



International Humanitarian Law: The legal framework for humanitarian forensic action



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ABSTRACT

In armed conflicts, death is not an exceptional occurrence, but becomes the rule and occurs on a daily basis. Dead bodies are sometimes despoiled, mutilated, abandoned without any funeral rite and without a decent burial. Unidentified remains may be counted by hundreds or thousands. As a result, families look for years for missing relatives, ignorant of the fate of their loved ones. International Humanitarian Law, also called the laws of war or the law of armed conflict, is an international law branch, which has been developed to regulate and, as far as possible, to humanize armed conflicts. It contains a number of clear and concrete obligations incumbent to belligerent parties on the management of dead bodies, which provide the legal framework for humanitarian forensic action. The purpose of this article is to present, in a simple and concise manner, these rules with a view to extrapolate some key legal principles, such as the obligation to respect the dignity of the dead or the right to know the fate of relatives, which shall guide anyone dealing with human remains.

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1. Introduction

*"No, I know he's dead, but . . ."*¹

In armed conflicts or other situations of violence, as well as in natural disasters or in the context of migration, death is everywhere. On the battlefield, in hospitals, in detention settings, in refugee camps, in mass graves . . . Especially in wars, violent deaths are not anymore an exceptional occurrence, but become the rule and occur on a daily basis. Dead bodies are sometimes despoiled, mutilated, abandoned without any funeral rite and without a decent burial. Unidentified remains may be counted by hundreds or thousands. Families look for years for missing relatives, ignorant of the fate of their loved ones.

In such contexts, forensic expertise is desperately needed, and not only for the purpose of criminal investigations, but also to ensure respect for basic humanitarian considerations. Human remains must be handled respectfully and with dignity. Families have the right to know the fate of their relatives. These are not only moral requirements but also proper international legal obligations.

International Humanitarian Law, also called the laws of war or the law of armed conflict, provides for clear and concrete obligations incumbent to belligerent parties towards the dead and their relatives in the context of armed conflicts. Notably, dead bodies must be searched for, collected, identified and returned to their families.²

Humanitarian organizations, such as the International Committee of the Red Cross (ICRC), can offer their forensic expertise to belligerent parties in order to support them in fulfilling their humanitarian obligations with regard to the management of dead bodies. The ICRC, for instance, describes its activities in this field as "provid(ing) advice, support and training to local authorities and forensic practitioners in searching for, recovering, analysing, identifying, and managing large numbers of unidentified remains in varying states of preservation".³ In brief, as defined by the ICRC, humanitarian forensic action consists in the application of forensic science to humanitarian activities.

The objective of this article is to present, in a simple and concise manner, the most important and relevant International Humanitarian

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¹ This is a quote from the main character (John May) in a movie entitled *Still Life* (2013) by Uberto Pasolini.

² Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC/Cambridge University Press, 2005, Rules 112–116. Available at: <https://www.icrc.org/customary-ihl/eng/docs/v1>. Hereafter: ICRC Customary IHL Study.

³ ICRC, In-brief: *Forensic science and humanitarian action*, In-brief, Geneva, ICRC, December 2013. Available at: <https://www.icrc.org/fr/publication/4156-forensic-science-and-humanitarian-action>.

tarian Law rules regarding the management of dead bodies, which constitute the legal framework for humanitarian forensic action in armed conflict situations. Knowing the existence and content of these rules enables persons managing dead bodies, including forensic experts, to support, strengthen and promote their action in armed conflicts by understanding what are belligerents' duties in such contexts. Understanding the principles underlying these rules gives also food for thought regarding potential limits to humanitarian forensic action or, at least, possible challenges in practice.

In terms of structure, this article will first present the relevant international legal frameworks, with a focus on International Humanitarian Law. Then it will discuss the key International Humanitarian Law provisions regarding the management of dead bodies and related institutional framework. Throughout the paper, the main legal principles underlying humanitarian forensic action will be recalled and summarized in the conclusion.

2. International Humanitarian Law and other relevant international legal frameworks

International Humanitarian Law (IHL) is one of the oldest branches of public international law, i.e. the law that regulates relations between States and other subjects of international law. IHL can be defined as “a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare”.⁴

In essence, IHL aims at limiting the savagery of wars: it establishes minimum non-derogable rules, which strike a balance between humanitarian considerations (principle of humanity) and the military necessity goal to prevail over the enemy. For instance, only military targets, never the civilian population or civilians can be attacked. IHL also provides that the wounded, sick and shipwrecked must be respected and protected. It affords protections to persons detained in relation to an armed conflict such as prisoners of wars or civilian internees. IHL does not regulate however, whether a State has the right to go to war, or to use force, against another State. This is governed by a distinct body of international law, called *jus ad bellum* and mainly governed by the United Nations Charter.

International Humanitarian Law rules can be found primarily in the Four Geneva Conventions of 1949 and in their Additional Protocols of 1977. These treaties are binding upon all States having ratified them. The Geneva Conventions are often depicted as embodying universally agreed-upon norms because they are among the most widely ratified treaties in the world.⁵

In order to trigger the applicability of International Humanitarian Law, there must be an armed conflict. There are mainly two types of armed conflicts. First, international armed conflicts, which oppose two or more belligerent States or a belligerent State and an international organization (such as NATO). The Gulf War opposing Iraq to a coalition of States led by the United States of America is a good example of an international armed conflict. Second, non-international armed conflicts opposing a State to an organized non-State armed group or opposing two or more organized non-State armed groups. The armed conflict in Colombia which opposed the Government to the Revolutionary Armed Forces of Colombia (FARC) can be given as an example of a non-international armed conflict. But non-international armed conflicts do not

necessarily take place on the territory of a single State. For instance, the conflict opposing the United States of America or France to the Islamic State (ISIS), an organized non-state armed group, in Syria, is also a non-international armed conflict even if it has a cross-border dimension.

The reason why lawyers give such importance to the classification of armed conflicts – i.e. as to whether armed violence reaches the threshold of an armed conflict or whether a conflict is international or not – is because the legal framework, the number and types of rules that will apply will substantially differ. While IHL for international armed conflicts has developed over centuries, the treaty rules that apply to non-international armed conflicts are newer, much less numerous and elaborate. This is so because States have traditionally been reluctant to regulate at the international level matters which they used to consider private or internal. As a result, while international armed conflicts are governed notably by the four Geneva Conventions and Additional Protocol I, non-international armed conflicts are only regulated by Article 3 common to the Geneva Conventions and Additional Protocol II, if its limitative conditions of application are fulfilled.

Most contemporary armed conflicts are non-international ones and in many of them, only one provision applies. This is the so-called Common Article 3, which merely encompasses the most fundamental humanitarian guarantees, such as the prohibition of murder, of torture and the right to a fair trial. This is nothing compared to the hundreds other provisions of the Geneva Conventions, which are dedicated to international armed conflicts exclusively. With respect to rules pertaining to the management of dead bodies, this difference between international and non-international armed conflicts is also crucial since most relevant rules have been developed for international armed conflicts alone.

This being said, IHL is not only made of treaty rules. Customary law is another important source of international law.⁶ It is unwritten law that is made of State practice considered by the States as legally binding. Identifying customary law is always a challenging task involving researching and analysing States' actual practice, their military manuals, domestic laws, declarations in international fora etc. After a ten-year study, the International Committee of the Red Cross has identified 161 rules that belong to customary International Humanitarian Law and which – for the great majority – apply equally to international and non-international armed conflicts.⁷ As we shall see, a number of rules pertaining to the management of dead bodies belong to customary International Humanitarian Law and apply to all types of armed conflicts and to all belligerent parties.

Not only IHL, but also other branches of international law provide significant legal obligations regarding the management of dead bodies. International human rights law, which applies at all times, is particularly important in contexts such as natural disasters or internal disturbances where IHL does not apply. But human rights law also offers protection in armed conflicts by complementing, reinforcing and influencing IHL.⁸

The main treaties forming part of human rights law are the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic Social and Cultural Rights (1966). There are also regional human rights treaties, such as the European Convention on Human Rights, the American Convention on Human Rights or the African Charter on Human and Peoples'

⁴ Art. 38 of the *Statute of the International Court of Justice* annexed to the *Charter of the United Nations*, 1945.

⁵ ICRC Customary IHL Study.

⁶ On the mutual influence between IHL and human rights law, see Gloria Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie*, Paris, Pedone, 2013.

⁴ ICRC, Fact-sheet: *What is International Humanitarian Law?*, Geneva, ICRC, 2004, p.1. Available at: https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

⁵ ICRC, Fact-sheet: *What is International Humanitarian Law?*, Geneva, ICRC, 2004, p.1. Available at: https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

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