



**PROTECTION OF RIGHTS WITHOUT BORDERS
NON-GOVERNMENTAL ORGANIZATION**

**INPUT ON THE PROTECTION OF DEAD PERSONS AND THEIR HUMAN REMAINS,
INCLUDING OF VICTIMS OF POTENTIALLY UNLAWFUL KILLINGS**

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This input covers some aspects of treatment of dead persons and their remains as documented by the “Protection of Rights without Borders” NGO as part of its fact-finding activities in the context of armed conflict in and around Nagorno Karabakh as well as analysis of the national legislation of the Republic of Armenia.

Parties to an armed conflict must record all available information before disposing of the dead, with a view to identifying these dead bodies or human remains at a later date,¹ in a respectful manner,² to the extent permitted by circumstances, as well as that bodies are buried or cremated individually.³ Deceased prisoners of war and internees must be buried in individual graves unless unavoidable circumstances require the use of collective graves.⁴ Parties to an international armed conflict must carry out a careful (medical) examination of the body before burying or cremating it, in order to confirm death, establish identity and enable a report to be made.⁵ When necessary, and if family members so wish, States should cover the cost of transferring the body or remains to the place chosen by the family members for burial, even if the transfer is to or from another country.⁶

Lack of comprehensive regulation of search operations, including lack of explicit prohibition of arbitrariness or discrimination in search and retrieval operations, may result in abuse. Footage disseminated on social media during and after the hostilities in and around Nagorno Karabakh in 2020 demonstrate that not all bodies were collected with due diligence by Azerbaijan. The bodies of the enemy combatants - Armenians in some cases were left in the place of engagement for prolonged periods. In some footage, animals were video recorded eating the flesh with no attempts to prevent that. PRWB documented numerous instances when Azerbaijani servicemen disrespected the dead bodies of fallen Armenian servicemen and/or mutilated their bodies. They did this on camera and disseminated widely on social media.⁷ As a result, bodies were not retrieved (on time) preventing establishment of their fate and whereabouts and/or identification. This resulted in a high number of Armenian servicemen and civilians from Nagorno Karabakh considered missing. Instances of arbitrary killing of

¹ GC I, Article 16(1); GC II, Article 19(1); GC III, Article 120(2); Rule 116, Customary International Humanitarian Law.

² GC I, Article 17; GC II, Article 20; GC III, Article 120; GC IV, Article 130; AP II, Article 8; and Rule 115, Customary International Humanitarian Law.

³ GC I, Articles 17(1) and 20(1); and interpretation of Rule 115, Customary International Humanitarian Law.

⁴ GC III, Article 120(5); and GC IV, Article 130(2).

⁵ GC I, Article 17(1); GC II, Article 20(1); and GC III, Article 120(3).

⁶ Principle 2, Guiding principles for the search for disappeared persons.

⁷ See more at the report, pp. 142-151, available at https://www.osf.am/wp-content/uploads/2022/06/Fact-Finding-Report_FINAL_web.pdf.



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civilian residents of Nagorno Karabakh who fell in custody of Azerbaijani servicemen in 2020 were documented by PRWB. While they were video recorded alive by Azerbaijani servicemen, later on their bodies were found during search and retrieval operations, left unattended or buried disrespectfully. Azerbaijani authorities largely failed to prosecute such instances and bring the perpetrators to justice. Footage appeared on social media during and in the immediate aftermath of hostilities in and around Nagorno Karabakh in 2020 where members of the armed forces dump several bodies in one hole. Such instances suggest lack of training and discipline among those involved in retrieval and transfer of the dead in the context of an armed conflict.

Similar practice of mutilation and disrespect of dead bodies was documented in previous years, the cases are pending judgment in the European Court of Human Rights. On 2 April 2016, Azerbaijani Special forces penetrated into Talish village, Nagorno Karabakh where they tortured and executed elderly members of the Khalapyan family in their house, as well as mutilated their corpses through cutting their auricles. On the same day, Azerbaijani Special forces executed through beheading and dismembered a Major of the Defense Army, H. T., while alive and beheaded his driver, Private H. Gh., post-mortem. The severed heads were taken as a war trophy and never returned to the families of the killed. Moreover, the severed head of the Major was posted on social media by a member of the Azerbaijani Special Forces proudly claiming the “possession of one”. Another instance of a hate crime in 2016 was the decapitation of an Armenian soldier of Ezidi origin, Kyaram Sloyan, where Azerbaijani servicemen posted on photos with the severed head Sloyan.⁸ Perpetrators were not subject to criminal or disciplinary sanctions; on the contrary, they got awarded by the President of Azerbaijan Aliyev.⁹ Lack of accountability, absolute impunity for mutilation and disrespect of dead bodies of Armenians contributed to a sharp increase of such practice by Azerbaijani military in 2020 and later on.

Adequate legal framework, including sanctions, ensuring accountability are key to ensure respect of international rules on the treatment of the dead, including in the context of armed conflict.

Recovery and identification

States should establish databases with elements relevant to the search, including genetic databanks and consultation systems that make it possible to obtain results quickly. These databases should be designed using an interdisciplinary approach and aim to be mutually compatible.

In international armed conflicts, the authorities must see to it that the dead, including their burials, are recorded as well as the particulars of graves and those interred there. This task might be efficiently covered by the State’s official graves registration service – if not, it would require the establishment and functioning of a complementary system to record the details of the death and interment of protected persons.

⁸ ECHR, *Khalapyan v Azerbaijan*, App. no. 54856/16 (communicated on 25 November 2016) (available at <https://hudoc.echr.coe.int/?i=001-169756>), ECHR, *K.S. and N.A. v. Azerbaijan and 21 other applications* (communicated on 25 November 2011) (available at: <https://hudoc.echr.coe.int/?i=001-169755>) Amnesty International, *Armenia/Azerbaijan: Decapitation and war crimes in gruesome videos must be urgently investigated* (10 December 2020).

⁹ President Aliyev awarded the mutilator of the killed Armenian Soldier’s Body in August, 19 September 2022, available at: <https://fip.am/en/20460>



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In Armenia, the procedure for carrying out identification of a dead body regulates in general the procedure for forensic examination of a dead body.¹⁰ It covers forensic examination in the context of criminal investigation. It does not contain any specific references to situations of an armed conflict. According to the procedure, the body is transferred to the forensic center based on the decision of the law-enforcement bodies by a body-transferring team by a special transport. Following the forensic examination, the forensic expert draws up a medical certificate about the death. The expert also draws a forensic report that is handed over to the body that requested the forensic examination. The regulation lists types of issues to be answered by the forensic examination.

Exhumation

The discovery of burial sites can be important not only in tracing missing persons but also in the identification of the commission of crimes and their possible subsequent prosecution. As such, exhumations should be performed only with the proper authorizations, and according to the conditions specified in law. If exhumations are required, the competent authority should ensure that the identity of human remains and cause of death are established with due diligence by an official qualified to perform exhumations and post-mortem examinations and to make a final determination.

In Armenia, there is no autonomous law on governing treatment of dead bodies during military operations, in particular their search, recovery, identification, transfer, burial, and repatriation. Exhumations take place in the framework of criminal investigations. This means that general rules for exhumations are applicable. Armenian legal framework in principle does not explicitly prohibit exhumations outside the criminal framework as such, however, there is no suitable procedure for this. If human remains are identified or repatriated, in the framework of criminal investigation, forensic examination is assigned.

Under the 2022 Armenian Criminal Procedure Code (CPC), exhumation is one of the investigative measures (Article 208) and it shall be carried out exclusively based on the decision of an investigator (Article 209(2(2))). It shall be conducted by an investigator with the participation of an experienced forensic expert (Article 201(2)), and if required, an expert from another field (Article 240(5)). Participation of a representative of local self-governing body is mandatory. Next of kin of the deceased has the right to participate in the exhumation (Article 240(5)).

Article 240 of the CPC specifically regulates the procedure of exhumation. Importantly, the CPC requires that in the investigator's decision to carry out exhumation contains the following information: brief description of the alleged crime for which the exhumation is required shall be presented, relevant data of the deceased, circumstances justifying the exhumation, the purpose, date/time and place.

The decision to carry out exhumation as well as notification with the information on the right to challenge this decision, the deadlines and the procedure are handed over to one of the next of kin. Any of the next of kin has the right to appeal the decision on the exhumation to the prosecutor within three days after one of the next of kin received the notification. In such a case, the exhumation is suspending

¹⁰ Government Decree N 601-Ն on Approving the Procedure on Forensic Examination, **adopted on** 15.04.2021, entered into force on 20.04.2021, available at <https://www.arlis.am/DocumentView.aspx?docid=151795>.



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pending the prosecutor's decision. Such approach leaves it open how all other interested family members would learn of the upcoming exhumation to be able to challenge the decision.

Court may also authorize the exhumation based on the motion of one of the parties or upon own initiative, if this has not been done during the pre-trial stage or the court finds that it does not suffice to use the protocol of exhumation compiled during the pre-trial stage (Article 333(5)).

Exhumation process shall be filmed. This is mandatory under the CPC (Article 214(3)).

Burial

The remains may be returned to the family if possible. If not, a proper burial should be ensured.¹¹

There should be a clear competent authority in charge of marking the graves. The existence and functioning of an official graves registration service to record the particulars of the dead and their burial shall be ensured. This service should extend to the information regarding protected persons in international armed conflicts.¹²

Commonly recognized international ethical standards of practice must be adhered to during the burial process. The burial should be preceded where possible by a medical examination and a report should be prepared. Burial should be in individual graves, unless circumstances require the use of collective graves. The dead should be buried where possible according to the rites of the religion to which the deceased belonged. Cremation should be avoided, except where necessary (e.g. for reasons of public health) and a record of the reason for it kept, as well as the ashes. All graves must be marked. After post-mortem examination, the remains should be released to the family at the earliest time possible. It is essential that all information be collected for the purpose of identification whenever exhumations are performed; regulations and procedures should be in conformity with the principles governing the protection of personal data and genetic information; it is important to preserve evidence conducive to the identification and that may be required for any criminal investigation, whether under national or international law.¹³

The Law on the Organization of Burial and Exploitation of Gravesites and Cremation Facilities of the Republic of Armenia stipulates general rules of burial, and does not address burial in the context of an armed conflict. It sets some rules on the procedure, including the burial in a coffin only (Article 11). Burial of those who do not have persons responsible for their burial is carried out by the head of the local self-governance body, after the police establishes the identity of the deceased and the circumstances of the death. In case of failure of the police to establish the identity of the deceased, the burial takes place with the consent of the relevant public bodies in places allocated for such situations in civilian burial sites (Article 13). If the local self-governing body is in charge of the burial, then the body is buried in an (individual) grave and a metal plaque is placed on the place of burial (Article 16).

¹¹ ICRC Guiding Principles / Model Law on the Missing, p.42.

¹² Ibid., p. 47.

¹³ Ibid., p.48.



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The plaque contains the following information: name, paternal name and last name of the deceased, date of birth and death, registration number of the grave.¹⁴

Burial of an unidentified person takes place with a consent of the Police of Armenia, in places specifically allocated for that purpose within a civilian cemetery. Cremation of an unidentified person is prohibited except for cases where there are sanitary-epidemic threats.¹⁵

The procedure on the burial approved by a government decree specifies that funeral may take place taking into account religious and cultural traditions.¹⁶

According to the Armenian Law on Preservation of the Memory, in case of retrieval of remains of members of armed forces of foreign states, their funeral is organized after notifying the state of origin, and where necessary, with participation of representatives of their organizations.¹⁷

Reburial of bodies of the fallen members of armed forces is carried out by the decision of the local self-governing bodies and the families are notified (Article 5).

The Law on Preservation of the Memory explicitly refers to the Geneva Conventions and other recognized norms of international law and the order for maintenance and preservation of the military burial sites (Article 6).

Military burial sites are subject to registration. It is carried out by local self-governance bodies. These bodies are also responsible for their maintenance and preservation. A plaque is placed on every military grave, and all of the graves are subject to passportization.

Armenian legislation contains most of the minimum safeguards for the burial are provided in the legislation, including burial in individual graves, burial where possible according to the rites of the religion to which the deceased belonged, prohibition of cremation for unidentified bodies, marking of the graves, etc. However, these regulations are generic and no references for the situations of armed conflict are made to ensure that the same protocols are complied with and there is awareness among those involved in retrieval, identification and disposal of bodies.

Repatriation

Following the 2020 hostilities against Nagorno Karabakh, a series of repatriations of the bodies from Azerbaijan were organized. In some cases, allegations of mistreatment either while alive or post mortem were made.¹⁸

¹⁴ Government Decree on Approval of Procedures, Rules and Templates of Grave Certificates stipulated in the Law on the Organization of Burial and Exploitation of Gravesites and Cremation Facilities, N 1910-Ն, adopted on 23.11.2006, para. 16, entered into force on 17.02.2007, available at <https://www.arlis.am/DocumentView.aspx?docid=168184>

¹⁵ Ibid., para. 21.

¹⁶ Ibid., para.15.

¹⁷ Article 5, Law on Preservation of Memory of the Fallen Members of the Armed Forces.

¹⁸ See, for example, '2020 Artsakh War: Husband Dies in Baku Prison, Wife Survives to Tell the Tale', <https://hetq.am/en/article/146216>



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Criminalization of mistreatment of the dead

Consistent with most religious and cultural traditions, humanitarian law prohibits the despoliation and mutilation of the dead. Parties must prevent the dead from being despoiled. Despoilment is a form of pillage and, as such, prohibited.¹⁹ Although not specifically provided for in Article 15 of GC I, the mutilation of dead bodies is prohibited under customary international law and is covered by the war crime of ‘committing outrages upon personal dignity’ under the 1998 ICC Statute.²⁰ The act of mutilating or despoiling the dead can lead to complications in the identification of the dead and is therefore likely to increase the chances of a person being considered missing when in fact they have been killed. Under AP I, the protection of the dead goes further than their protection against despoilment: parties to an armed conflict are obliged more broadly to ‘respect’ the dead.²¹

Criminalization on national level shall also ensure command responsibility for those acts committed by their subordinates.

Armenian Law on the Approval of the Internal Rulebook of the Armed Forces explicitly stipulates the obligation of the respective officers in charge of legal and social matters to raise awareness of the members of the armed forces of IHL.²² Aspects related to the prohibition of pillage and disrespect to the dead bodies shall be also covered.

The 2022 Criminal Code of Armenia contains new approach of listing the crimes and criminalizing autonomous offences that constitute violations of IHL, prioritizing them in the Code, including related to the disrespect to the dead.

Article 142 of the 2022 Criminal Code criminalizes despoilment of the dead or wounded in the battlefield. It is punishable with 4 to 8 years of imprisonment. This offence is considered a grave crime under the Criminal Code.

Article 143 of the 2022 Criminal Code criminalizes disrespect or desecration of the bodies of the dead in the battlefield. In particular, this includes mutilation of the dead bodies in the battlefield or disrespect in other manner, punishable with 5 to 10 years of imprisonment (grave crime). Commission of this offence while on military duty is considered an aggravated circumstance and is punishable with 8 to 12 years of imprisonment (particularly grave crime). In case this act was coupled with taking photos or filming the process mutilation, it is punishable with 10 to 15 years of imprisonment.

The Criminal Code also contains another general offence (not as a crime against humanity or a war crime) of disrespect of the dead body (Article 305), that is a disrespect of the dead body by desecration, unlawful exhumation, taking the clothes or property off the body or disrespect of the memory of the deceased in other manner that is punishable with non-custodial sentences or imprisonment up to 2 years. Commission of this crime based on racial, ethnic, nationality or social origin, religion or hatred

¹⁹ Hague Regulations (1907), Article 28; see also Rule 52, Customary International Humanitarian Law.

²⁰ Rule 113, Customary International Humanitarian Law, cited in Footnote 4. ICC Elements of Crimes (2002), Definition of the war crime of outrages upon personal dignity (ICC Statute (1998), Article 8(2)(b)(xxi).

²¹ See Article 34, AP I.

²² Article 104, Law on Approval of the Internal Rulebook of the Armed Forces.



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motivation by other grounds or committed in group are aggravating circumstances, and is punishable with 1 to 4 years of imprisonment.

Criminal Code not only makes it an autonomous offence but also distinguishes if committed while on military duty. Moreover, it takes into account a relatively new development of the use of (phone) cameras to film the action, and makes it an aggravated crime. It also significantly harshened the sanction.

Article 148 of the 2022 Criminal Code criminalizes omission (inaction) during an armed conflict (command responsibility). This includes commander's responsibility for failure to take all possible measures to prevent or report commission of, among others, despoilment of the dead or wounded in the battlefield and mutilation of the dead bodies in the battlefield or disrespect in other manner by their subordinates. Failure to report is punishable with imprisonment from 2 to 5 years, and failure to prevent - with imprisonment from 3 to 8 years depending on the circumstances.

Under Article 91 of the Criminal Code, amnesty is not applicable to crimes against peace and humanity, including above-mentioned Article 142 (despoilment of the dead in the battlefield) and Article 143 (disrespect or desecration of the bodies of the dead in the battlefield).

Under Article 90(7), statute of limitation is not applicable to Article 142 (despoilment of the dead in the battlefield) and Article 143 (disrespect or desecration of the bodies of the dead in the battlefield).