwrecked, and dead.³

To make sure that the military personnel are aware of the rules of international humanitarian law and have the disposition and competence, basic and diverse skill-based training programs are given.⁴ However, the detailed responsibilities of members of the defense force in the context of armed conflict are to be determined by the directive or military manual.⁵ What is so unclear is that whether the issue of dead body management, in the context of armed conflict, is covered by the specific directives or manuals. Though the specific content of it is difficult to know, the Ethiopian defense force has adopted Standing Rules of Engagement in 2007.⁶ In many countries, the specific obligation of defense members including treatment of dead bodies is provided in their military manuals.⁷ For security reasons, more likely, there is no information available on the Ethiopian defense force manuals or publications relating to the conduct of the military at conflict times.

5. Conclusion and the ways forward

International humanitarian law, also known as the law of armed conflicts, encompasses several provisions relevant to those who lost their lives in armed conflict, their gravesite, and their family. Humanitarian issues towards the dead and their family are several. These provisions impose substantive obligations to the parties involved in the hostility. The Geneva Conventions of 1949 and Additional Protocol thereto impose on countries the obligation to suppress violations of international humanitarian law. Consequently, countries including Ethiopia are required to take all measures essential to suppress violations of the obligations towards the dead in armed conflict.

Ethiopia is a party to the aforesaid Conventions and Protocols and other area-specific agreements. Hence, the country has an international obligation to reform its laws to bring them in line with the international treaty obligations. The FDRE Constitution of 1995 which is the fundamental law of the country has created a legal environment that is not fairly conducive to the incorporation of IHL obligations that directly relate to the dead, their gravesite, and the right of the family who lost their relatives or son. International humanitarian law is a subspecialty of human rights law that is not incorporated in the Constitution. Notwithstanding the absence of specific constitutional provisions, it contains general rules which could also be effective in protecting the posthumous rights of the dead including their human dignity, and protecting the rights and needs of their families and next of kin. If not for the more specific right of the dead, it is at least possible to reconsider international humanitarian law under the Constitution.

Furthermore, the Criminal Code which is relatively in a better position in incorporating provisions as regards the rights of dead bodies and their family still needs amendment. First, though the Criminal Code has recognized some of the posthumous rights of the dead namely respectful treatment of the dead, respectful disposal of the dead bodies, and protection of their possessions, it is not full-fledged. Second, most of the obligations including the search for and collect the body of the dead, return of the dead bodies to the family or next of kin, identification and respectful disposal of the dead are not incorporated at all.

Therefore, the Ethiopia Criminal Code should be revised to incorporate the rest of the obligations to be in line with the international treaty obligations so that effective justice can be done to the dead and their families.

[databases.icrc.org/customaryihl/eng/docs/v1_rul_rule156#Fn_21_60%3E%20accessed%2022%20April%](https://databases.icrc.org/customaryihl/eng/docs/v1_rul_rule156#Fn_21_60%3E%20accessed%2022%20April%202022)

¹ On this, see *supra note*,66

² Defense Forces Proclamation No. 1100/2019, Art.9(3). Similar duties were imposed upon the members of the defense force in the repealed Defense Forces Proclamation No. 27/11996, Art.8; See also Defense Force Proclamation No.809/2013,

³ Additional Protocol I (1977) to the Geneva Conventions of 1949

⁴ *Ibid.*, Art.7

⁵ *Ibid.*, Art.72

⁶ ICRC, Customary IHL – Military Manuals (2020) available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule139 >

⁷ ICRC, Rule 115. Disposal of the Dead (2020) available at https://ihl-databases.icrc.org/customary-ihl/eng/print/v1_rul_rule115

The Ethiopian defense law that has direct relevance to the armed conflict obliges members of the defense force to observe international humanitarian law, albeit in general terms. Regarding the rights of the dead in armed conflict and the corresponding obligation of the parties to the conflict, nothing is mentioned in the Proclamation. Hence, the Proclamation which is the main normative framework that can be applied during armed conflict should incorporate the major obligations towards the dead in armed conflict.

References

- Al-Dawoody, A., Management of the dead from the Islamic law and international humanitarian law perspectives: Considerations for humanitarian forensics (2017) available at [doi:10.1017/S1816383118000486](https://doi.org/10.1017/S1816383118000486), 99 (2)
- Defense Forces Proclamation No. 27/1996, Art.8
- Defense Forces Proclamation No. 1100/2019, Art.9(3).
- FDRE (Federal Democratic Republic of Ethiopia) Constitution (1995). Proclamation No. 1. Negarit Gazette, Year 1, No 1, Arts. 9 and 13
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
- Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949
- Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949
- ICRC Commentary on the First Geneva Convention, 2016 and, in particular, the commentary on Art. 17, para 1645 available at <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt17>
- ICRC Commentary on the First Geneva Convention, 2016, the commentary on common Article 3, para. 639 available at <https://ihl-databases.icrc.org/ihl/full/GCI-commentaryArt3>
- ICRC, Customary IHL – Military Manuals (2020) available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule139
- ICRC, Customary IHL - Practice Relating to Rule 113. Treatment of the Dead, (2020)
- ICRC, Customary IHL - Practice Relating to Rule 114. Return of the Remains and Personal Effects of the Dead (2020)
- ICRC, Customary IHL - Rule 112. Search for and Collection of the Dead (2020) available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule112
- ICRC, Customary IHL- Practice Relating to Rule 116, Accounting for the Dead (2020).
- ICRC, Customary IHL- Rule 115. Disposal of the Dead (2020) available at https://ihl-databases.icrc.org/customary-ihl/eng/print/v1_rul_rule115
- ICRC, Customary IHL-Rule 105. Respect for Family Life (2020), Retrieved from https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule105
- ICRC, Definition of War Crimes - Rule 156 (ICRC, 2020), available at https://ihl-databases.icrc.org/customaryihl/eng/docs/v1_rul_rule156#Fn_21_60%3E%20accessed%202022%20April%.
- Louise Arimatsu, Last Rights, The Dead, the Missing and the Bereaved at Europe's International Borders 2017,p.3 and 15
- M Cordner, S, & Tidball-Binz, M, Humanitarian forensic action — Its origins and future, available at DOI: 10.1016/j.forsciint (2017)
- Moon, C., Human rights, human remains forensic humanitarianism and the human rights of the dead (2016)
- Oxford Manual on Naval War (1913), art. 85-86
- Pathak, M.,Gupta, S., & Rai, S., Humanitarian Forensic: A Noble Approach towards Mankind, Volume 18, Issue 10 Ser.11 (October. 2019), PP 31-35
- Perreault, K., Heritage Ethics and Human Rights of the Dead (2018), available at [doi:10.3390/genealogy2030022](https://doi.org/10.3390/genealogy2030022)
- Proclamation No. 1024/2017 International Agreements Making and Ratification Procedure Proclamation
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977
- Rome Statute of the International Criminal Court (ICC), 1998 Article 8(2)
- Sandvik, K., Digital Dead Body Management (DDBM): Time to Think it Through, *Journal of Human Rights Practice* (2020), available at <https://doi.org/10.1093/jhuman/huaa002>,1-16
- The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, Art.275
- The 1955 Revised Constitution of Ethiopia, Art.122
- The Hague Convention on Maritime Warfare (1907), art. 16-17
- The Penal Code of the Empire of Ethiopia of 1957, Proclamation No.158 of 1957 (5 May 1958), Arts.281

United Nations General Assembly, Universal Declaration of Human Rights (UDHR). General Assembly Resolution 217 A (III) of 10 December 1948.
Wels, W., Dead body management in armed conflict: paradoxes in trying to do justice to the dead, The Hague