

# The war crime of outrages against the personal dignity of the dead: Legal basis, evolution, and elements

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## Abstract

*The mistreatment of corpses during armed conflicts is a grim and ancient practice that persists in modern warfare despite the protections afforded to the dead under international humanitarian law (IHL). This article explores the application of the war crime of outrages upon personal dignity to acts committed against the deceased. Sketching the development of the prohibition against maltreatment of the dead in the early laws and customs of war, it identifies post-Second World War prosecutions as the turning point where violations of such IHL provisions were clearly sanctioned as crimes*

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*imputing individual responsibility under international law. Turning to the elements of the modern war crime of outrages upon personal dignity, the article appraises the scant engagement of international criminal courts and tribunals with the offence in contexts involving the dead. It stresses that jurisprudential guidance must be primarily sought in national case law from European jurisdictions, which have, in recent years, played host to the prosecution of a significant number of war crimes cases involving the degrading treatment of corpses. On the basis of this jurisprudence, the article then revisits the elements of the war crime, examining the particulars of the offence in the context of the dead.*

**Keywords:** war crimes, outrages upon personal dignity, the dead, Rome Statute, international criminal law.

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Hence is it that the office of burial is said to be performed not so much for the man, that is, for the person, as for mankind, that is for human nature.

Hugo Grotius<sup>1</sup>

## Introduction

Spanish philosopher George Santayana, in a quote commonly misattributed to Plato, memorably wrote that “only the dead have seen the end of war”.<sup>2</sup> The motif of heroic death in battle throughout ancient Greek epic myth similarly emphasized that “[t]o pass by death is also to escape the process of aging” and that “[t]o fall on the battlefield saves the warrior from this inexorable decay”.<sup>3</sup> Such a conception of death as a merciful delivery from the savagery of the battlefield has persisted since.<sup>4</sup> But the true tragic record of warfare, from antiquity to modernity, would appear to dispel any such claim that the horrors of war end upon death or that death in war preserves bodies from despoliation. On the contrary, it would appear that, in countless cases, the bodies of deceased combatants fall victim to some of the most barbaric and senseless violence to punctuate armed conflict, even if *post-mortem* in nature. The disturbingly ancient history of the despoliation and desecration of the corpses of the opposing military emphasizes that the horrors of war faced by soldiers transcend the physical death of combatants.

- 1 Hugo Grotius, *The Law of War and Peace*, ed. Stephen C. Neff, Cambridge University Press, Cambridge, 2012 (first published 1625), Book II, Chap. 19, p. 267, § 2.
- 2 George Santayana, “Tipperary”, in George Santayana, *Soliloquies in England and Later Soliloquies*, Scribner’s, New York, 1922, p. 102.
- 3 Jean-Pierre Vernant, “A ‘Beautiful Death’ and the Disfigured Corpse in Homeric Epic”, in Froma I. Zeitlin (ed.), *Mortals and Immortals: Collected Essays*, Princeton University Press, Princeton, NJ, 1991, pp. 59–60.
- 4 See, e.g., Adam Rosenblatt, “International Forensic Investigations and the Human Rights of the Dead”, *Human Rights Quarterly*, Vol. 32, No. 4, 2010, p. 941 (“Dead bodies are safely beyond many of the dangers that affect the living, from pain to disease”).

The mistreatment of corpses during and in the aftermath of armed conflict is a horror of an ancient vintage. Homer's *Iliad* features corpse mutilation extensively,<sup>5</sup> so much so that a rich body of literature has developed drawing on patterns in Homeric depictions of corpse mutilation to construct thematic lessons from its inclusion as a narrative device in understanding broader themes of warfare, honour and theology in ancient Greece and, later, Rome.<sup>6</sup> Beyond the battlefield, many national jurisdictions have come to criminalize acts of desecrating the dead as "ordinary" domestic offences, drawing rich scholarly discussions concerning whether the dead truly possess interests capable of being harmed and, if so, whether harm to such interests warrants the intervention of criminal law.<sup>7</sup> As will be discussed, these questions are of continued salience as a matter of international law.

Obligations under international humanitarian law (IHL) relating to the treatment and protection of the dead and related war crimes receive relatively scarce engagement in leading works on IHL.<sup>8</sup> Even less scholarly attention has been paid to issues of individual responsibility under international criminal law for violations of such *jus in bello* provisions. The few illuminating studies to date have either focused on the broader IHL framework,<sup>9</sup> issues of humanitarian forensics<sup>10</sup> or the treatment of war crimes against the dead in particular national jurisdictions.<sup>11</sup> In recent years,

- 5 The gods of the Greek pantheon are depicted as condemning the mutilation of a corpse as an immoral act: see, e.g., Homer, *The Iliad*, trans. Anthony Verity, Oxford University Press, Oxford, 2012, Book XVI, pp. 269–272, §§ 569–683, and Book XXIV, pp. 389–390, §§ 1–76.
- 6 See, e.g., Charles Segal, *The Theme of the Mutilation of the Corpse in the Iliad*, Brill, Leiden, 1971; Andrew M. McClellan, *Abused Bodies in Roman Epic*, Cambridge University Press, Cambridge, 2019; Maaïke van der Plas, "Corpse Mutilation in the *Iliad*", *Classical Quarterly*, Vol. 70, No. 2, 2020.
- 7 See, e.g., Ernest Partridge, "Posthumous Interests and Posthumous Respect", *Ethics*, Vol. 91, No. 2, 1981; Jonathan Herring, "Crimes against the Dead", in Belinda Brooks-Gordon, Fatemeh Ebtehaj, Jonathan Herring, Martin Johnson and Martin Richards (eds), *Death Rites and Rights*, Hart, Oxford, 2007; Daniel Spirling, *Posthumous Interests*, Cambridge University Press, Cambridge, 2008; Heather Conway, *The Law and the Dead*, Routledge, London, 2016; Imogen Jones, "A Grave Offence: Corpse Desecration and the Criminal Law", *Legal Studies*, Vol. 37, No. 4, 2017.
- 8 For notable exceptions, see Daniela Gavshon, "The Dead", in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015; Marco Sassòli, *International Humanitarian Law*, 2nd ed., Edward Elgar, Cheltenham, 2024, paras 8.270–8.285.
- 9 See, e.g., Anna Petrig, "The War Dead and Their Gravesites", *International Review of the Red Cross*, Vol. 91, No. 874, 2009; D. Gavshon, above note 8; Caroline Fournet and Nicole Siller, "'We Demand Dignity for the Victims' – Reflections on the Legal Qualification of the Indecent Disposal of Corpses", *International Criminal Law Review*, Vol. 15, No. 5, 2015, pp. 900–910; Frédéric Mégret and Chloe Swinden, "Returning the 'Fallen Terrorist' for Burial in Non-International Armed Conflicts", *Journal of Humanitarian Legal Studies*, Vol. 10, No. 2, 2019, pp. 344–351.
- 10 See, e.g., A. Rosenblatt, above note 4; Éadaoin O'Brien, "Forensic Science, International Criminal Law and the Duties towards Persons Killed in War", in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights*, Edward Elgar, Cheltenham, 2012; Welmot Wells, *Dead Body Management in Armed Conflict*, LLM thesis, Leiden Law School, The Hague, 2016; Ahmed Al-Dawoody, "Management of the Dead from the Islamic Law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics", *International Review of the Red Cross*, Vol. 99, No. 906, 2017; Gloria Gaggioli, "International Humanitarian Law: The Legal Framework for Humanitarian Forensic Action", *Forensic Science International*, Vol. 282, 2018.
- 11 See, e.g., Kai Ambos, "Deceased Persons as Protected Persons within the Meaning of International Humanitarian Law: German Federal Supreme Court Judgment of 27 July 2017", *Journal of International Criminal Justice*, Vol. 16, No. 5, 2018; Anna Andersson, "Outrage upon the Personal Dignity of the Dead

the International Committee of the Red Cross (ICRC) has produced several reports and guidelines in relation to the treatment of the dead during armed conflict that clarify both the applicable law and best practices.<sup>12</sup> In addition, in April 2024, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions published an extensive report assessing the protection of the dead across various legal frameworks, including IHL and international criminal law, but focussing primarily on international human rights law and practical guidance on protections and investigations.<sup>13</sup>

This article seeks to examine and clarify the elements of the war crime of outrages against the personal dignity of the dead, an offence applicable during both international armed conflicts (IACs) and non-international armed conflicts (NIACs) under the Rome Statute of the International Criminal Court (ICC) and customary international law. It first identifies the offence's basis in IHL, before outlining the scattered and imprecise treatment of the offence in the jurisprudence of international criminal courts and tribunals. The article then turns to the far more extensive engagement with the offence that can be found in the universal jurisdiction case law of continental European States. In doing so, it traces the development of the offence through post-Second World War prosecutions of mistreatment of the dead, vital antecedents to the crystallization of individual criminal responsibility for such acts under customary international law. Reviewing the practice and jurisprudence of domestic courts, the article aims to foster a more detailed understanding of the specific elements and operation of the war crime of outrages against personal dignity when applied to the dead.

## Overview of the legal framework applicable to the dead in war

### Early instruments

Even in its earlier instruments, the protections of IHL have extended to the wartime dead. The 1880 Oxford Manual on *The Laws of War on Land*, while a non-binding

in International and Swedish War Crimes Legislation and Case Law”, *Scandinavian Studies in Law*, Vol. 66, 2020; Vanessa Bergmann, Franziska Blenk and Nathalie Cojger, “Desecration of Corpses in Relation to § 8(1) No. 9 German Code of Crimes against International Law (VStGB): The Judgment of the German Federal Court of Justice (*Bundesgerichtshof*) of July 27, 2017–3 StR 57/17”, *German Law Journal*, Vol. 22, No. 2, 2021, pp. 281–285; Lachezar Yanev, “Syrian War Crimes Trials in the Netherlands: Claiming Universal Jurisdiction over Terrorist Offences and the War Crime of Outrages upon Personal Dignity of the Dead”, *Netherlands Yearbook of International Law*, Vol. 52, 2023, pp. 315–319; and see the article by Angelica Widström in this issue of the *Review*: Angelica Widström, “A Case Study on War Poses”, *International Review of the Red Cross*, Vol. 107, No. 929, 2025.

12 ICRC Advisory Service on International Humanitarian Law, “Humanity after Life: Respecting and Protecting the Dead”, Geneva, 2020, available at: [www.icrc.org/en/document/humanity-after-life-respect-and-protection-dead](http://www.icrc.org/en/document/humanity-after-life-respect-and-protection-dead) (all internet references were accessed in April 2025); ICRC, *Guiding Principles for Dignified Management of the Dead in Humanitarian Emergencies and to Prevent Them Becoming Missing Persons*, Geneva, 2021.

13 *Protection of the Dead: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/56/56, 25 April 2024, esp. paras 14–16.

model for national military manuals, was the first instrument to explicitly outline a prohibition against the despoliation of the dead, with Article 19 providing that “[i]t is forbidden to rob or mutilate the dead lying on the field of battle”.<sup>14</sup> Article 3 of the 1906 Geneva Convention required that a “careful examination is made of the bodies of the dead prior to their interment or incineration”.<sup>15</sup> This obligation was reiterated in Article 16 of the 1907 Hague Convention X on Maritime Warfare and Article 85 of the non-binding 1913 Oxford *Manual of the Laws of Naval War*, which also specified that the dead must be protected “from pillage and ill-treatment”.<sup>16</sup> The latter obligation was most authoritatively reiterated *verbatim* in Article 3 of the 1929 Geneva Convention. Article 4 of the 1929 Convention also required that States “ensure that the dead are honourably interred, that their graves are respected and marked so that they may always be found”.<sup>17</sup> These early instruments laid the groundwork for modern IHL’s treatment of violence against the dead.

## Modern international humanitarian law

Contemporary IHL imposes various obligations on belligerent parties with respect to the treatment and disposal of the dead.<sup>18</sup> These obligations are based both in treaty law – namely, the Geneva Conventions of 1949 and their Additional Protocols of 1977 – and customary IHL, as primarily reflected in the ICRC Customary Law Study of 2005. Firstly, parties must at all times, and particularly after an engagement, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction of any kind.<sup>19</sup> Before disposing of the dead,

- 14 Institut de Droit International, *The Laws of War on Land*, 9 September 1880, in *Annuaire de l’Institut de Droit International*, Vol. 5, 1882, Art. 19, pp. 156 ff.
- 15 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 202 CTS 144, 6 July 1906 (entered into force 9 August 1906), Art. 3.
- 16 Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, 205 CTS 359, 18 October 1907 (entered into force 26 January 1910), Art. 16; Institut de Droit International, *Manual of the Laws of Naval War*, 9 August 1913, in *Annuaire de l’Institut de Droit International*, Vol. 26, 1913, Art. 85, pp. 641 ff.
- 17 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 118 LNTS 303, 27 July 1929 (entered into force 19 June 1933) (1929 GC), Arts 3, 4.
- 18 This article does not explore open questions as to “what test is decisive to determine when a person is to be considered dead”: Michael Bothe, Karl J. Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden, 2013, p. 140. It suffices to note that this is a question that is far from restricted to the field of international law. See, e.g., Fred Feldman, *Confrontations with the Reaper: A Philosophical Study of the Nature and Value of Death*, Oxford University Press, New York, 1994, Chaps 4, 5; P.-L. Chau and Jonathan Herring, “The Meaning of Death”, in B. Brooks-Gordon *et al.* (eds), above note 7.
- 19 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 15(1); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 18(1); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 16(2); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 32, 33; Protocol

parties must record all available personal information on the deceased, with a view to identifying their bodies or remains.<sup>20</sup> IHL also imposes other obligations relating to wills, return of remains and personal artefacts, recording of information, gravesites, and exhumations.<sup>21</sup> The most pertinent IHL obligation in the context of the present article is that requiring parties to at all times take all possible measures to prevent the despoliation of the dead.<sup>22</sup> The dead must be disposed of in a respectful manner,<sup>23</sup> and to the extent permitted by circumstances, parties must ensure that bodies are buried or cremated individually.<sup>24</sup> Unlike obligations relating to the identification of the dead, which apply only to deceased persons of the “adverse Party”,<sup>25</sup> the obligation to prevent despoliation applies with respect to all dead, no matter their affiliation.<sup>26</sup>

Furthermore, Article 3(1)(c) common to the four Geneva Conventions (common Article 3(1)(c)) provides for an absolute prohibition on “outrages upon personal dignity, in particular humiliating and degrading treatment”, when committed against protected persons. As will be discussed in greater detail below, whether the dead qualify as persons enjoying such protected status, and thus the extent to which they enjoy the minimum protection of common Article 3, remains a core controversy. In its most recent Commentary on Geneva Convention III (GC III), the ICRC takes the position that the prohibition against “violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture” under common Article 3(1)(a) does not apply when such acts are committed *post-mortem*, but that the dead do enjoy the protection against “outrages upon personal dignity” under common Article 3(1)(c).<sup>27</sup> It should be recalled that, while common Article 3 is most commonly discussed in the context of protections applicable during NIACs,

Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 8; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 112, available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules>.

- 20 GC I, Art. 16(1); GC II, Art. 19(1); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 120(2); ICRC Customary Law Study, above note 19, Rule 116.
- 21 These are examined in greater depth elsewhere: see A. Petrig, above note 9, pp. 351–355, 357–363; D. Gavshon, above note 9, paras 10–12, 43–47. With regard to NIACs, see F. Mégret and C. Swinden, above note 9, pp. 347–351.
- 22 GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2); AP I, Art. 34(1); AP II, Art. 8; ICRC Customary Law Study, above note 19, Rule 113.
- 23 GC I, Art. 17; GC II, Art. 20; GC III, Art. 120; GC IV, Art. 130; AP II, Art. 8; ICRC Customary Law Study, above note 19, Rule 115.
- 24 GC I, Art. 17(1); GC II, Art. 20(1); GC III, Art. 120(5); GC IV, Art. 130(2); ICRC Customary Law Study, above note 19, Rule 116.
- 25 GC I, Art. 16(1); GC II, Art. 19.
- 26 A. Petrig, above note 9, pp. 349–350. See also AP I, Art. 34(1).
- 27 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2021 (ICRC Commentary on GC III), paras 647, 704. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), paras 1296–1305.

this provision provides a set of minimum protections applicable during *all* armed conflicts, both IACs and NIACs.<sup>28</sup>

## International human rights law

The rules of IHL and international human rights law take differing approaches to the dead as subjects of legal protection, with persisting debate over the relationship between the two *corpora* of law continuing to dominate discussions of their mutual applicability during armed conflict.<sup>29</sup> That being said, the rights of the dead have not traditionally been embraced by human rights law. It is generally understood that while the procedural limbs of various human rights find application with respect to deceased persons,<sup>30</sup> substantive human rights obligations do not extend to the dead, with the European Court of Human Rights (ECtHR) reasoning that “the human quality is extinguished on death”.<sup>31</sup> Even with respect to procedural limbs of rights, such obligations are generally owed to the deceased person’s family or next of kin.<sup>32</sup> In this vein, it should be noted that the mental suffering caused to family members by virtue of the mutilation or maltreatment of the corpse of a loved one may amount to inhumane or degrading treatment.<sup>33</sup>

- 28 See, e.g., International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, *ICJ Reports 1986*, para. 21; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 (*Tadić* Interlocutory Appeal Decision), para. 89; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment (Appeals Chamber), 9 July 2009, para. 26.
- 29 See, far from exhaustively, Marko Milanović, *Extraterritorial Application of Human Rights Treaties*, Cambridge University Press, Cambridge, 2011, pp. 229–261; Cordula Droege, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, *Israel Law Review*, Vol. 40, No. 2, 2007; Noam Lubell, “Challenges in Applying Human Rights Law to Armed Conflict”, *International Review of the Red Cross*, Vol. 87, No. 860, 2005.
- 30 See, e.g., European Court of Human Rights (ECtHR), *McCann and Others v. United Kingdom*, Appl. No. 18984/91 (Grand Chamber), 27 September 1995, para. 161; Inter-American Court of Human Rights (IACtHR), *Río Negro Massacres v. Guatemala*, Judgment, Series C, No. 250, 4 September 2012, para. 240; UN Human Rights Committee, *General Comment No. 36, Article 6: Right to Life*, UN Doc. CCPR/C/GC/36, 3 September 2019, paras 27–29. On such obligations during armed conflict, see Ian Park, *The Right to Life in Armed Conflict*, Oxford University Press, Oxford, 2018, pp. 48–62.
- 31 ECtHR (United Kingdom), *Akpinar and Altun v. Turkey*, Appl. No. 56760/00, 27 February 2007, para. 82. See also ECtHR, *Estate of Kresten Filtenborg Mortensen v. Denmark*, Appl. No. 1338/03, Decision on Admissibility, 15 May 2006; ECtHR, *Jones v. United Kingdom*, Appl. No. 42639/04, Decision on Admissibility, 13 September 2005; *Ibuna v. Arroyo* [2012] EWHC 428 (Ch), [2012] WTLR 827, [50] (Peter Smith J).
- 32 See, e.g., ECtHR, *Kaya v. Turkey*, Appl. No. 22535/93, 28 March 2000, para. 126; IACtHR, *Las Dos Erres Massacre v. Guatemala*, Judgment, Series C, No. 211, 24 November 2009, para. 206, and references cited therein; ECtHR, *Al-Skeini and Others v. United Kingdom*, Appl. No. 55721/07 (Grand Chamber), 7 July 2011, para. 175. On the related “right to truth” enjoyed by victims’ families and the general public, see James A. Sweeney, “The Elusive Right to Truth in Transitional Human Rights Jurisprudence”, *International and Comparative Law Quarterly*, Vol. 67, No. 2, 2018.
- 33 See, e.g., IACtHR, *Blake v. Guatemala*, Judgment, Series C, No. 36, 24 January 1998, paras 114–116; ECtHR, *Akkum and Others v. Turkey*, Appl. No. 21894/93, 24 March 2005, para. 259; IACtHR, *Moiwana Community v. Suriname*, Judgment, Series C, No. 124, 15 June 2005, paras 98–100, 103; ECtHR, *Akpinar*, above note

The exclusion of the dead from substantive obligations of human rights law is also confirmed in the jurisprudence of international criminal tribunals on crimes against humanity. Unlike war crimes, crimes against humanity do not require any nexus with an armed conflict,<sup>34</sup> and are rooted in international human rights law rather than IHL. In *Tadić*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) concluded that acts of mutilation committed against a corpse could not constitute the crime against humanity of “other inhumane acts”,<sup>35</sup> opining that while the philosophical proposition that acts against a corpse could be “inhumane” is sound, the clear formulation of all other crimes against humanity as applying only to the living had the necessary implication of confining “other inhumane acts”, a residual subcategory of the offence, only to those acts committed against the living.<sup>36</sup> For the time being at least, acts of violence against deceased persons can be considered excluded from the direct ambit of international human rights law.

## Post-Second World War origins of corpse mistreatment as an international crime

### Prosecutions in the Pacific Theatre

The earliest modern international judicial engagement with the ill-treatment of the dead during armed conflict concerned allegations of *post-mortem* mutilation and cannibalism perpetrated by Japanese soldiers and officers during the Second World War.<sup>37</sup> While allegations of mutilation and trophy-collecting from corpses also surrounded US service members in the Pacific,<sup>38</sup> only members of the Japanese armed forces faced criminal prosecution, with the moral revulsion surrounding cannibalism contributing to the perceived severity of the offences.<sup>39</sup> The International Military Tribunal for the Far East, created to prosecute Japanese leadership for international crimes committed during the war, was the first international court

31, para. 86; IACtHR, *Río Negro Massacres*, above note 30, paras 151–165; ECtHR, *Petrosyan v. Azerbaijan*, Appl. No. 32427/16, 4 November 2021, paras 74–75.

34 See, e.g., ICTY, *Tadić* Interlocutory Appeal Decision, above note 28, para. 141; ICTY, *Prosecutor v. Kunarac et al.*, Case Nos IT-96-23 and IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002 (*Kunarac et al.* Appeal Judgment), para. 83.

35 Statute of the International Criminal Tribunal for the former Yugoslavia, 32 ILM 1203, 25 May 1993, Art. 5(i). Cf. Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 7(1)(k).

36 ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment (Trial Chamber I), 7 May 1997, para. 748.

37 On cannibalism by members of the Japanese armed forces in the Pacific Theatre, see, generally, Yuki Tanaka, *Hidden Horrors: Japanese War Crimes in World War II*, 2nd ed., Rowman & Littlefield, Lanham, MD, 2018, pp. 123–418.

38 See James J. Weingartner, “Trophies of War: U.S. Troops and the Mutilation of Japanese War Dead, 1941–1945”, *Pacific Historical Review*, Vol. 61, No. 1, 1992; Simon Harrison, “Skull Trophies of the Pacific War: Transgressive Objects of Remembrance”, *Journal of the Royal Anthropological Institute*, Vol. 12, No. 4, 2006.

39 On cannibalism as an international crime, see René Provost, “Cannibal Laws”, in René Provost (ed.), *Culture in the Domains of Law*, Cambridge University Press, Cambridge, 2017, pp. 296–306.

to opine on the criminality of corpse mistreatment under international law. The Tribunal described cannibalism as a “traditional war crime”, observing that members of the Japanese armed forces, including high-ranking officers, participated in the grizzly practice “from choice and not of necessity”.<sup>40</sup> Curiously, however, the Tribunal did not specifically convict any of the accused of offences relating to cannibalism or corpse mutilation,<sup>41</sup> perhaps indicating that its *obiter* on such acts’ criminality was expressive, condemning a practice that was found to be widespread but for which no defendant before the Tribunal was conclusively found to be individually criminally responsible.

The greatest number of post-Second World War prosecutions of corpse mutilation and cannibalism occurred before Australian military courts in New Guinea between 1945 and 1946.<sup>42</sup> Six such trials of direct perpetrators were conducted. Two were conducted before a military court in Wewak, resulting in one conviction and one acquittal,<sup>43</sup> and three before a military court in Rabaul, resulting in four convictions and five acquittals, though three convictions were not confirmed by the Australian commander-in-chief, resulting in their invalidity.<sup>44</sup> The sixth trial, the most significant trial concerning Japanese corpse mutilation, was also conducted before the Rabaul court and concerned Lieutenant-General Adachi Hatazō, commander of Japanese forces in New Guinea, who was tried and found to bear command responsibility for atrocities committed by soldiers under his command, including mutilation and cannibalism of the dead.<sup>45</sup> Notably, this trial not only featured one of the highest-ranking individuals ever charged or convicted of corpse mistreatment but was also the only case involving such offences before the post-Second World War Australian military courts in which a defendant was formally

40 International Military Tribunal for the Far East, *United States et al. v. Araki et al.*, Judgment, 4 November 1948, in Bernard V.A. Röling and C. F. Rüter (eds), *The Tokyo Judgment*, Vol. 1, APA University Press, Amsterdam, 1977, pp. 409–410.

41 R. Provost, above note 39, p. 300.

42 See Georgina Fitzpatrick, “Cannibalism and the War Crimes Trials”, in Georgina Fitzpatrick, Timothy McCormack and Narrelle Morris (eds), *Australia’s War Crimes Trials 1945–51*, Brill Nijhoff, Leiden, 2016, pp. 289–299. On Australian trials against members of the Japanese armed forces, see, generally, Dean Aszkielowicz, *The Australian Pursuit of Japanese War Criminals, 1943–1957*, Hong Kong University Press, Hong Kong, 2017.

43 Australian Military Court at Wewak, *In re Tazaki*, transcript, 30 November 1945, National Archives of Australia (NAA), A471, 80713, p. 23 (convicted of mutilation and cannibalism of a deceased Australian prisoner of war); Australian Military Court at Wewak, *In re Hidano*, transcript, 11 December 1945, NAA, A471, 83839, p. 25 (acquitted of the murder and cannibalism of a New Guinea native). See also Georgina Fitzpatrick, “The Trials at Wewak”, in G. Fitzpatrick, T. McCormack and N. Morris (eds), above note 42, pp. 408–428.

44 Australian Military Court at Rabaul, *In re Katsuyama and Suzuki*, transcript, 4 February 1946, NAA, A471, 80712, pp. 12, 14 (both defendants acquitted of the murder and cannibalism of a Chinese prisoner of war); Australian Military Court at Rabaul, *In re Tomiyasu*, transcript, 2 April 1946, NAA, A471, 80783, p. 17 (convicted of the murder and cannibalism of an Indian prisoner of war); Australian Military Court at Rabaul, *In re Takahashi et al.*, transcript, 12 July 1946, NAA, A471, 80794, pp. 46–47 (all six defendants faced a single count of cannibalism; three were acquitted and the convictions of the remaining three were not confirmed); Australian Military Court at Rabaul, *In re Mena*, transcript, 28 May 1946, NAA, A471, 81048, p. 12 (acquitted of the mutilation and cannibalism of a deceased Australian soldier).

45 Australian Military Court at Rabaul, *In re Adachi*, transcript, 23 September 1947, NAA A471, 81652, Part 1, pp. 204–205. See also G. Fitzpatrick, above note 42, pp. 319–321.

charged with and convicted of a war crime in relation to the ill-treatment of corpses during armed conflict.<sup>46</sup>

US military courts in the Pacific also convicted several Japanese service members of offences against the dead.<sup>47</sup> In April 1946, a US military commission at Yokohama convicted two Japanese soldiers of “bayoneting and mutilating the dead body of a United States prisoner of war”.<sup>48</sup> In a separate August 1946 case, a US military commission at the Mariana Islands tried and convicted Lieutenant-General Yoshio Tachibana and twelve other Japanese officers and soldiers in relation to the torture, killing and *post-mortem* cannibalism of eight American airmen who had been captured after being shot down in what is often referred to as the Chichijima incident.<sup>49</sup> Tachibana and a number of other defendants were convicted of violations of the laws and customs of war for removing and consuming the flesh of seven of the American prisoners of war, denying them proper burials, and bayoneting the corpse of another.<sup>50</sup>

These acts of *post-mortem* mutilation and cannibalism were unequivocally branded by the Mariana Islands commission as violations of “the laws and customs of war and the moral standards of civilised society”.<sup>51</sup> It is revealing to observe that the commission only used the latter phrase concerning the “moral standards of civilised society” in reference to crimes against the dead, notably omitting it when opining on other violations of the laws and customs of war, including torture and ill-treatment.<sup>52</sup> This signifies the particularly repulsive character and severe stigmatization that the commission assigned to *post-mortem* offences.

## Prosecutions in the European Theatre

Outside the Pacific Theatre, prosecutions concerning the mistreatment of the dead during the Second World War were limited. An exceptional case was that of Max Schmid, a Nazi medical officer at a battlefield morgue who was convicted in May 1947 by a US military court in Dachau, Germany, for decapitating an unknown deceased US soldier, skinning and bleaching his skull, and gifting it to his wife as a souvenir.<sup>53</sup> Unlike the majority of the trials in the Pacific Theatre, the *Schmid* court

46 Australian Military Court at Rabaul, *Adachi*, above note 45, pp. 25, 204 (though the Court used the phrase “violation of the laws and usages of war”).

47 For a historical overview, see Timothy Maga, “‘Away from Tokyo’: The Pacific Islands War Crimes Trials, 1945–1949”, *Journal of Pacific History*, Vol. 36, No. 1, 2001.

48 US Military Commission at Yokohama, *United States v. Mibuchi and Kikuchi*, Judgment, 20 April 1946, US National Archives, 331.39.2, Microfilm Publication M1112, Reel 1, Case No. 25.

49 See, generally, Chester Hearn, *Sorties into Hell: The Hidden War on Chichi Jima*, Greenwood Press, Westport, CT, 2003.

50 US Military Commission at the Mariana Islands, *United States v. Tachibana et al.*, Record of Proceedings, 15 August 1946, US National Archives, 331.39.5, Box 1654, Folder “Yoshio Tachibana, et al., Vol. I (Record of Proceedings), 1945–49”, pp. 7, 9–14 (charges), 422–425 (convictions).

51 *Ibid.*, pp. 7, 9–14 (emphasis added).

52 *Ibid.*, p. 8.

53 US General Military Government Court at Dachau, *United States v. Schmid*, 19 May 1947, in *Law Reports of Trials of War Criminals*, Vol. 8, 1949, p. 151.

explicitly branded the offence in question as a war crime and identified Articles 3 and 4 of the 1929 Geneva Convention as the relevant provisions of IHL whose violation furnished the individual criminal responsibility of the accused.<sup>54</sup> The court also recalled four cases from the Pacific Theatre discussed above to support the criminal nature of the accused's conduct.<sup>55</sup>

In November 1947, a US military tribunal at Nuremberg declared in the *Pohl* case that the desecration of the dead, “even without the added offense of killing, is and always has been a crime”.<sup>56</sup> The tribunal would go on to convict defendant August Frank, a high-ranking functionary in the Main Economic and Administrative Office of the SS, of war crimes and crimes against humanity in relation to, *inter alia*, the plundering of concentration camp dead for valuables.<sup>57</sup> In contrast to the cases from the Pacific Theatre and *Schmid*, the *Pohl* tribunal was dealing not with physical mutilation of the dead but with the plunder and pillaging of their property, the prohibition of which is *lex specialis* relative to that of pillage more generally.

## Mistreatment of the dead as a war crime under the Rome Statute

It is trite to point out that not every violation of IHL will constitute a war crime.<sup>58</sup> Thus, while “IHL foresees and in many respects regulates individual criminal responsibility in order to ensure its implementation”,<sup>59</sup> violations of responsibilities of belligerents to search for, bury and, when possible, return the dead do not generally furnish individual criminal responsibility.<sup>60</sup> It is principally the obligation to prevent the mistreatment or despoliation of the dead and the extension of the prohibition against humiliating or degrading treatment under common Article 3 to deceased persons that furnishes the criminality of acts of violence committed against the dead.<sup>61</sup> These prohibitions are the only IHL rules relating to the dead whose violation is presently recognized as imputing individual criminal responsibility, whether committed in the context of an IAC or a NIAC.

While the term “mutilation” appears frequently in national military manuals as the archetypical example of prohibited corpse mistreatment,<sup>62</sup> the war crime of

54 *Ibid.*, pp. 151–152. See 1929 GC, above note 17, Arts 3(1), 4(4), 4(5).

55 US General Military Government Court at Dachau, *Schmid*, above note 53, p. 152.

56 US Military Tribunal II, *United States v. Pohl et al.*, Opinion and Judgment, 3 November 1947, in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. 5, 1947, p. 996.

57 *Ibid.*, pp. 996–997.

58 Michael Bothe, “War Crimes”, in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2001, pp. 387–388; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, 4th ed., Oxford University Press, Oxford, 2020, para. 1175.

59 M. Sassòli, above note 8, para. 9.56; see also paras 5.204–5.215.

60 See D. Gavshon, above note 4, para. 57.

61 Common Art. 3(1)(c); GC I, Art. 15(1); GC II, Art. 18(1); GC IV, Art. 16(2); AP I, Art. 34(1); AP II, Art. 8; ICRC Customary Law Study, above note 19, Rule 113.

62 See, e.g., Australian Defence Force, *The Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, 2006, § 13.30; Norwegian Ministry of Defence, *Manual of the Law of Armed Conflict*, 2013,

mutilation under Article 8(2)(b)(x) and (2)(c)(i) of the Rome Statute, derived respectively from Article 11(2)(a) and (4) of Additional Protocol I (AP I) and common Article 3(1)(a), and from Article 4(2)(b) of Additional Protocol II (AP II),<sup>63</sup> is inapplicable to *post-mortem* acts. In the *Mbarushimana* case, ICC Pre-Trial Chamber I concluded that the offence “presupposes an act committed against a person and not a dead body”.<sup>64</sup> This approach is in line with the aforementioned position of the ICRC that the prohibition of mutilation under common Article 3(1)(a) does not apply to violence against the dead.<sup>65</sup> The war crime of outrages upon personal dignity, in particular humiliating and degrading treatment (by virtue of the specific stipulations of its entry in the ICC Elements of Crimes (EoC), a secondary document containing authoritative specifications of the elements of each crime under the Statute), is uniquely intended to capture the criminality of mistreatment directed at the dead. The offence applies both during IACs and NIACs under Article 8(2)(b)(xxi) and (2)(c)(ii) of the Rome Statute respectively.<sup>66</sup>

## Drafting history of the Rome Statute and the Elements of Crimes

In its 1994 draft ICC statute, the International Law Commission (ILC) referred only to “serious violations of the laws and customs applicable in armed conflict” as a general category of crime under Article 20(c).<sup>67</sup> However, in its commentary thereto, the ILC proffered some specific offences that may fall within this category, curiously excluding outrages upon personal dignity.<sup>68</sup> Instead, the offence first appeared in the 1996 alternative proposals of States before the Preparatory Committee on the Establishment of an ICC (PCEICC), as reflected in the chairman’s revised informal text aggregating various States’ proposals for expanding on the ILC draft by clarifying and specifying war crimes under the proposed court’s jurisdiction.<sup>69</sup> While it is unclear which States proposed the inclusion of outrages upon personal dignity, the chairman’s text offered a number of possible formulations of the provision on war crimes, all of which include the offence in the context of both IACs and NIACs.

§ 4.42; New Zealand Defence Force, *Manual of Armed Forces Law*, Vol. 4: *Law of Armed Conflict*, 2019, § 11.3.4(a); UK Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication 383, 2004, § 7.31; US Department of Defense, *Law of War Manual*, 2023, § 7.7.1.1.

63 Common Art. 3(1)(a); AP I, Art. 11(2)(a), (4); AP II, Art. 4(2)(b). See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2003, pp. 230, 396.

64 ICC, *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-465, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 16 December 2011, para. 154.

65 ICRC Commentary on GC III, above note 27, para. 647.

66 Rome Statute, above note 35, Art. 8(2)(b)(xxi) and (2)(c)(ii).

67 ILC, *Draft Statute for an International Criminal Court*, in *Yearbook of the International Law Commission*, Vol. 2, Part 2, UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), 1994, p. 38, Draft Art. 20(c).

68 See *ibid.*, pp. 38–40, commentary on Draft Art. 20, paras 8–10.

69 PCEICC, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. 2: *Compilation of Proposals*, UN Doc. A/51/22, 1996, pp. 61, 63, 65.

Following further discussions at the PCEICC, the Working Group on the Definition of Crimes (WGDC) synthesized these various proposals into a single draft consolidated text, which it submitted to the full Committee in February 1997, providing for the offence in both its IAC and NIAC formulations.<sup>70</sup> The result of these various drafts was the inclusion of the war crime of outrages upon personal dignity in the final text of the 1998 Rome Statute.<sup>71</sup> However, none of the draft statutes nor the final Statute itself elaborated on the *ratione personae* scope of the offence, resulting in the Statute leaving the question of whether the dead constituted “persons” within the meaning of Article 8(2)(b)(xxi) and (2)(c)(ii) unanswered.

It would fall to the Preparatory Commission for the International Criminal Court (PCICC), tasked by the Rome Conference with, *inter alia*, the drafting of an EoC document,<sup>72</sup> to offer clarity on this matter. The elements of the war crime of outrages upon personal dignity were not discussed at the first session of the PCICC in February 1999. The first appearance of both the elements of the war crime of outrages upon personal dignity and footnotes concerning the *ratione personae* scope of the offence can be found in the 10 and 11 August 1999 discussion papers issued by the coordinator of the Working Group on Elements of Crimes (WGEC) during the second session of the PCICC.<sup>73</sup> Both of these discussion papers included the following identical footnotes to the first material elements of the both the IAC and NIAC formulations of the offence:

For this crime, “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.<sup>74</sup>

With the lack of any noted conflicting perspectives present within the coordinator’s discussion papers concerning the applicability of the offence to acts against the dead, the inclusion of the footnotes can be seen as a relatively uncontroversial clarification. It has been suggested that this inclusion was made to take into account post-Second World War jurisprudence,<sup>75</sup> though the record of the PCICC discloses no explicit reasoning to this effect.

70 PCEICC, WGDC, *Draft Consolidated Text: War Crimes*, UN Doc. A/AC.249/1997/WG.1/CRP.2, 20 February 1997, p. 7, paras B(4)(n), C(c).

71 For a review of the various drafts, see M. Cherif Bassiouni and William A. Schabas, *The Legislative History of the International Criminal Court*, 2nd ed., Vol. 2, Martinus Nijhoff, Leiden, 2016, pp. 11–19.

72 UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court Res. F, UN Doc. A/CONF.183/10, 17 July 1998, Annex I, para. 5(b).

73 PCICC, WGEC, *Discussion Paper Proposed by the Coordinator: Article 8 (2)(b)(x) and (xxi)*, UN Doc. PCNICC/1999/WGEC/RT.8, 10 August 1999, p. 2 fn. 4; PCICC, WGEC, *Discussion Paper Proposed by the Coordinator: Article 8(2)(c)*, UN Doc. PCNICC/1999/WGEC/RT.5/Rev.1, 11 August 1999, p. 2 fn. 6. The contents of the WGEC coordinator’s discussion papers are synthesized in PCICC, *Proceedings of the Preparatory Commission at Its Second Session*, UN Doc. PCNICC/1999/L.4/Rev.1, 18 August 1999, Annex IV, Appendix.

74 PCICC, *Proceedings of the Preparatory Commission*, above note 73, Annex IV, Appendix, p. 69 fn. 7, p. 74 fn. 22.

75 K. Dörmann, above note 63, p. 314; A. Andersson, above note 11, p. 262.

The elements of outrages upon personal dignity were not discussed at the third session of the PCICC in November–December 1999, with the Commission adopting the footnotes on the dead, as they were formulated in the coordinator’s discussion papers, in its second session during its first complete reading of the EoC.<sup>76</sup> This reading marked the first appearance in the footnotes of the stipulation that “the victim need not personally be aware of the existence of the humiliation or degradation or other violation”, inserted immediately following the sentence on the qualification of the dead as persons.<sup>77</sup> The text of the footnote remained unchanged at the second reading of the EoC at the fourth session of the PCICC in April 2000.<sup>78</sup> At its fifth session in July of the same year, the PCICC adopted the finalized draft text of the EoC without any changes to the relevant footnotes.<sup>79</sup>

### Outrages upon the personal dignity of the dead in the Rome Statute

The offence of “outrages upon personal dignity” principally derives from the prohibition of such conduct under common Article 3(1)(c). It should be recalled that common Article 3, though often referenced solely in the context of NIACs, contains minimum standards applicable during armed conflicts of any nature.<sup>80</sup> Furthermore, during IACs in particular, Article 27 of Geneva Convention IV (GC IV) provides that protected persons, in all circumstances, are entitled “to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs”, and that such persons “shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity”. The phrase “outrages upon personal dignity” is later included as an act categorically prohibited at any time and place and in any manner whatsoever during both IACs and NIACs under Article 75(2)(b) of AP I and Article 4(2)(e) of AP II respectively. The ICRC Commentary on the Additional Protocols defines such prohibited acts as those “which, without directly causing harm to the integrity and physical and mental well-being of persons, are aimed at humiliating and ridiculing them, even forcing them to perform degrading acts”.<sup>81</sup> The nature of outrages upon personal dignity as a war crime is recognized

76 PCICC, *Proceedings of the Preparatory Commission at Its First, Second and Third Sessions: Addendum: Annex III: Elements of Crimes*, UN Doc. PCNICC/1999/L.5/Rev.1/Add.2, 22 December 1999, p. 26 fn. 57, p. 30 fn. 69.

77 *Ibid.*

78 PCICC, *Proceedings of the Preparatory Commission at Its Fourth Session: Addendum: Annex III: Elements of Crimes*, UN Doc. PCNICC/2000/L.1/Rev.1/Add.2, 7 April 2000, p. 31 fn. 56, p. 37 fn. 63.

79 PCICC, *Report of the Preparatory Commission for the International Criminal Court: Addendum: Finalized Draft Text of the Elements of Crimes*, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 33 fn. 39, p. 39 fn. 57, reissued as *Report of the Preparatory Commission for the International Criminal Court: Addendum: Part II: Finalized Draft Text of the Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000.

80 See above note 28.

81 ICRC Commentary on the APs, above note 27, para. 3047.

under customary IHL,<sup>82</sup> equally applicable during both IACs and NIACs.<sup>83</sup>

Excluding the contextual elements applicable to all war crimes, the substantive elements of the offence in the context of an IAC under Article 8(2)(b)(xxi) of the Rome Statute require that the perpetrator humiliated, degraded or otherwise violated the dignity of the victim and that the severity of this violation was of such a degree as to be generally recognized as an outrage upon personal dignity.<sup>84</sup> When the offence is committed during a NIAC, Article 8(2)(c)(ii) imposes two additional elements further to those required by Article 8(2)(b)(xxi) – namely, that the victim or victims were either *hors de combat*, civilians, or medical or religious personnel taking no active part in the hostilities, and that the perpetrator was aware of the factual circumstances establishing this protected status.<sup>85</sup>

The most significant feature of the elements of the offence, for the present purposes, is found in the footnotes to element 1 of both of the above entries in the EoC, quoted in full in the previous subsection. The identical footnotes to the *actus rei* of both the IAC and NIAC formulations of the offence provide in relevant part that the term “persons”, as used in element 1, “can including dead persons”, and that “the victim need not personally be aware of the existence of the humiliation or degradation or other violation”.<sup>86</sup> The crucial implication of this clarification, of course, is the explicit extension of the *ratione personae* scope of outrages against personal dignity so as to include deceased victims. As will be seen below, this pair of footnotes has been central in questions as to the customary nature of the protection of the dead under IHL.

## Justification for criminalization

The criminalization of war crimes derived from so-called Geneva Law generally serves to protect the fundamental individual rights of protected persons, *inter alia* life, security, dignity and physical integrity, which are particularly threatened by the specific circumstances of armed conflicts.<sup>87</sup> The law of war crimes is commonly said

82 ICTY, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23/1-T, Judgment (Trial Chamber II), 22 February 2001 (*Kunarac et al.* Trial Judgment), para. 498; Special Court for Sierra Leone (SCSL), *Prosecutor v. Brima et al.* (AFRC), Case No. SCSL-04-16-T, Judgment (Trial Chamber II), 20 June 2007 (AFRC Trial Judgment), para. 715; SCSL, *Prosecutor v. Sesay et al.* (RUF), Case No. SCSL-04-15-T, Judgment (Trial Chamber I), 2 March 2009 (RUF Trial Judgment), para. 174. See also ICRC Customary Law Study, above note 19, p. 315.

83 See G. Werle and F. Jeßberger, above note 58, para. 1301; Robin Geiß and Andreas Zimmermann, “Article 8”, in Kai Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., C. H. Beck, Munich, Hart, Oxford and Nomos, Baden-Baden, 2022, p. 645, para. 914.

84 ICC, *Elements of Crimes*, 2013 (EoC), Art. 8(2)(b)(xxi), Elements 1 and 2.

85 *Ibid.*, Art. 8(2)(c)(ii), Elements 1, 2, 3, 4.

86 *Ibid.*, Art. 8(2)(b)(xxi), Element 1 fn. 49, and Art. 8(2)(c)(ii), Element 1 fn. 57.

87 Kai Ambos, *Treatise on International Criminal Law*, 2nd ed., Vol. 1, Oxford University Press, Oxford, 2021, p. 114; Ginevra Le Moli, *Human Dignity in International Law*, Cambridge University Press, Cambridge, 2021, pp. 284–294; G. Werle and F. Jeßberger, above note 58, para. 1189; Helmut Satzger, *International and European Criminal Law*, 2nd ed., C. H. Beck, Munich, Hart, Oxford, and Nomos, Baden-Baden, 2018, p. 312.

to also protect universal legal interests such as world peace.<sup>88</sup> The criminalization of outrages upon personal dignity specifically seeks, similarly to Geneva Law generally, to safeguard “respect for the human personality”.<sup>89</sup> The criminalization of outrages on personal dignity lies at the heart of the protections envisioned in IHL, with “[t]he general principle of respect for human dignity [being] the basic underpinning and indeed the very *raison d’être* of international humanitarian law and human rights law”.<sup>90</sup> In the context of deceased victims, this offence’s protected interest is identical to the purpose of IHL protections of the dead generally: “to preserve the dignity of the dead”.<sup>91</sup> This formulation suggests (i) that at least some of the legal interests possessed by an individual *ante mortem* – namely, dignity – continue to be enjoyed *post mortem*, and (ii) that such interests are capable of being harmed despite the physical death of the individual. Both points are problematic from the standpoint of criminal law theory.

The classical “harm principle” articulates the now axiomatic theoretical justification for the criminalization of a given act or course of conduct: criminalization is inappropriate save for acts or conduct that cause harm to the interests of others.<sup>92</sup> The harm principle has also come to occupy a significant place in prevailing theoretical understandings of the *ratione materiae* ambit of international criminal law.<sup>93</sup> The application of the harm principle to deceased persons and related questions of posthumous rights have been the subject of rich philosophical discussion.<sup>94</sup> While a minority of scholars assert that the dead retain certain legal interests that are capable of being harmed after death in a similar manner as they would be *ante mortem*,<sup>95</sup> the

88 K. Ambos, *Treatise*, above note 87, p. 114; G. Werle and F. Jeßberger, above note 58, para. 1190; H. Satzger, above note 87, p. 312; Robert Kolb, “Droit international penal”, in Robert Kolb and Damien Scalia (eds), *Droit international penal*, 2nd ed., Helbing Lichtenhahn, Basel, 2012, p. 127.

89 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Judgment (Trial Chamber I), 25 June 1999 (*Aleksovski* Trial Judgment), para. 54.

90 ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment (Trial Chamber I), 10 December 1998 (*Furundžija* Trial Judgment), para. 183, quoted in ICC, *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008 (*Katanga and Ngudjolo Chui* Confirmation Decision), fn. 482.

91 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 1634.

92 Joel Feinberg, *The Moral Limits of the Criminal Law*, Vol. 1: *Harm to Others*, Oxford University Press, New York, 1984, pp. 61–64; A. P. Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs*, Hart, Oxford, 2011, Chaps 1, 2. On the various iterations of the principle, see James Edwards, “Harm Principles”, *Legal Theory*, Vol. 20, No. 4, 2014.

93 See, e.g., Larry May, *Crimes against Humanity: A Normative Account*, Cambridge University Press, Cambridge, 2004, Chap. 5; Andrew Altman and Christopher H. Wellman, “A Defense of International Criminal Law”, *Ethics*, Vol. 115, No. 1, 2004; Kai Ambos, “The Overall Function of International Criminal Law: Striking the Right Balance between the *Rechtsgut* and the Harm Principles”, *Criminal Law and Philosophy*, Vol. 9, No. 2, 2015.

94 For overviews of the debate, see Thomas L. Muinzer, “The Law of the Dead: A Critical Review of Burial Law, with a View to Its Development”, *Oxford Journal of Legal Studies*, Vol. 34, No. 4, 2014, pp. 798–801; H. Conway, above note 7, pp. 146–147.

95 See, e.g., Dorothy Grover, “Posthumous Harm”, *Philosophical Quarterly*, Vol. 39, No. 156, 1989, pp. 350–353; Walter Glannon, “Persons, Lives, and Posthumous Harms”, *Journal of Social Philosophy*, Vol. 32, No. 2, 2001, pp. 133–137.

majority contend that the dead themselves do not have interests harm to which may justify the imposition of individual criminal responsibility.<sup>96</sup> In the context of international crimes against the dead, the latter conclusion would appear to support the positions of a number of scholars who assert that the dead do not enjoy protected status under IHL and thus cannot properly be victims of the war crime of outrages upon personal dignity.<sup>97</sup> As will be demonstrated in the reviews of case law in the following sections, this is a decidedly incorrect view of the law; the dead are in fact protected persons within the meaning of IHL.

That being said, the interests of a deceased person should not be understood as the retained interests of their former living selves; instead, they should be retrospectively based on what their living selves' interests *would* have been.<sup>98</sup> Thus, “when a person is ‘wronged’ after death, this is not a wrong to the corpse but a wrong to the live person they once were.”<sup>99</sup> Under this rationale, the legal interests of a person may be infringed upon in death if they are “treated after death in a way which they would have strongly objected to if alive.”<sup>100</sup> This rationale comports with the above-discussed understanding that the IHL basis for the criminality of outrages upon the dignity of the dead lies primarily in common Article 3(2)(c) as well as Article 75(2)(b) of AP I and Article 4(2)(e) of AP II. The incorporation of the dead within the *ratione personae* ambit of outrages upon personal dignity acknowledges that the acts prohibited by the above provisions are of such an inexcusable character that any living person would object in the strongest terms to those acts being inflicted upon them even after death.

## The limited jurisprudence of international courts and tribunals

An international criminal court or tribunal has only once considered *post-mortem* acts in the context of the war crime of outrages against personal dignity. In the *Bagosora et al.* case before the International Criminal Tribunal for Rwanda (ICTR), the Trial Chamber found, in a decision on defence motions to acquit, that a conviction for outrages upon personal dignity may be founded upon the act of “burying

96 See, e.g., E. Partridge, above note 7, pp. 253–261; Joan C. Callahan, “On Harming the Dead”, *Ethics*, Vol. 97, No. 2, 1987; John Harris, “Law and Regulation of Retained Organs: The Ethical Issues”, *Legal Studies*, Vol. 22, No. 4, 2002, pp. 534–534; Stephen Winter, “Against Posthumous Rights”, *Journal of Applied Philosophy*, Vol. 21, No. 2, 2010; I. Jones, above note 7, pp. 606–607.

97 See below note 193.

98 J. Feinberg, above note 92, p. 83. See also Steven Luper, “Posthumous Harm”, *American Philosophical Quarterly*, Vol. 41, No. 1, 2004, p. 70; Thomas Nagel, *Mortal Questions*, Cambridge University Press, Cambridge, 2012, Chap. 1. Note also the harm that violence against the dead may inflict to their surviving relatives or next of kin. See J. Herring, above note 7, pp. 233–234. On its own, however, such harm provides a less compelling justification for criminalization than that emphasizing what a deceased individual's interests would have been while they were still alive.

99 J. Herring, above note 7, p. 232. See also J. Feinberg, above note 92, pp. 83–85; George Pitcher, “The Misfortunes of the Dead”, *American Philosophical Quarterly*, Vol. 21, No. 2, 1984; W. Glannon, above note 95, pp. 137–139.

100 J. Herring, above note 7, p. 232. See also J. Feinberg, above note 92, p. 84; G. Pitcher, above note 99; F. Feldman, above note 18, Chap. 7; T. Nagel, above note 98, Chap. 1.

corpses in [a] latrine pit”<sup>101</sup> However, the Chamber’s analysis of the same events in the trial judgment leaves it unclear whether it viewed the manner of the corpses’ disposal itself as criminal. The judges heard evidence that soldiers “began pushing some of the Tutsi refugees in latrine pits before throwing in grenades. The soldiers forced others to dig their own graves before killing them.”<sup>102</sup> The prosecution’s closing brief then detailed the “forcing of victims to dig their own graves and the throwing of them *alive* into latrines before killing them.”<sup>103</sup> Thus, it would appear that the *Bagosora* Trial Chamber’s focus was on the particularly humiliating manner in which the victims were killed, not the humiliating nature of their subsequent burial. Further, the Chamber did not consider this particular event when establishing the accused’s guilt, as the prosecutor had introduced this evidence subsequent to the indictment and the pre-trial brief.<sup>104</sup>

Marginally more persuasive case law on the qualification of violence against the dead as an outrage upon personal dignity can be found in the *Brđanin* case before the ICTY. The Trial Chamber listed acts committed against corpses amongst a broader list of acts constituting humiliating and degrading treatment, explaining as follows:

As a final humiliating gesture, the bodies of killed Bosnian Muslims and Bosnian Croats were often treated with disrespect or even mutilated, buried in mass graves and sometimes re-buried in order to cover up the crimes committed. Some of these gravesites have not been discovered to date. There can be no doubt that these acts were discriminatory in fact. The Trial Chamber also finds that in the given situation, these acts amount to the level of gravity of crimes against humanity.<sup>105</sup>

While these acts were found to constitute ill-treatment as an underlying act of the crime against humanity of persecution, the ICTY Trial Chamber recognized the basis of the prohibition of such treatment during armed conflict in common Article 3.<sup>106</sup> The ICC, for its part, has yet to prosecute a charge under Article 8(2)(b)(xxi) or 8(2)(c)(ii) of the Rome Statute involving the dead. Nevertheless, in *Al Hassan*, when enumerating acts that have been considered in jurisprudence to constitute outrages upon personal dignity, Pre-Trial Chamber I included “treating corpses in a disrespectful manner or mutilat[ing] them”, citing the above-referenced excerpt from

101 ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgment of Acquittal under Rule 98bis of the Rules of Procedure and Evidence (Trial Chamber II), 2 February 2005 (*Bagosora et al.* Rule 98bis Decision), para. 40.

102 ICTR, *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment (Trial Chamber II), 18 December 2008, para. 965.

103 *Ibid.*, para. 2220 (emphasis added).

104 *Ibid.*, para. 2221.

105 ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment (Trial Chamber II), 1 September 2004 (*Brđanin* Trial Judgment), para. 1019.

106 *Ibid.*, para. 1014.

the *Brđanin* trial judgment.<sup>107</sup> The *Al Hassan* case itself, however, did not involve outrages against personal dignity committed against dead persons and thus cannot necessarily be considered definitive jurisprudence on the matter.

## Jurisprudence of European national courts

In stark contrast to the scant engagement of international criminal courts and tribunals with war crimes against the dead, domestic jurisdictions in Europe have seen a remarkable number of proceedings concerning the maltreatment of corpses arising out of armed conflict in Iraq and Syria. From these cases in Germany, Finland, Sweden and the Netherlands has emerged a growing body of jurisprudence clarifying crucial aspects of the elements of the war crime of outrages upon personal dignity particular to circumstances involving deceased victims.

The most extensive and conclusive jurisprudence on the matter of war crimes against the dead comes from national courts prosecuting Syrian and Iraqi nationals under the principle of universal jurisdiction in the last decade, including the highest courts of two European States. While difficulties often arise in applying IHL before domestic judiciaries,<sup>108</sup> paradoxically, national courts have provided far greater clarity and depth of engagement with the notion of war crimes against the dead than their international counterparts.

### Germany

In 2002, Germany adopted the Code of Crimes against International Law (Völkerstrafgesetzbuch, VStGB),<sup>109</sup> a dedicated statute providing for the prosecution and punishment of genocide, crimes against humanity and war crimes before its domestic courts.<sup>110</sup> Section 8(1)(9) of the VStGB designates “treat[ing] a person who is to be protected under international humanitarian law in a gravely humiliating or degrading manner” as a war crime when committed during either an IAC or a NIAC.<sup>111</sup> It is under this provision that German authorities have prosecuted instances of corpse mistreatment as international crimes.

The first judgment of a German court relating to the offence under Section 8(1)(9) of the VStGB was rendered in July 2016 by the Higher Regional Court (Oberlandesgericht, OLG) of Frankfurt am Main in the *Aria L.* case, convicting a jihadist militant in relation to a video that the accused posted to Facebook in

107 ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-461, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 13 November 2019 (*Al Hassan* Confirmation Decision), para. 262.

108 See Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014, Chaps 1, 2 (discussing the role of national courts in both legitimizing violations of IHL on some occasions and outright avoiding the application of IHL on others).

109 Völkerstrafgesetzbuch (Code of Crimes against International Law), 26 June 2002, *Federal Law Gazette* 2002, Vol. 1, p. 2254, last amended 30 July 2024, *Federal Law Gazette* 2024, Vol. 1, No. 255 (VStGB).

110 On the VStGB generally, see a recent special issue on the code in the *Journal of International Criminal Justice*, Vol. 21, No. 4, 2023, edited by Florian Jeßberger and Julia Geneuss.

111 VStGB, above note 109, § 8(1)(9).

which he is shown posing with the severed heads of two Syrian government soldiers impaled on spikes.<sup>112</sup> The OLG identified the *actus reus* of the defendant's crime as his act of posing with the bodies rather than the recording or online distribution of the video.<sup>113</sup> It considered the act as one which is "generally" and "cross-culturally" regarded as seriously degrading given the fact that it reduces a corpse to a "trophy" and thus reduces the victim's body to an object.<sup>114</sup> With regard to the qualification of the dead as protected persons under IHL, the Court was content with citing the ICRC Customary Law Study and the relevant footnotes to the EoC as a clear indication that the dead enjoyed protected status under customary IHL.<sup>115</sup>

In the separate *Abdelkarim E.* case, a Syrian member of the so-called Islamic State of Iraq and the Levant (ISIL) was charged before the OLG Frankfurt am Main with *inter alia* the war crime of humiliating or degrading treatment of a protected person in relation to three videos recovered from his mobile phone where he, along with two other men, is seen kicking a corpse, cutting off its nose and ears, and then shooting it in the head. In August 2016, the first-instance court rejected the accused's application to end his pre-trial detention.<sup>116</sup> The accused appealed the decision to the Federal Court of Justice (Bundesgerichtshof, BGH), the highest court on civil and criminal matters in Germany. In considering the appeal, the BGH examined the necessity of pre-trial detention with recourse to the seriousness of the offences charged. In doing so, the Court examined the specific legal elements of the offence under Section 8(1)(9) of the VStGB.

In its September 2016 judgment, the BGH concluded that the category of protected persons under Section 8(1)(9) of the VStGB – which "includes in particular members of the armed forces and fighters of the opposing party who have laid down their arms or are otherwise defenseless – *also includes deceased persons*", and that such protection "serves to protect the honour of the dead or the dignity of the human being that continues beyond death".<sup>117</sup> The Court cited the EoC in concluding that the inclusion of the dead as protected persons under the EoC furnished its parallel inclusion in the VStGB, given that, in enacting the latter, "the legislature wanted to implement the criminal provisions of the Rome Statute ... and to ensure that Germany is always in a position to prosecute the crimes that fall under the jurisdiction of the ICC itself".<sup>118</sup> The Court, moreover, subscribed to the view that the PCICC believed that "the prohibition of the desecration of corpses was part of customary international law and, correspondingly, should be included in the ICC Statute".<sup>119</sup> In doing so, the BGH both affirmed the protected status of the dead

112 Higher Regional Court (Oberlandesgerichte) of Frankfurt am Main (OLG Frankfurt), *Aria L.*, 12 July 2016, *Neue Justiz (NJ)* 2016, p. 514 (unofficial English translation by DeepL).

113 *Ibid.*, p. 516.

114 *Ibid.*

115 *Ibid.*, p. 515.

116 OLG Frankfurt, *Abdelkarim E.*, 5 August 2016, 3 StE 4/16.

117 Federal Court of Justice (Bundesgerichtshof, BGH), *Abdelkarim E.*, 8 September 2016, *Neue Juristische Wochenschrift (NJW)* 2016, p. 3606, para. 22 (emphasis added, unofficial English translation by DeepL).

118 *Ibid.*

119 *Ibid.*, para. 23.

under the Rome Statute framework and strongly implied that the Statute and EoC are declaratory of customary international law for the purpose of defining the scope of persons protected by IHL in the context of Section 8(1)(9) of the VStGB.<sup>120</sup>

Following this landmark interlocutory appeal judgment, the accused in *Abdelkarim E.* was convicted of the charged offence in November 2016, with the OLG Frankfurt am Main summarily adopting the approach of the BGH concerning the protected status of the dead.<sup>121</sup> The Court found that despite the fact that the accused did not personally commit all the acts of mutilation depicted in the videos recovered from his mobile phone, “his membership of the group whose members carried out the acts and with whom he had made a joint decision to commit the act” rendered him liable for the war crime of humiliating or degrading treatment of a protected persons as an accomplice.<sup>122</sup>

With respect to the OLG Frankfurt’s 2016 judgment in the *Aria L.* case, the accused appealed the question of whether the dead may be considered protected persons within the meaning of Section 8(1)(9) of the VStGB. While the BGH had previously opined on the matter in its *Abdelkarim E.* interlocutory judgment, it had done so in the context of affirming the continued propriety of pre-trial detention, not with specific regard to establishing the elements of the offence. In its 2017 judgment on the *Aria L.* appeal, the BGH affirmed its previous findings that the dead constitute protected persons for the purpose of the relevant offence, reaffirming that the legislature’s intention in enacting the VStGB was to mirror the Rome Statute system, including the particulars of the EoC.<sup>123</sup> It went further than in *Abdelkarim E.*, finding that the dead were included within the scope of protected persons in customary IHL at the time of the Rome Statute’s adoption and thus that the relevant footnotes of the EoC simply reflected the existing IHL of the time, rather than broadening the scope of protections.<sup>124</sup> The BGH also cited the ICRC Customary Law Study and the limited jurisprudence of the ICTR and ICTY in support of its assessment of customary international law.<sup>125</sup> The Court specifically found that the two deceased victims in the case at hand constituted persons *hors de combat* and were thus protected under common Article 3.<sup>126</sup>

## Finland

The incorporation of international crimes into Finnish domestic law is presently accomplished primarily by Chapter 1, Section 7 of the Criminal Code, read in

120 *Ibid.*, paras 19–23.

121 OLG Frankfurt, *Abdelkarim E.*, 8 November 2016, 5-3 StE 4/16-4-3/16, para. 213 (unofficial English translation by DeepL).

122 *Ibid.* On the facts of the acts, see *ibid.*, paras 171–191.

123 BGH, *Aria L.*, 27 July 2017, *NJW 2017*, p. 3669, para. 19, unofficial English translation by Eurojust available at: [www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2017-07\\_DE-Federal-Court-of-Justice\\_EN.pdf](http://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2017-07_DE-Federal-Court-of-Justice_EN.pdf).

124 *Ibid.*, p. 3669, paras 21, 23.

125 *Ibid.*, p. 3669, paras 25–26.

126 *Ibid.*, p. 3668, paras 13–14.

conjunction with a 1996 decree on the application of this provision.<sup>127</sup> Chapter 1, Section 7(1) of the Criminal Code affords Finnish courts with universal criminal jurisdiction over offences “based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence)”,<sup>128</sup> with the 1996 decree specifying that “international offences”, within the meaning of this provision, includes *inter alia* any war crime or crime against humanity defined in the Rome Statute or other criminal offence prescribed under the Geneva Conventions or AP I.<sup>129</sup> Thus, while the statutory codification of international criminal law in Finnish penal law is based on the Rome Statute, Finnish courts can still reference customary international law in interpreting the content and elements of Rome Statute offences.<sup>130</sup>

This quite direct approach to the domestic implementation of the Rome Statute in Finland means that, when prosecuting war crimes and crimes against humanity, Finnish courts are directly applying the law of the Rome Statute. This lends their jurisprudence on crimes against the dead particular authority in terms of interpreting the position of international criminal law applicable before the ICC on such offences. Finnish courts have thus far played host to three similar cases concerning the war crime of outrages upon the personal dignity of the dead, all involving degrading acts committed against corpses, photos of which were later published on Facebook.

The first case, *Hilal*, involved a sergeant in the special forces branch of the Iraqi Army who was convicted in March 2016 by the District Court of Kanta-Häme of committing outrages against personal dignity during a NIAC under Article 8(2)(c)(ii) of the Rome Statute in relation to a photograph he posted on Facebook of himself crouched down posing next to a decapitated head of what is believed to be an enemy combatant.<sup>131</sup> The Court primarily conceptualized the *actus reus* of the offence as the accused’s act of posting the image in question on Facebook – emphasizing that it was “freely viewable by a very large number of Facebook users” – rather than his act of posing with the head or taking the photograph itself.<sup>132</sup> The “degrading” nature of the conduct was thus understood as the online distribution of a photograph of the severed head in a manner and through a medium that exposed the deceased individual to public curiosity before an indefinite and unknown quantity of individuals. The District Court noted that the relevant footnote to the offence’s

127 Rikoslaki (Criminal Code), Act 39/1889 (Finnish Criminal Code), Chap. 1, § 7; Decree on the Application of Chapter 1, Section 7 of the Criminal Code, Act 627/1996, 1996 (Finnish Decree on International Crimes).

128 Finnish Criminal Code, above note 127, Chap. 1, § 7(1).

129 Finnish Decree on International Crimes, above note 127, § 1(2).

130 Mikaela Heikkilä, “The Criminalisation and Prosecution of International Core Crimes in Finland”, *Scandinavian Studies in Law*, Vol. 66, 2020, p. 461; Mark Klamberg, “Nordic Perspectives on International Criminal Law and International Humanitarian Law”, in Mikkel J. Christensen, Kjersti Lohne and Magnus Hörnqvist (eds), *Nordic Criminal Justice in a Global Context*, Routledge, London, 2023, p. 62.

131 District Court of Kanta-Häme (DC Kanta-Häme), *District Prosecutor v. Hilal*, Case No. R 16/214, 22 March 2016, unofficial English translation by Eurojust available at: [www.legal-tools.org/doc/546cd9/pdf](http://www.legal-tools.org/doc/546cd9/pdf).

132 *Ibid.*, p. 6.

entry in the EoC provides that the dead can properly be victim to the war crime in question,<sup>133</sup> adding that combatants may “become *hors de combat* following their death in combat”.<sup>134</sup>

The second Finnish case involving war crimes against the dead, *Jebbar-Salman*, concerned remarkably similar factual circumstances. The defendant, also a sergeant in the Iraqi Army, was convicted on an identical statutory basis as *Hilal* by the District Court of Pirkanmaa for the act of publishing a photograph of himself on Facebook posing with the decapitated head of an individual believed to be an ISIL fighter.<sup>135</sup> Just as in *Hilal*, the Court in *Jebbar-Salman* referred to the footnote concerning dead persons in the EoC in establishing that the dead could properly be victims of outrages upon personal dignity and that the individual, as a deceased combatant, was rendered *hors de combat* and thus enjoyed protection under common Article 3.<sup>136</sup>

The third case before Finnish courts was distinct from the former two. In this most recent case, *Hasan*, the District Court of Helsinki convicted an Iraqi soldier of outrages upon personal dignity as a war crime in relation to several videos and photographs posted to his Facebook account demonstrating maltreatment of the dead. In one video, the defendant is seen beheading a corpse, believed to be that of an ISIL combatant, before posing while making a “victory” hand sign as a fellow soldier holds the victim’s severed head in front of the defendant. In a second video, the defendant and other Iraqi soldiers are seen posing before a mound of at least four corpses that had been set on fire.<sup>137</sup> Unlike *Hilal* and *Jebbar-Salman*, the Court in *Hasan* considered that the defendant’s actions in the videos – particularly his decapitation of the corpse in the first video – formed part of the degrading treatment, reasoning as follows:

[T]he severing of the dead fighter’s head, taking images and video of this action, and uploading, or allowing the uploading, of both the videos referred to in the charge, along with the photographs, to the Facebook profile ... constitute, in view of the content that was published and the actions as a whole, a general offence against a person’s honour.<sup>138</sup>

The *Hasan* case thus elucidates the potential scope of the *actus reus* of the offence, casting a broad net as to the types of conduct that can satisfy the material element of the war crime. The particular *actus reus* on the basis of which a given charge is founded will vary on a case-by-case basis, largely on the grounds of the available

133 *Ibid.*

134 *Ibid.*

135 District Court of Pirkanmaa (DC Pirkanmaa), *District Prosecutor v. Jebbar-Salman*, Case No. R 16/1304, 18 May 2016, pp. 2–3, unofficial English translation by Eurojust available at: [www.legal-tools.org/doc/96a1b2/pdf](http://www.legal-tools.org/doc/96a1b2/pdf).

136 *Ibid.*, p. 4.

137 District Court of Helsinki (DC Helsinki), *District Prosecutor v. Hasan*, Case No. R 18/6593, 10 January 2019, p. 7, unofficial English translation by Eurojust available at: [www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2019-01-10\\_FI\\_R-18-6593.pdf](http://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/2019-01-10_FI_R-18-6593.pdf).

138 *Ibid.*, p. 9.

evidence. Because video evidence in *Hasan* established that the defendant had himself beheaded the corpse, this act of *post-mortem* mutilation could underpin the charge of outrages upon the deceased victim's dignity. On the other hand, because the evidence in *Hilal* and *Jebbar-Salman* was confined to still images, the respective courts could not establish that the defendants themselves had severed the heads which they were photographed displaying and instead based the charges solely on the defendants' acts of publishing the gruesome images on social media.

## Sweden

In 2014, Sweden codified the offences specified in Article 5 of the Rome Statute into its domestic law through the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes.<sup>139</sup> The 2014 Act was explicitly an attempt to bring Sweden's previously existing open-ended jurisdiction over international crimes into line with the Rome Statute framework.<sup>140</sup> While the provisions of the Act generally correspond to those of the Rome Statute,<sup>141</sup> it does not differentiate between war crimes committed during an IAC and those committed during a NIAC, reflecting increasing scholarly opinion on the artificial nature of the distinction between the two in war crimes law.<sup>142</sup> Section 4(7) of the Act designates as a war crime, during either an IAC or NIAC, "subject[ing] a protected person to humiliating or degrading treatment that is calculated to seriously violate their personal dignity".<sup>143</sup> This offence is intended to correspond to those under Article 8(2)(b)(xxii) and 8(2)(c)(ii) of the Rome Statute.<sup>144</sup>

In December 2016, the Blekinge District Court in Sweden convicted Raed Thaer Abdulkareem, a former member of the Iraqi Army, of the above war crime in relation to a video and photographs of the accused in Iraq posing next to a decapitated head on a barrel next to other bodies with severed heads, and taking selfies with corpses. Citing the qualification of the dead as "persons" in the EoC, the Court held that the dead are protected persons under common Article 3(1).<sup>145</sup> The Skåne and Blekinge Court of Appeal affirmed the District Court's conclusion on substantially

139 Lag om Straff för Folkmord, Brott mot Mänskligheten och Krigsförbrytelser (Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes), SFS 2014:406, 2014 (Swedish International Crimes Act).

140 See Swedish Ministry of Justice, *Straffansvar för folkmord, brott mot mänskligheten och krigsförbrytelser*, Prop. 2013/14:146, 25 February 2014, pp. 67, 71. See also Mark Klamberg, "The Evolution of Swedish Legislation on International Crimes", *Scandinavian Studies in Law*, Vol. 66, 2020, p. 214.

141 The passage of the act was viewed as fulfilling an obligation to prosecute Rome Statute offences. See Håkan Friman, "Political and Legal Considerations in Sweden Relating to the Rome Statute for the International Criminal Court", in Roy S. Lee (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law*, Transnational, Ardsley, NY, 2005, pp. 139–140.

142 M. Klamberg, above note 130, p. 62.

143 Swedish International Crimes Act, above note 139, § 4(7).

144 A. Anderson, above note 11, p. 265.

145 Blekinge District Court (DC Blekinge), *Public Prosecutor v. Abdulkareem*, Case No. B 569-16, 6 December 2016, pp. 16–17, unofficial English translations of both District Court and Court of Appeal judgments by Eurojust available at: [www.legal-tools.org/doc/897810/pdf](http://www.legal-tools.org/doc/897810/pdf).

similar grounds.<sup>146</sup> The Court of Appeal specifically clarified that the accused committed an outrage against the personal dignity of the pictured deceased individuals both through the manner in which he posed with their corpses and by posting the relevant photographs on Facebook.<sup>147</sup>

In the separate 2017 *Abdullah* case, the Södertörn District Court convicted a former member of the Syrian Army of the war crime of humiliating or degrading treatment of a protected person in relation to a photo of him with his foot on the corpse of what appears to be a civilian, surrounded by the corpses of persons appearing to be soldiers placed in degrading positions.<sup>148</sup> The Court concluded that the dead constituted protected persons on the basis of the relevant footnotes to the EoC, which it considered reflected customary IHL at the time of the Rome Statute's adoption.<sup>149</sup> Accordingly, the Court concluded that both the defendant's treatment of the corpse in the photo and his subsequent posting of it on Facebook constituted an outrage upon the personal dignity of the deceased victim.<sup>150</sup>

The most significant Swedish case dealing with war crimes against the dead is that of *Saeed*. In 2019, the Örebro District Court convicted a former member of the Iraqi Army of the war crime of humiliating or degrading treatment of a protected person in relation to widely circulated photographs of the accused posing next to corpses, many of which appeared to have been desecrated.<sup>151</sup> The court cited the findings of the Skåne and Blekinge Court of Appeal in *Abdulkareem* in affirming that the dead constitute protected persons under common Article 3(1). The District Court found that the corpses shown in the photos in question enjoyed protected status regardless of whether they were civilians or combatants due solely to the fact that they were deceased and thus not taking any part in hostilities.<sup>152</sup> The Göta Court of Appeal affirmed the conclusions of the District Court without significant explicit engagement with the relevant IHL.<sup>153</sup>

The *Saeed* case proceeded to the Supreme Court of Sweden, which pronounced its detailed judgment in 2021.<sup>154</sup> The Court cited the footnotes in the EoC providing for the applicability of the war crime of outrages on personal dignity, adding that “[t]he fact that dead persons are mentioned only in the footnotes

146 Skåne and Blekinge Court of Appeal (CA Skåne and Blekinge), *Public Prosecutor v. Abdulkareem*, Case No. B 3187-16, April 2017.

147 *Ibid.*, p. 4.

148 Södertörn District Court (DC Södertörn), *Public Prosecutor v. Abdullah*, Case No. B 11191-17, 25 September 2017.

149 *Ibid.*, pp. 9, 11.

150 *Ibid.*, pp. 14–15.

151 Örebro District Court (DC Örebro), *Public Prosecutor v. Saeed*, Case No. B 6072-18, 19 February 2019, unofficial English translations of both District Court and Court of Appeal judgments by Eurojust available at: [www.eurojust.europa.eu/sites/default/files/Partners/Genocide/Anonymised-SE-case-B939-19.pdf](http://www.eurojust.europa.eu/sites/default/files/Partners/Genocide/Anonymised-SE-case-B939-19.pdf).

152 *Ibid.*, p. 8.

153 Göta Court of Appeal (CA Göta), *Public Prosecutor v. Saeed*, Case No. B 939-19, 6 December 2019, p. 3.

154 Supreme Court of Sweden (SC Sweden), *Public Prosecutor v. Saeed*, Case No. B 5595-19, 5 May 2021, *Nytt Juridiskt Arkiv* 2021, p. 303, official English translation available at: [www.legal-tools.org/doc/xso1mx/pdf](http://www.legal-tools.org/doc/xso1mx/pdf). See, in greater depth, A. Widström, above note 11.

does not *per se* mean that the text is not to be deemed to be an integral part of the elements of crimes”.<sup>155</sup> The Court also observed that while the terms of the Rome Statute and the EoC were a product of diplomatic negotiations, it should be assumed that, in crafting the EoC, the PCICC intended to reflect the state of existing customary international law at the time of the Rome Statute’s adoption.<sup>156</sup> Logically, any deviation by the PCICC from the elements of a given offence’s formulation under customary international law would thus be explicit. The Court also cited the 2017 judgment of the German BGH and the fact that no national jurisprudence has rejected the qualification of the dead as protected persons.<sup>157</sup> Ultimately, the Supreme Court concluded that “[t]he purpose of the elements of crimes in the Rome Statute and the application thereof clearly indicate that dead persons are covered by the term protected persons in accordance with customary international law”.<sup>158</sup> In the specific circumstances of the case, the Court concluded that the deceased individuals were combatants *ante mortem* and thus were rendered *hors de combat* upon their killing, making them protected persons under common Article 3.<sup>159</sup> The Supreme Court upheld the defendant’s conviction.<sup>160</sup>

Following the seminal *Saeed* case, Swedish courts have seen one other case, *Fatosh*, involving crimes against the dead. In March 2023, the Gothenburg District Court convicted a Syrian woman alleged to have been a member of ISIL *inter alia* of the war crime of outrages against personal dignity.<sup>161</sup> The Court found that while she had posted several photographs of a person posing next to a severed head and other mutilated corpses accompanied by degrading messages on Facebook, there was not enough evidence to positively identify her as the individual in the video or as the person responsible for the mutilation itself.<sup>162</sup> However, the Court nevertheless convicted her, finding that her act of posting the videos on an online social media platform and her accompanying comment on one photo, which “portrayed the protected person in the photo as a trophy”, constituted distinct acts of severe humiliating and degrading treatment.<sup>163</sup> The District Court summarily affirmed the protected status of the dead under IHL with reference to *Saeed*,<sup>164</sup> suggesting that the question has become a matter of *res judicata* before Swedish courts.

155 SC Sweden, *Saeed*, above note 154, para. 22.

156 *Ibid.*, para. 23.

157 *Ibid.*, para. 25.

158 *Ibid.*, para. 27.

159 *Ibid.*, para. 39.

160 *Ibid.*, para. 49.

161 Gothenburg District Court (DC Gothenburg), *Public Prosecutor v. Fatosh*, Case Nos B 7721-21, B 4663-22, 29 March 2023, unofficial English translation by Eurojust available at: [www.eurojust.europa.eu/sites/default/files/assets/files/46.-sweden-translation-of-the-judgment-of-the-district-court-of-gothenburg-of-29-march-2023-case-b7721-21-b4663-22.pdf](http://www.eurojust.europa.eu/sites/default/files/assets/files/46.-sweden-translation-of-the-judgment-of-the-district-court-of-gothenburg-of-29-march-2023-case-b7721-21-b4663-22.pdf).

162 *Ibid.*, pp. 17–20.

163 *Ibid.*, p. 21.

164 *Ibid.*, p. 15.

## The Netherlands

The legal framework for the prosecution of international crimes before domestic courts in the Netherlands is provided for in the International Crimes Act (ICA) of 2003.<sup>165</sup> The intention of Dutch legislatures in enacting the ICA was clearly to align domestic law on international crimes with that of the nascent ICC.<sup>166</sup> Sections 5(6)(j) and 6(1)(c) of the ICA criminalize outrages upon personal dignity as a war crime in IACs and NIACs respectively.<sup>167</sup> The latter provision explicitly codifies those prohibitions provided for in common Article 3.<sup>168</sup> Prosecutions under this provision relating to NIACs have occurred on three occasions in the Netherlands.

The first Dutch prosecution for war crimes targeting the dead, the *Al Khedr* case, concerned a Free Syrian Army soldier who, while being on the payroll of ISIL, was pictured in a social media post smiling and posing in front of a deceased man affixed to a wooden cross.<sup>169</sup> The photograph had been published on the defendant's own Facebook page. He was also charged in relation to privately distributing a photograph of a sandaled foot placed on a female corpse.<sup>170</sup> In its 23 July 2019 judgment in the case, the District Court of The Hague held that the defendant's act of posting next to the strung-up corpse in the first photograph constituted an outrage on the personal dignity of the deceased, as it "contributed to further deepening the humiliation and/or dishonouring of the deceased" occasioned by their being affixed to the cross and constituted an expression on the part of the defendant "that the body of the deceased had to be considered a trophy and that he is superior compared to the deceased".<sup>171</sup> In addition, the Court concluded that the defendant's subsequent act of publishing the first photo on Facebook, which "ensured that a large number of people had the opportunity to take cognisance of the photograph", when taken in conjunction "with the fact that he himself posed for the photograph and had it made, ... further continued the outrage upon [the] personal dignity of the deceased person".<sup>172</sup> Both the defendant's act of posing with the corpse and his subsequent publication of the image formed part of the *actus reus* of the offence.

The District Court acquitted the defendant of the charge relating to the second photograph, finding that while the actions depicted in the image certainly

165 Wet Internationale Misdrijven (International Crimes Act), *Staatsblad*, 2003 (Dutch ICA), p. 270.

166 Hans Bevers, Niels Blokker and Jaap Roording, "The Netherlands and the International Criminal Court: On Statute Obligations and Hospitality", *Leiden Journal of International Law*, Vol. 16, No. 1, 2003, p. 140; Göran Sluiter, "Implementation of the ICC Statute in the Dutch Legal Order," *Journal of International Criminal Justice*, Vol. 2, No. 1, 2004, pp. 173–176.

167 Dutch ICA, above note 165, §§ 5(6)(j), 6(1)(c).

168 See *ibid.*, § 6(1) (*chapeau*).

169 District Court (Rechtbank) of The Hague (Rb Den Haag), *Public Prosecutor v. Al Khedr*, ECLI:NL:RBDHA:2019:7430 (English translation: ECLI:NL:RBDHA:2019:10647), 23 July 2019, *Nieuwsbrief Strafrecht 2019*, §§ 5.1, 5.3.2, paras 1–12.

170 *Ibid.*, §§ 5.1, 5.3.2, paras 13–15.

171 *Ibid.*, § 5.3.4.2, para. 1.

172 *Ibid.*, § 5.3.4.2, para. 2.

constituted outrages against the personal dignity of the deceased individual, as the defendant does not appear in the photographs and did not publish them to his Facebook page, the charges were based solely on the defendant's material act of privately forwarding the image to one other individual.<sup>173</sup> Accordingly, the Court held that, while in doing so the defendant "did indeed continue the humiliation and/or dishonour", the mere act of forwarding the image to a single person "is not in itself of such a nature and seriousness that this is automatically regarded as an assault on the personal dignity of the deceased person".<sup>174</sup> With regard to the deceased individual's protected status, the court reasoned that whether or not they were a member of ISIL when alive, as was alleged, they would enjoy protection under common Article 3 as their death rendered them a person not taking direct part in hostilities.<sup>175</sup> The Court also made reference to the inclusion of the dead within the definition of "person" in the relevant footnotes to the EoC.<sup>176</sup> The defendant appealed his conviction.

Considering numerous grounds of appeal raised by the accused, the Court of Appeal of The Hague affirmed the conviction entered by the District Court.<sup>177</sup> Like the District Court, the Court of Appeal considered that in the case of the first photo, the defendant had committed an outrage against the dignity of the deceased person both by virtue of the manner in which he posed with the corpse and his posting the incriminating image to Facebook, which "ensured that a large number of people were given the opportunity to take note of the photo".<sup>178</sup> The Court also affirmed that, as individuals not taking direct part in hostilities, deceased persons *ipso facto* constitute protected persons under common Article 3, regardless of their *ante-mortem* status.<sup>179</sup> The Dutch Supreme Court summarily rejected the accused's appeals in cassation and affirmed his conviction.<sup>180</sup>

The second case before Dutch courts concerning the mistreatment of the dead, *Ahmad al-Y.*, involved a Syrian militia fighter who posted a video to YouTube depicting himself and others posing next to multiple deceased Syrian Army soldiers, calling them "dogs" and "carcasses of Al-Assad" while singing songs, placing his foot on the corpses, and spitting on and kicking them.<sup>181</sup> The District Court of The Hague summarily reasoned that the dead constitute individuals not taking direct part in hostilities and are thus protected under common Article 3.<sup>182</sup> Moreover, it held that, when taken in conjunction, the defendant's conduct with respect to the corpses in the

173 *Ibid.*, § 5.3.4.2, para. 3.

174 *Ibid.*

175 *Ibid.*, §§ 5.3.4.1, para. 1, 5.3.4.2, para. 5.

176 *Ibid.*, § 5.3.4.1, para. 4.

177 Court of Appeal (Gerechtshof) of The Hague (Hof Den Haag), *Public Prosecutor v. Al Khedr*, ECLI:NL:GHDHA:2021:103 (English translation: ECLI:NL:GHDHA:2021:2130), 26 January 2021.

178 *Ibid.*, p. 33.

179 *Ibid.*, p. 31.

180 Supreme Court (Hoge Raad), *Public Prosecutor v. Al Khedr*, ECLI:NL:HR:2022:499, 5 April 2022, *Rechtspraak van de Week 2022*, p. 415.

181 Rb Den Haag, *Public Prosecutor v. Ahmad al-Y.*, ECLI:NL:RBDHA:2021:3998 (English translation: ECLI:NL:RBDHA:2021:5336), 21 April 2021, § 5.1.

182 *Ibid.*, § 5.4.1.2.

video and his subsequent distribution of the footage via a public YouTube channel constituted degrading treatment of sufficient severity to constitute a war crime.<sup>183</sup> The Court accordingly convicted the defendant.<sup>184</sup>

However, The Hague Court of Appeal would overturn the defendant's conviction, finding that the outrage against the dignity of the deceased victims did not arise to the sufficient degree of severity to constitute a war crime.<sup>185</sup> Firstly, the Court once again affirmed that the dead enjoy protection under common Article 3 and customary IHL,<sup>186</sup> reasoning that "[t]he protected interest – the dignity of the individual – belongs to all those who cannot be excluded from protection on the basis of direct participation in hostilities" and finding that it "fails to see that such personal dignity can no longer exist once a person is deceased".<sup>187</sup> Despite this conclusion, with regard to severity, the Court opined that while the dead do enjoy protection under IHL, "they cannot be said to be suffering severely physically or mentally".<sup>188</sup> On this basis, the Court emphasized that the various acts against the corpses depicted in the video were transient in nature, not adversely affecting the integrity of the bodies in any way. The judges also dismissed the significance of the accused's acts of spitting on a corpse and placing his foot on top of it as having only "take[n] place once and twice respectively and always within a brief moment".<sup>189</sup> Distinguishing the decision of a differently composed bench of the Court of Appeal in *Al Khedr*, the judges did not consider that the conduct of the defendant and the other individuals in the video were indicative of the display of the deceased persons as trophies.<sup>190</sup> The Public Prosecution Service has appealed the *Ahmad al-Y.* decision to the Supreme Court.<sup>191</sup>

## The war crime of outrages upon personal dignity against the dead

### Status under customary international law

The proposition that the dead fall within the *ratione personae* scope of the war crime of outrages upon personal dignity may not simply be inferred from the above-discussed footnotes in the EoC. As Yanev has emphasized, even before the ICC, in order for a crime to have been committed on the territory of a non-State Party, it

183 *Ibid.*, § 5.4.2.3, para. 3.

184 *Ibid.*, § 5.4.3.

185 Hof Den Haag, *Public Prosecutor v. Ahmad al-Y.*, ECLI:NL:GHDHA:2022:2421 (English translation: ECLI:NL:GHDHA:2022:2858), 6 December 2022, § 9.3, para. 15.

186 *Ibid.*, § 9.2, para. 11.

187 *Ibid.*, § 9.2, para. 10.

188 *Ibid.*, § 9.3, para. 13.

189 *Ibid.*

190 *Ibid.*

191 Public Prosecution Service at the Hoge Raad, *Public Prosecutor v. Ahmad al-Y.*, ECLI:NL:PHR:2024:1384, 17 December 2024.

must have existed under customary international law at the time.<sup>192</sup> On this basis, Berster and Ambos have argued that IHL does not extend protection to the dead within the framework of common Article 3, and thus that the footnotes of the EoC regarding the dead are not reflective of customary international law.<sup>193</sup>

The present author disagrees with this interpretation. Rather, it is submitted that the footnotes to the EoC bringing the dead within the ambit of outrages upon personal dignity reflect the evolution of customary IHL in the period since the Second World War.<sup>194</sup> The varied practice of post-Second World War war crimes tribunals lends clear jurisprudential support to the notion that IHL prohibits the maltreatment of the dead and that such maltreatment entails individual criminal responsibility under customary international law. This conclusion is bolstered by the widespread criminalization of corpse mistreatment in domestic legal systems<sup>195</sup> and its unconditional prohibition during armed conflict in the military manuals and national legislation of countless States.<sup>196</sup> It also aligns with the position of the ICRC in its Customary Law Study and the updated ICRC Commentary on common Article 3.<sup>197</sup>

Moreover, the consensus of States in the aftermath of the 1998 Rome Conference in relation to the inclusion within the EoC explicating the applicability of outrages upon personal dignity to acts of degrading treatment of the dead serves as a powerful indicator of *opinio juris* amongst States that this approach reflected the customary IHL of the time. Berster and Ambos' contentions that the inclusion of the dead within the meaning of "person" in the form of a footnote is indicative of disagreement amongst States Parties enjoy no basis in the *travaux préparatoires* of the EoC;<sup>198</sup> on the contrary, the *travaux* disclose no disagreement on the part of States Parties on the inclusion of the dead within the scope of the term "persons" in the relevant footnotes. Furthermore, the Swedish Supreme Court reasoned in *Saeed* that "the intention of the work of the Drafting Committee which construed the elements

192 L. Yanev, above note 11, p. 318. See ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-503, Judgment on the Appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence'" (Appeals Chamber), 1 November 2021, para. 86 ("a chamber must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged").

193 Lars Berster, "Entscheidungsbesprechung: BGH, Decision of 8 September 2016 – StB 27/16", *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 12, 2017, pp. 264–268; K. Ambos, "Deceased Persons", above note 11, pp. 1114–16. See also V. Bergmann, F. Blenk and N. Cojger, above note 11, p. 282 (expressing more reserved scepticism at the inclusion of the dead within the scope of IHL protections).

194 Making similar arguments regarding the relation of the relevant footnotes to the EoC and customary IHL, see, e.g., K. Dörmann, above note 63, p. 314; Lars Büngener, "Aus der Praxis des Generalbundesanwalts im Völkerstrafrecht – Aktuelle Entwicklungen", *Zeitschrift für Internationale Strafrechtsdogmatik*, Vol. 12, 2017, pp. 757–760; Gerhard Werle and Aziz Epik, "Anmerkung zu BGH, Urteil vom 27. Juli 2017 – 3 StR 57/1", *Juristenzeitung*, Vol. 5, 2018; A. Andersson, above note 11, pp. 262–263; L. Yanev, above note 11, pp. 318–319.

195 See, generally, H. Conway, above note 7 (on the criminalization of corpse mistreatment as an "ordinary" domestic offence across national jurisdictions).

196 For a review, see ICRC Customary Law Study, above note 19, pp. 2663–2667.

197 *Ibid.*, Rule 113; ICRC Commentary on GC III, above note 27, paras 611, 668.

198 See L. Berster, above note 193, pp. 266–267; K. Ambos, above note 11, p. 1116.

of crimes was that the general purport would correspond to established international humanitarian law” and thus that “as a starting point, the criteria (*including the footnotes and the general commentary*) should be viewed as part of the customary international law when the Rome Statute was created”.<sup>199</sup> The German BGH similarly reasoned that the footnotes to the EoC on the inclusion of the dead within the scope of “persons” are reflective of the position of customary IHL at the time of the Rome Statute’s adoption.<sup>200</sup> Other lower national courts have reached the same conclusion.<sup>201</sup>

Rather than seeking to improperly import into the Rome Statute framework protections that were not afforded under IHL, the inclusion of the dead as protected persons for the purpose of outrages upon personal dignity serves to reflect the crystallization of such protections in modern customary IHL. Presently, in light of the plethora of consistent jurisprudence from numerous jurisdictions affirming this in the specific context of the war crime of outrages upon personal dignity, this conclusion with regard to the customary nature of the protection of the dead under IHL, in particular common Article 3(2)(c), has been definitively reinforced and confirmed.

As the formulation of the offence in question both before international and internationalized criminal courts and before domestic courts can thus be considered reflective of customary international law, the remainder of this section sketches the particulars of the war crime of outrages upon the personal dignity of the dead, consolidating international and domestic jurisprudence to elucidate the specifics of the offence that arise and should be clarified in situations involving the commission of the crime against deceased individuals.

## Material elements (*actus reus*)

### *Humiliation, degradation, or violation of the dignity of persons*

As with other crimes of ill-treatment, no exhaustive enumeration of acts constituting outrages upon personal dignity exists.<sup>202</sup> As Rodley writes, any attempt to develop a “catalogue of horrific practices ... would simply provide a challenge to the ingenuity of the torturers, not a viable legal prohibition”.<sup>203</sup> The qualification of acts as falling within the *actus reus* of outrages upon personal dignity must thus be considered on a case-by-case basis. For the purpose of this offence, “humiliating” and “degrading”

199 SC Sweden, *Saeed*, above note 154, para. 23 (emphasis added). But cf. A. Widström, above note 11, pp. 7–9 (criticizing the Court for the regrettable brevity of its analysis on this point of law).

200 BGH, *Aria L.*, above note 123, p. 3669, paras 21, 23.

201 DC Blekinge, *Abdulkareem*, above note 145, p. 8; DC Södertörn, *Abdullah*, above note 148, pp. 9, 11.

202 ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2594, Trial Judgment (Trial Chamber X), 26 June 2024 (*Al Hassan* Trial Judgment), para. 1153.

203 Nigel S. Rodley, *The Treatment of Prisoners under International Law*, 2nd ed., Oxford University Press, Oxford, 1998, p. 105, quoted in ICTY, *Prosecutor v. Delalić et al. (Čelebići)*, Case No. IT-96-21-T, Judgment (Trial Chamber I), 16 November 1998 (*Čelebići* Trial Judgment), para. 469.

treatment are considered functionally synonymous since both enjoy equal prohibition under IHL.<sup>204</sup> In the *Musema* case, an ICTR Trial Chamber defined the *actus reus* of the war crime of outrages upon personal dignity as “[s]ubjecting victims to treatment designed to subvert their self-regard”.<sup>205</sup>

The footnotes to the respective first elements of Article 8(2)(b)(xxi) and 8(2)(c)(ii) of the EoC also specifically add that “the victim need not personally be aware of the existence of the humiliation or degradation or other violation”.<sup>206</sup> The ICRC Commentary on GC III explains that this point “was made in order to cover the deliberate humiliation of unconscious persons”,<sup>207</sup> but it is also of great importance when considering outrages upon the personal dignity of the dead, as emphasized by the Swedish Supreme Court in *Saeed*,<sup>208</sup> as it allows the war crime to cover those who, being deceased, can no longer experience emotions of humiliation or perceived degradation. This is in line with the “objective” standard for assessing the severity of material acts of the war crime, as discussed below.

International courts and tribunals have considered a variety of acts to amount to the war crime of outrages upon personal dignity, including death threats and repetitive screams over a loudspeaker,<sup>209</sup> the use of detainees as human shields and trench diggers,<sup>210</sup> physical violence and causing constant fear of physical, mental or sexual violence or being robbed,<sup>211</sup> public acts of physical violence,<sup>212</sup> squalid conditions of detention,<sup>213</sup> forcing detainees to perform manual labour or subservient acts,<sup>214</sup> forcing detainees to beat one another,<sup>215</sup> forcing detainees to relieve

204 ICRC Commentary on GC III, above note 27, para. 706; Manfred Nowak and Ralph Janik, “Torture, Cruel, Inhuman, or Degrading Treatment or Punishment”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 8, para. 6.

205 ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment (Trial Chamber I), 27 January 2000 (*Musema* Trial Judgment), para. 285.

206 EoC, above note 84, Art. 8(2)(b)(xxi), Element 1 fn. 49 and Art. 8(2)(c)(iv), Element 1 fn. 57. See also ICTY, *Aleksovski* Trial Judgment, above note 89, para. 55.

207 ICRC Commentary on GC III, above note 27, para. 705.

208 SC Sweden, *Saeed*, above note 154, para. 29.

209 ICTY, *Aleksovski* Trial Judgment, above note 89, paras 227–228.

210 *Ibid.*, para. 229.

211 *Ibid.*, paras 187–210; ICTY, *Čelebići* Trial Judgment, above note 203, paras 1058–1059; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Judgment (Trial Chamber I), 2 November 2001 (*Kvočka et al.* Trial Judgment), paras 171, 173–174; Kosovo Specialist Chambers (KSC), *Specialist Prosecutor v. Shala*, KSC-BC-2020-04/F00007, Decision on the Confirmation of the Indictment (Pre-Trial Judge), 12 June 2020 (*Shala* Confirmation Decision), para. 96; ICC, *Prosecutor v. Said*, ICC-01/14-01/21-218, Decision on the Confirmation of Charges (Pre-Trial Chamber II), 9 December 2021 (*Said* Confirmation Decision), para. 29(h), (p); KSC, *Specialist Prosecutor v. Shala*, KSC-BC-2020-04/F00847, Trial Judgment and Sentence (Trial Panel I), 16 July 2024 (*Shala* Trial Judgment), paras 972, 1015.

212 ICC, *Al Hassan* Trial Judgment, above note 202, paras 1383–1389.

213 ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment (Trial Chamber II), 30 November 2005, para. 285; ICC, *Said* Confirmation Decision, above note 211, para. 29(e); KSC, *Shala* Trial Judgment, above note 211, paras 636, 748, 971; ICC, *Al Hassan* Trial Judgment, above note 202, para. 1385, 1388, 1392, 1394.

214 ICTY, *Kvočka et al.* Trial Judgment, above note 211, para. 172; KSC, *Shala* Confirmation Decision, above note 211, para. 96; KSC, *Shala* Trial Judgment, above note 211, paras 738, 761, 1098.

215 ICTY, *Čelebići* Trial Judgment, above note 203, paras 1067–1070; ICC, *Prosecutor v. Ongwen*, ICC-02/04-01/15-1762-Red, Trial Judgment (Trial Chamber IX), 4 February 2021 (*Ongwen* Trial Judgment), paras 3064–3065 (beating to death); KSC, *Shala* Trial Judgment, above note 211, paras 749, 1098.

bodily functions in their clothing or on the floor of a cell,<sup>216</sup> forced incestual sexual acts,<sup>217</sup> abduction and sexual slavery,<sup>218</sup> forced nudity,<sup>219</sup> rape and other sexual violence and coerced sexual acts,<sup>220</sup> and forcing individuals to witness sexual violence against others in a manner constituting a threat or intimidation, or in an otherwise degrading or humiliating manner.<sup>221</sup>

National courts have convicted defendants for the war crime of outrages upon personal dignity in relation to, *inter alia*, the following acts against deceased persons: mutilating corpses through beheading or *post-mortem* amputation of body parts,<sup>222</sup> recording oneself shouting threats and insults at a corpse,<sup>223</sup> posing and/or taking photos with a corpse or the severed heads of corpses displayed in a trophy-like manner,<sup>224</sup> posing with one's foot on a corpse,<sup>225</sup> kicking and shooting at a corpse,<sup>226</sup>

- 216 ICTY, *Kvočka et al.* Trial Judgment, above note 211, para. 172; ICC, *Al Hassan* Trial Judgment, above note 202, para. 1388. See also ECtHR, *Hurtado v. Switzerland*, Appl. No. 37/1993/432/511, 26 January 1994, para. 12 (not allowing a prisoner to change their soiled clothes).
- 217 ICTY, *Čelebići* Trial Judgment, above note 203, paras 1062–1066; ICTR, *Bagosora et al.* Rule 98bis Decision, above note 101, para. 40; ICTY, *Prosecutor v. Češić*, Case No. IT-95-10/1-S, Sentencing Judgment (Trial Chamber I), 11 March 2004, para. 13.
- 218 ICTY, *Kunarac et al.* Trial Judgment, above note 82, paras 775–781; SCSL, *AFRC* Trial Judgment, above note 82, para. 719; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber II), 18 May 2012 (*Taylor* Trial Judgment), para. 432.
- 219 ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber I), 2 September 1998 (*Akayesu* Trial Judgment), para. 688; ICTY, *Kunarac et al.* Trial Judgment, above note 82, paras 766–774; ICTR, *Bagosora et al.* Rule 98bis Decision, above note 101, para. 40; SCSL, *Taylor* Trial Judgment, above note 218, para. 1196; ICC, *Katanga and Ngudjolo Chui* Confirmation Decision, above note 90, paras 369–370; ICC, *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-433, Decision on the Confirmation of Charges (Pre-Trial Chamber II), 9 July 2021 (*Abd-Al-Rahman* Confirmation Decision), paras 41, 43.
- 220 ICTR, *Akayesu* Trial Judgment, above note 219, para. 688; ICTY, *Furundžija* Trial Judgment, above note 90, paras 183, 272; ICTY, *Čelebići* Trial Judgment, above note 203, paras 1062–1066; ICTY, *Brđanin* Trial Judgment, above note 105, para. 1012; SCSL, *RUF* Trial Judgment, above note 82, para. 1205; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Judgment (Appeals Chamber), 27 January 2014 (*Đorđević* Appeal Judgment), para. 857; Extraordinary Chambers in the Courts of Cambodia (ECCC), *Prosecutor v. Khieu*, Case No. 002/19-09-2007-ECCC/SC, Appeal Judgment (Supreme Court Chamber), 23 December 2022 (*Khieu* Appeal Judgment), paras 1575–1576.
- 221 ICTY, *Furundžija* Trial Judgment, above note 90, para. 186; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment (Trial Chamber II), 31 July 2003, para. 757; ICTY, *Brđanin* Trial Judgment, above note 105, para. 1012; ICTY, *Đorđević* Appeal Judgment, above note 220, para. 852.
- 222 BGH, *Abdelkarim E.*, above note 117, p. 3605, para. 16; OLG Frankfurt, *Abdelkarim E.*, above note 121, para. 213; DC Helsinki, *Hasan*, above note 137, p. 9.
- 223 BGH, *Abdelkarim E.*, above note 117, p. 3605, para. 17; OLG Frankfurt, *Abdelkarim E.*, above note 121, paras 171, 174; Rb Den Haag, *Ahmad al-Y.*, above note 181, § 5.4.2.3.
- 224 OLG Frankfurt, *Aria L.*, above note 112, p. 516; DC Pirkanmaa, *Jebbar-Salman*, above note 135, p. 2; DC Kanta-Häme, *Hilal*, above note 131, pp. 3, 6; DC Blekinge, *Abdulkareem*, above note 145, pp. 11, 17; CA Skåne and Blekinge, *Abdulkareem*, above note 146, p. 4; Rb Den Haag, *Al Khedr*, above note 169, § 5.3.4.2; Rb Den Haag, *Ahmad al-Y.*, above note 181, § 5.4.2.3; DC Gothenburg, *Fatosh*, above note 161, p. 21.
- 225 DC Pirkanmaa, *Jebbar-Salman*, above note 135, p. 2; DC Södertörn, *Abdullah*, above note 148, pp. 14–15; DC Örebro, *Saeed*, above note 151, pp. 8–10; CA Göta, *Saeed*, above note 153, pp. 2–3; SC Sweden, *Saeed*, above note 154, paras 42–46; Rb Den Haag, *Al Khedr*, above note 169, § 5.3.4.2, para. 3; Rb Den Haag, *Ahmad al-Y.*, above note 181, § 5.4.2.3.
- 226 BGH, *Abdelkarim E.*, above note 117, p. 3605, para. 17; OLG Frankfurt, *Abdelkarim E.*, above note 121, paras 175, 213.

and disseminating photographs or videos displaying corpses being treated in any degrading manner on the internet.<sup>227</sup>

### *The severity of the humiliation, degradation or other violation*

An act of humiliation or degradation or other violation of personal dignity must rise to a certain severity in order to be considered a war crime,<sup>228</sup> though this severity threshold is necessarily less than that of torture and other cruel, inhuman or degrading treatment or punishment.<sup>229</sup> This threshold is also one, unlike torture, that is oriented towards the severity of humiliation or degradation, rather than the physical or mental pain, suffered by the victim,<sup>230</sup> either in the eyes of the victim or those of others.<sup>231</sup> This is emphasized by the absence of a requirement that the suffering occasioned by the act must have long-term effects.<sup>232</sup> In *Aleksovski*, the ICTY Trial Chamber opined that the “severity” requirement of the *actus reus* of the war crime of outrages on personal dignity demands that “the humiliation to the victim must be so intense that the reasonable person would be outraged”.<sup>233</sup> This test differs, for instance, from a subjective test that would consider whether the victim themselves was outraged. This objective standard was affirmed by the ICTY Appeals Chamber in *Kunarac et al.*<sup>234</sup> and adopted by the Trial Chamber in *Kvočka et al.*<sup>235</sup> The standard has since enjoyed broad support in the jurisprudence of subsequent tribunals,<sup>236</sup> including the ICC,<sup>237</sup> with Trial Chamber X of the latter most recently holding that the relevant determination must be based on

227 DC Pirkanmaa, *Jebbar-Salman*, above note 135, p. 4; DC Kanta-Häme, *Hilal*, above note 131, p. 6; DC Helsinki, *Hasan*, above note 137, p. 9; DC Blekinge, *Abdulkareem*, above note 145, p. 17; CA Skåne and Blekinge, *Abdulkareem*, above note 146, p. 4; DC Södertörn, *Abdullah*, above note 148, p. 15; DC Örebro, *Saeed*, above note 151, pp. 10–11; CA Göta, *Saeed*, above note 153, pp. 2–3; SC Sweden, *Saeed*, above note 154, paras 30, 48; Rb Den Haag, *Al Khedr*, above note 169, § 5.3.4.2; Hof Den Haag, *Al Khedr*, above note 177, p. 33; Rb Den Haag, *Ahmad al-Y.*, above note 181, § 5.4.2.3; DC Gothenburg, *Fatosh*, above note 161, p. 20.

228 ICTY, *Aleksovski*, above note 89, para. 54.

229 See ICTR, *Musema* Trial Judgment, above note 205, para. 285 (“these offences may be regarded as a [*sic*] lesser forms of torture”); M. Nowak and R. Janík, above note 204, para. 11.

230 ICRC Commentary on GC III, above note 27, para. 703; M. Nowak and R. Janík, above note 204, para. 11.

231 ECtHR, *Tyrer v. United Kingdom*, Appl. No. 5856/72, 25 April 1978, para. 32.

232 *Kunarac et al.* Appeal Judgment, above note 34, paras 501, 503; ICTY, *Kvočka et al.* Trial Judgment, above note 211, para. 168; ICC, *Katanga and Ngudjolo Chui* Confirmation Decision, above note 90, para. 369; ICC, *Al Hassan* Confirmation Decision, above note 107, para. 262; ICC, *Ongwen* Trial Judgment, above note 215, para. 2756; ICC, *Al Hassan* Trial Judgment, above note 202, para. 1152.

233 ICTY, *Aleksovski* Trial Judgment, above note 89, para. 56.

234 ICTY, *Kunarac et al.* Trial Judgment, above note 232, para. 162.

235 ICTY, *Kvočka et al.* Trial Judgment, above note 211, para. 167.

236 See e.g. SCSL, *AFRC* Trial Judgment, above note 82, para. 716; SCSL, *RUF* Trial Judgment, above note 82, para. 175; SCSL, *Taylor* Trial Judgment, above note 218, para. 431; ECCC, *Khieu* Appeal Judgment, above note 220, para. 1574.

237 See, e.g., ICC, *Katanga and Ngudjolo Chui* Confirmation Decision, above note 90, para. 369; ICC, *Al Hassan* Confirmation Decision, above note 107, para. 262; ICC, *Ongwen* Trial Judgment, above note 215, para. 2756; ICC, *Abd-Al-Rahman* Confirmation Decision, above note 219, para. 45.

“a reasonable person’s objective assessment and must be assessed on a case-by-case basis”.<sup>238</sup>

The national jurisprudence recalled in the previous subsection<sup>239</sup> demonstrates that an accused will only be held directly responsible for mistreatment depicted in digital media if it is clear from the video or image in question that they participated in the mistreatment on display.<sup>240</sup> Merely appearing in a photograph or video displaying corpses is not a sufficiently serious outrage against the dignity of the dead.<sup>241</sup> For posing with deceased persons to constitute sufficiently severe degrading treatment, the corpses must be reduced to a trophy-like position;<sup>242</sup> otherwise, liability is restricted to the sharing of such media. The posting of an image or video depicting corpse mistreatment will generally only constitute a degrading act of sufficient severity if it is digitally distributed in a manner which ensures that a numerically large number of individuals will be able to view it.<sup>243</sup> While infringing on the dignity of the deceased victim, the limited and private sharing of media will not, in principle, rise to the requisite degree of severity to furnish individual criminal responsibility.<sup>244</sup>

The *Ahmad al-Y.* judgment of the Court of Appeal of The Hague is an outlier amongst national jurisprudence. The judges’ conclusion that the actions of the defendant and others pictured in a video where they yelled at, kicked, spat at and placed a foot atop a pile of corpses were not a sufficiently serious outrage against the personal dignity of the deceased to constitute a war crime<sup>245</sup> appears deeply flawed and contrary to established jurisprudence. Firstly, the Court erred in emphasizing that the actions did not disturb the physical integrity of the corpses, as intentional courts and tribunals have clearly and consistently affirmed that the war crime of outrages upon personal dignity does not require that the acts or conduct in question have long-term consequences.<sup>246</sup> The severity of a degrading act is not in and of itself diminished by its transient nature, particularly when such an act is captured on video

238 ICC, *Al Hassan* Trial Judgment, above note 202, para. 1152.

239 See above notes 222–227.

240 See e.g. DC Helsinki, *Hasan*, above note 137, p. 9; CA Skåne and Blekinge, *Abdulkareem*, above note 146, p. 4; Rb Den Haag, *Al Khedr*, above note 169, § 5.3.4.2, paras 2–3; Rb Den Haag, *Ahmad al-Y.*, above note 181, § 5.4.2.3, para. 3; DC Gothenburg, *Fatosh*, above note 161, p. 20.

241 SC Sweden, *Saeed*, above note 154, para. 30; DC Blekinge, *Abdulkareem*, above note 145, p. 17.

242 See, e.g., OLG Frankfurt, *Aria L.*, above note 112, p. 516; BGH, *Aria L.*, above note 123, p. 3671, para. 53; Rb Den Haag, *Al Khedr*, above note 169, § 5.3.4.2, para. 1; Hof Den Haag, *Al Khedr*, above note 177, p. 33; SC Sweden, *Saeed*, above note 154, paras 42, 43; DC Gothenburg, *Fatosh*, above note 161, p. 21.

243 See, e.g., DC Kanta-Häme, *Hilal*, above note 131, p. 6; OLG Frankfurt, *Aria L.*, above note 112, p. 516; DC Pirkanmaa, *Jebbar-Salman*, above note 135, p. 3; CA Skåne and Blekinge, *Abdulkareem*, above note 146, p. 4; Rb Den Haag, *Al Khedr*, above note 169, § 5.3.4.2, para. 2; Hof Den Haag, *Al Khedr*, above note 177, p. 33.

244 Rb Den Haag, *Al Khedr*, above note 169, § 5.3.4.2.

245 Hof Den Haag, *Ahmad al-Y.*, above note 185, § 9.3, para. 13.

246 ICTY, *Kunarac et al.* Trial Judgment, above note 82, paras 501, 503; ICTY, *Kvočka et al.* Trial Judgment, above note 211, para. 168; ICC, *Katanga and Ngudjolo Chui* Confirmation Decision, above note 90, para. 369; ICC, *Ongwen* Trial Judgment, above note 215, para. 2756; ICC, *Al Hassan* Trial Judgment, above note 202, para. 1152. See also BGH, *Aria L.*, above note 123, p. 3670, paras 39–43; SC Sweden, *Saeed*, above note 154, para. 29.

and distributed online. Secondly, the Court appears to improperly deviate from the objective standard of severity by considering factors such as whether the fighters and the individual filming appear to pay attention to their compatriots' acts against the corpses.<sup>247</sup> This approach unacceptably emphasizes the subjective considerations of the alleged perpetrators in determining severity, contravening the objective standard in a particularly egregious manner. The Dutch Supreme Court would be well advised to review the *Ahmad al-Y.* judgment's conformity with international and domestic jurisprudence on the severity requirement.

### Subjective element (*mens rea*)

Under the Rome Statute framework, outrages upon personal dignity carry the standard *mens rea* provided by Article 30 of the Rome Statute. Where national jurisdictions provide for a basis or default *mens rea* for criminal offences, domestic courts have also applied this requirement to the war crime of outrages against personal dignity.<sup>248</sup> The NIAC formulation of the offence under Article 8(2)(c)(ii) of the Rome Statute imposes an additional mental element requiring that the accused was aware of the factual circumstances that established the protected status of the victim.<sup>249</sup> With regard to the severity of the act which comprises the *actus reus*, there is no requirement that the accused completed a value judgment as to the severity of the humiliation or degradation that they inflicted upon the victim.<sup>250</sup>

There is no requirement that the perpetrator held any discriminatory intent or motive in committing the offence.<sup>251</sup> While the ECtHR has observed that whether a particular act is degrading is to be assessed, in part, on the basis of whether "its object is to humiliate and debase the person concerned",<sup>252</sup> no such requirement has been embraced by international criminal law. There is no requirement that the accused possessed any specific intent to humiliate, ridicule or degrade the victim,<sup>253</sup> though the perpetrator must know that their act or acts *could* humiliate, ridicule or degrade the victim.<sup>254</sup>

247 Hof Den Haag, *Ahmad al-Y.*, above note 185, § 9.3, para. 13.

248 See, e.g., SC Sweden, *Saeed*, above note 154, para. 31.

249 EoC, above note 84, Art. 8(2)(c)(ii), Element 4. See also ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Judgment (Appeals Chamber), 19 May 2010, para. 66.

250 ICC, *Ongwen* Trial Judgment, above note 215, para. 2757; ICC, *Al Hassan* Trial Judgment, above note 202, para. 1154. See EoC, above note 84, General Introduction, para. 4.

251 ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment (Appeals Chamber), 24 March 2000, para. 28; ICTY, *Kunarac et al.* Trial Judgment, above note 232, para. 28; SCSL, *RUF* Trial Judgment, above note 82, para. 177; ICC, *Ongwen* Trial Judgment, above note 215, para. 2757; ICC, *Al Hassan* Trial Judgment, above note 202, para. 1154.

252 ECtHR, *Raninen v. Finland*, Appl. No. 152/1996/771/972, 16 December 1997, para. 55.

253 ICTY, *Aleksovski* Appeal Judgment, above note 251, para. 27; SCSL, *AFRC* Trial Judgment, above note 82, para. 716; ICC, *Ongwen* Trial Judgment, above note 215, para. 2757; ICC, *Al Hassan* Trial Judgment, above note 202, para. 1154. See also ECtHR, *Peers v. Greece*, Appl. No. 28524/95, 19 April 2001, para. 74; ECtHR, *Kalashnikov v. Russia*, Appl. No. 47095/99, 15 July 2002, para. 95.

254 ICTY, *Aleksovski*, above note 251, para. 27; ICTY, *Kunarac et al.* Appeal Judgment, above note 34, para. 164; SCSL, *AFRC* Trial Judgment, above note 82, para. 716; SCSL, *RUF* Trial Judgment, above note 82, para. 177; SCSL, *Taylor* Trial Judgment, above note 218, para. 431.

The accused need not be aware of the *ante-mortem* status of a deceased victim given that the dead enjoy protection as persons not taking an active part in hostilities regardless of their status or combat role when alive. Accordingly, the *mens rea* requirement of Article 8(2)(c)(ii) of the Rome Statute demanding knowledge of the factual circumstances establishing the victim's protected status only requires that the defendant knew the victim was deceased at the time of the offence.<sup>255</sup> The Swedish and Dutch courts have even suggested that the knowledge may be established if the defendant, even if not knowing the victims are deceased, was aware that they enjoyed *ante-mortem* protected status.<sup>256</sup> Under this approach, so long as the accused believes that the victim enjoyed protected status, even if they are mistaken as to the nature of that status, they may possess the necessary *mens rea*. This appears appropriate in light of the fact that outrages against personal dignity are regarded as equally criminal no matter the specific nature of the victim's protected status.

## Sentencing considerations

The majority of accused convicted in European domestic jurisdictions of outrages against the personal dignity of the dead have been given relatively short sentences ranging from suspended or conditional sentences<sup>257</sup> to periods of imprisonment of two years or less in most cases.<sup>258</sup> This generally reflects the nature of most of their culpable conduct being the posting of videos depicting corpse mistreatment rather than participating in the depicted conduct themselves. In the German case of *Abdelkarim E.*, where the accused was found to have personally participated in the mutilation of a corpse, a higher sentence was imposed.<sup>259</sup> In the two Dutch cases, the accused's relatively lengthy sentences were the result of their concurrent convictions for the higher-sentence-bearing offence of membership in a foreign terrorist organization,<sup>260</sup> with the district courts in the two cases taking two and a half and two

255 Rb Den Haag, *Al Khedr*, above note 169, § 5.3.4.2, para. 6; Hof Den Haag, *Al Khedr*, above note 177, p. 32; Rb Den Haag, *Ahmad al-Y.*, above note 181, § 5.4.2.2, para. 1.

256 DC Örebro, *Saeed*, above note 151, p. 11; CA Göta, *Saeed*, above note 153, p. 4; Rb Den Haag *Ahmad al-Y.*, above note 181, § 5.4.2.2, paras 2–3; Hof Den Haag, *Ahmad al-Y.*, above note 185, § 9.2, para. 9; DC Gothenburg, *Fatosh*, above note 161, p. 21.

257 DC Kanta-Häme, *Hilal*, above note 131, p. 7 (suspended sentence); DC Helsinki, *Hasan*, above note 137, p. 9 (1.5-year conditional sentence).

258 DC Pirkanmaa, *Jebbar-Salman*, above note 135, p. 4 (1.3 years); OLG Frankfurt, *Aria L.*, above note 112, pp. 514, 516–517 (2 years); CA Skåne and Blekinge, *Abdulkareem*, above note 146, p. 5 (1.5 years); DC Södertörn, *Abdullah*, above note 148, p. 21 (8 months); CA Göta, *Saeed*, above note 153, p. 5, affirmed, SC Sweden, *Saeed*, above note 154, para. 52 (1 year); DC Gothenburg, *Fatosh*, above note 161, p. 22 (3 months).

259 OLG Frankfurt, *Abdelkarim E.*, above note 121, para. 230 (8.5 years).

260 Hof Den Haag, *Al Khedr*, above note 177, pp. 35–37, 39 (7 years, reducing the District Court's sentence of 7.5 years); Rb Den Haag, *Ahmad al-Y.*, above note 181, § 7.4, paras 4–6 (6 years, recalling that the accused's war crime conviction was later overturned on appeal).

years' imprisonment as their respective starting points with regard to the sentence for the relevant war crime.<sup>261</sup>

Of special note is the role of corpse mistreatment in sentencing with respect to crimes besides outrages against personal dignity as, even when corpse mistreatment is not directly charged as a criminal offence, it may be considered an aggravating factor in sentencing before the ICC where it demonstrates that an accused's crimes were committed "with particular cruelty".<sup>262</sup> In the 1946 *Tachibana et al.* case, the US Military Commission found that the *post-mortem* ill-treatment of the deceased prisoners of war was to be considered an aggravating factor with respect to the charges of murder and neglect as war crimes concerning the prisoners' deaths.<sup>263</sup> Similarly, in the *Yekatom and Ngaïssona* case, trial proceedings in which are ongoing before the ICC as of the time of this article's writing, the prosecutor has argued that charges relating to the torture and murder of the second deputy mayor of the Central African town of Mbaïki are aggravated by the alleged *post-mortem* dismemberment of his genitalia, which the prosecutor submitted "demonstrates a profound degree of depravity".<sup>264</sup>

## Conclusion

While the recent surge in domestic courts' engagement with the war crime of outrages against the personal dignity of the dead would suggest that the offence is of a relatively contemporary vintage, this article has demonstrated that the mistreatment of the dead has long been considered the proper subject of both IHL and international criminal law. Post-Second World War prosecutions of crimes against the deceased as violations of the laws and customs of war, coupled with the more robust protections of the Geneva Conventions followed by their Additional Protocols, paved the way for the crystallization of individual criminal responsibility for *post-mortem* degrading treatment as a war crime, culminating in its codification within the Rome Statute and its EoC.

In the last decade, a number of European States have spearheaded the prosecution of outrages against the personal dignity of deceased victims as part of a broader wave of prosecutions of crimes committed in Syria and Iraq under the principle of universal jurisdiction. Resultantly, the courts of these jurisdictions have

261 Rb Den Haag, *Al Khedr*, above note 169, § 8.3, para. 10, affirmed, Hof Den Haag, *Al Khedr*, above note 177, p. 36; Rb Den Haag, *Ahmad al-Y.*, above note 181, § 7.4, para. 4 (recalling that the accused's war crime conviction was later overturned on appeal).

262 ICC, *Rules of Procedure and Evidence*, ICC-PIDS-LT-02-002/13, 2013, Rule 145(2)(b)(iv).

263 US Military Commission at the Mariana Islands, *Tachibana et al.*, above note 50, pp. 4–6, 19, 25, 27.

264 ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-2747-Red, Public Redacted Version of "Prosecution's Sentencing Submissions", ICC-01/14-01/18-2747-Conf, 13 December 2024 (Trial Chamber V), 31 December 2024, para. 14. See also ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-T-215-ENG, transcript, 20 March 2023, pp. 38–39; ICC, *Prosecutor v. Yekatom and Ngaïssona*, ICC-01/14-01/18-T-222-Red2-ENG, transcript, 17 April 2023, pp. 18–19.

begun to fill the jurisprudential gap left by international criminal courts and tribunals' fleeting engagement with crimes of posthumous mistreatment. As this article has sought to examine, this growing body of national case law represents an incredibly valuable tool in more precisely defining the elements of the war crime of outrages against personal dignity when considering deceased victims.

The extension of the ambit of international criminal law to encompass war crimes against the dead necessitates the balancing of protecting fundamental interests of human dignity that survive after death and preserving the coherence of IHL and international criminal law. Particularly in light of the widespread nature of crimes against the dead during contemporary armed conflict (evidenced in part by the growing body of national jurisprudence on the issue), the clarification of how IHL and international criminal law respond to such atrocities is of paramount importance. This article seeks to make a broad and far-reaching contribution in this regard. Greater scholarly attention to this overlooked area of war crimes law is long overdue. The seemingly fundamental extension of the penal enforcement of *jus in bello* to offences against the deceased not only elevates the status of IHL in safeguarding the most vulnerable but also reaffirms the humanistic aspirations at its core.