

The Legal Protection of the Bodies of the Dead in Armed Conflict From Physical Ill-Treatment

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ABSTRACT

This article provides a doctrinal and case study-based analysis of the legal framework governing the protection of the bodies of the dead from physical ill-treatment in armed conflict, with a particular focus on violations involving mutilation and other forms of degradation. It critically examines the substantive and interpretive dimensions of relevant international norms, especially Rule 113 (prohibition of mutilation of the dead) and Rule 90 (protection of personal dignity), as outlined in the 2005 ICRC's Study on Customary International Humanitarian Law. These norms are analyzed within their treaty-based foundations, including the Geneva Conventions and the Rome Statute of the International Criminal Court, as well as in light of international jurisprudence during the past two decades, particularly the case law of the ICC, ICTY, ICTR and SCSL. The article employs a qualitative research methodology, drawing on a wide range of primary and secondary sources, including case studies, judicial rulings, reports of international organizations and opinions of scholars. Through a critical examination of emblematic incidents, including Borovo Selo in 1991, Mogadishu in 1993, Kigali in 1994, etc., the article explores the evidentiary and prosecutorial challenges that hinder the practical recognition of these acts as independent crimes. The findings reveal a significant underrepresentation of post-mortem physical ill-treatment in international legal proceedings, where such acts are often subsumed under broader charges like murder, inhuman treatment, or crimes against humanity, rather than prosecuted as distinct violations of international law. By comparing contemporary international jurisprudence with post-WWII case law, particularly the Dachau and Yokohama trials, this article identifies a normative regression in prosecutorial and judicial approaches to the legal qualification and punishment of crimes in question. It calls for the recalibration of prosecutorial strategies, bold interpretation of legal frameworks and appropriate regard to forensic findings, to ensure accountability.

Keywords: ill-treatment of the dead, mutilation, outrages upon personal dignity, war crimes, international criminal tribunals, international customary law.

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INTRODUCTION

When 12 Croatian police officers were killed in an ambush during their operation in Borovo Selo on May 2 1991, some bodies were afterwards physically mutilated beyond recognition and desecrated (Rupić, 2022: 175). This was carried out by local Serbian civilians and members of paramilitary units from Serbia (Orečić, 2022: 185). According to the testimony of one of the surviving police officers, the enemies dragged five or six killed members of the unit into a pile, whom they mutilated then, shot them with firearms, urinated on them, etc., which was terrible to watch (Rupić, 2022: 175). The speaker of the Croatian Television show “Dnevnik”, while showing images, illustrated: Eyes gouged out, eyes gouged out, throat cut, eyes gouged out, ... (Croatian Radiotelevision, 1991). The Croatian Assistant Minister of the Interior gave an example: ... the third without a bullet wound, but with severed arms and head (Orečić, 2022: 96). According to the indictment at the Osijek County Court, it was a context of non-international armed conflict (Orečić, 2022: 133-138). It gradually became an international armed conflict against Croatia (ICJ, 2015: 36, 39).

In the fighting on 3 and 4 October 1993 in Mogadishu, Somalia, between US forces supporting the UNOSOM II peacekeeping operation and members of the Somali militia under the leadership of Mohamed Farrah Aidid, 18 US soldiers were killed. This was followed by the physical mutilation and ill-treatment of dead bodies, including their dragging through the streets of the city using motor vehicles (Petrig, 2009: 341). Bowden (1999: 11) wrote: „They had a dead American soldier draped over a wheelbarrow. He was stripped to black undershorts and lay draped backward with his hands dragging on the dirt. The body was caked with dry blood and the man’s face looked peaceful, distant. There were bullet holes in his chest and arm. Ropes were tied around his body, and it was half wrapped in a sheet of corrugated tin. The crowd grew larger as the wheelbarrow was pushed through the street. People spat and poked and kicked at the body.”. Consequently, the UNOSOM II was gradually disbanded and withdrawn (Henderson, 2024: 237).

During the UNAMIR peacekeeping operation, members of the Rwandan army killed ten disarmed Belgian peacekeepers on 7 April 1994. It led to complete withdrawal of the Belgian contingent from Rwanda (UN, 1999: 19-20). The indictment before the Belgian court against Major Bernard Ntuyahaga, for the crime of murder, did not mention mutilation or physical ill-treatment of the bodies, neither did the indictment brought before the International Criminal Tribunal for Rwanda (ICTR) against Theoneste Bagosora, nor the ICTR’s Trial Chamber judgment in the case of Bagosora *et al.* (Military I) (Le Procureur fédéral Belge, 2007; ICTR Prosecutor, 1998a and 1998b; ICTR Trial Chamber, 2008).¹ This cannot either be found in Belgian Senate Parliamentary commission of inquiry report, at least in publicly available part, nor in the United

¹ The ICTR was established by UN Security Council Resolution 955, adopted on 8 November 1994, pursuant to Chapter VII of the UN Charter. The Tribunal was founded following the 1994 Rwandan genocide, with the mandate to prosecute those responsible for genocide and other serious violations of international humanitarian law committed in Rwanda and neighboring states.

Nations (UN) Report of the Independent Inquiry (Belgian Senate, 1997 and UN, 1999). The Belgian indictment only contained information about the causes of death of the individual soldiers (Le Procureur fédéral Belge, 2007: 34-35, 47). However, some sources suggest that the bodies of the dead could not even be accurately counted at first (Dallaire, 2004: 255 and 258; Suhrke, 1998: 41). Some other sources talk even more directly about the physical mutilation of the dead bodies, so overall, it could be concluded that it was committed using sharp objects (machetes) (Hipple, 2015: 1).

Even without a detailed analysis of the above cases, in terms of the (non)existence of spontaneity in the perpetrators' actions, the perpetrators' strong hatred towards the victims, the planned intimidation of the opponent, or their deterrence from future actions, it can be concluded that such events and acts provoke a strong negative reaction of the public in the victims' countries and in the vast majority of the international public, as well as the expectations for appropriate punishment of the perpetrators (Harrison, 2006: 817).² In this regard, the question arises of what normative standards have been established in international law so far to protect the bodies of the dead during armed conflict, and how gross physical attacks on the dead should be qualified under international criminal law. While these acts also raise profound ethical concerns, as described in Homer's Iliad, this article focuses on the legal aspects, particularly within the framework of international law of armed conflict (Wels, 2016: 3).

Thus, this article examines the normative content and interpretation of the relevant customary international law rules, particularly Rule 113 (prohibition of mutilation of the dead) and Rule 90 (protection of personal dignity), as well as their foundations in treaty international law. It also analyzes a range of case studies, focusing on evidentiary and prosecutorial challenges. In particular, it compares relevant developments with post-World War II jurisprudence, including cases heard before international criminal tribunals in the 1990s, and draws conclusions regarding current prosecutorial practices and normative approaches. The objective of this article is to assess the legal treatment and prosecutorial recognition of post-mortem physical ill-treatment in armed conflicts, and to propose interpretive and strategic improvements aimed at ensuring accountability for such violations under international law, to avoid tolerance of any form of desecration of human remains in armed conflict. While primarily grounded in the law of armed conflict, the protection of the bodies of the dead from physical ill-treatment also intersects with international human rights law. As this dimension merits separate and thorough analysis, it will only be briefly noted in this article.

² Referring to the use of body parts of enemies as war souvenirs, Harrison argues that such practices tend to occur in societies, including modern states, where human status of enemies is denied.

RULES OF INTERNATIONAL LAW FOR THE PROTECTION OF THE BODIES OF THE DEAD IN ARMED CONFLICTS

In international law there are different terms used regarding the persons who died in armed conflict: “the dead”, “dead person”, “the killed”, “bodies”, “the remains of deceased” or “remains of persons who have died” (Petrig, 2009: 344). On the other hand, the term “physical mutilation” includes acts such as “amputations, injury to limbs, removal of organs, and forms of sexual mutilations” (Klamberg, et al., 2023: 258). To illustrate the meaning of the term “(physical) mutilation”, the Assembly of the States Parties to the International Criminal Court (ICC) Statute particularly mentions permanent disfigurement of person or persons and permanent disabling or removing an organ or appendage (ICC, 2013: 15). Hence, mutilation must consist of physical violence (Dinstein, 2021: 234).³ However, it must be noted here that the provision the Assembly refers to, regulates such acts committed against living persons only. Namely, the provision requires that mutilation causes death or serious endangerment of person’s physical or mental health (ICC, 2013: 16). Nevertheless, the above description of the acts in question can be sufficiently illustrative concerning the bodies of the dead, too.

The first Geneva Convention ever enacted, the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, did not contain specific rules concerning the dead. Such rules were for the first time included in the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Precisely, it was the obligation to protect the dead „from robbery and ill treatment” (Article 3). That Convention also prescribed “careful examination ... of the bodies of the dead prior to their interment or incineration” (ibid.). The 1907 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, signed in The Hague, prescribed similarly: “After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment. They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.” (Article 16). Such standards were later adopted in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, which prescribed as follows: “After each engagement the occupant of the field of battle shall take measures to search for the wounded and dead, and to protect them against pillage and maltreatment.” (Article 3). As far as the examination of the bodies is concerned, the 1929 Convention provided for “a careful, and if possible medical, examination of the bodies, with a view to confirming death, establishing identity and enabling a report to

³ The ICC was established by the Rome Statute, which was adopted on 17 July 1998 and entered into force on 1 July 2002. The ICC is a permanent international court with jurisdiction over the most serious crimes of concern to the international community, namely genocide, crimes against humanity, war crimes and the crime of aggression. It was founded in response to the need for a standing judicial mechanism to ensure accountability when national bodies are unwilling or unable to prosecute.

be made“ (Article 4). Therefore, the possibility of a medical examination was introduced, with the purpose of the examination being to create a report.

Although these conventions used very general terms regarding the conduct towards the dead (“ill treatment” and “maltreatment”), the obligation of a “careful examination” of the bodies, including “a report to be made”, potentially enabled the timely knowledge of possible physical acts against the bodies of the dead. Subsequently, the obligations listed above were prescribed in the 1949 Geneva conventions for the protection of war victims. The First Geneva Convention of 1949 imposes a duty of the parties to the conflict “to search for the dead and prevent their being despoiled” (Article 15). So does the Second Geneva Convention (Article 18). However, their implementation depends on circumstances permitting it (Dinstein, 2022: 217). Still, the ICRC considers this rule as important for ensuring respect for the dignity of the dead, but also because the disrespect for the dead might set off a cycle of barbarity (ICRC Commentary of Convention (I), 2016). Article 16 of the First Geneva Convention (1949) prescribes the obligation of making a “record as soon as possible, in respect of each wounded, sick or dead person” which should include *inter alia* “particulars concerning wounds or illness, or cause of death”. According to the ICRC’s Commentary, this obligation is an absolute one, as evident from the wording “shall record” (ICRC Commentary of Convention (I), 2016). Similar to Article 4 of the 1929 Convention, Article 17 provides for a careful examination (medical, if possible) of the bodies before burial or cremation (Convention (I), 1949). Very similar rules can also be found in the Second Geneva Convention of 1949, in Articles 18 and 19.

According to the Third Geneva Convention of 1949, which protects the prisoners of war, there is an obligation to make a report concerning the “medical examination of the body with a view to confirming death and ..., where necessary, establishing identity” (Article 120). While that obligation is related to the burial or cremation to be carried out after the examination, Article 121 prescribes that “every death or serious injury of a prisoner of war caused or suspected to have been caused by a sentry, another prisoner of war, or any other person, ... shall be immediately followed by an official enquiry” (*ibid.*). Yet, in our opinion, obligations concerning the dead persons provided by the First and the Second Geneva Convention of 1949, should be applicable to prisoners of war, at least as subsidiary rules. The Fourth Geneva Convention (1949) prescribes the obligation “to search for the killed ... and to protect them against pillage and ill-treatment” (Article 16). The ICRC points out that compliance with all these obligations is a prerequisite for subsequent obligations in dealing with the dead, namely the return of the remains, their dignified burial and identification of the dead. The ICRC also notes there is no practical difference between international and non-international armed conflicts (ICRC, 2005, rule 112).

Under the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), the protection of the dead goes beyond their protection against despoilment only (Protocol I, 1977). Still, concerning the remains of the dead, Protocol I is quite brief, simply prescribing that the remains “shall be respected”, without any further clarification (Article 34) (Sandoz et al., 1987: 369). Thus, reference should be made to the pro-

visions of all four 1949 Geneva Conventions, to determine the complete contents of this obligation. Basically, it consists of “preventing the remains from being despoiled and from being exposed to public curiosity, by placing them in an appropriate place before burial or cremation” (ibid.). Moreover, it constitutes a measure of essential public hygiene (ibid.). Respect for the remains also means handling them in a way that aligns with the deceased’s known wishes or religious beliefs, to the extent possible (ibid.). For non-international armed conflicts, such obligations are set out in Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II, Article 8), which develops and reaffirms the obligation already contained in Common Article 3, thus reflecting Article 15 of the First Convention (Sandoz et al., 1987: 1413-1414).

While numerous states have ratified Protocol II, several states in which non-international armed conflicts occasionally take place have not done so. In such conflicts, Common Article 3 of the four Geneva Conventions often remains the only applicable treaty provision of the law of armed conflict (Henckaerts, 2005: 177). It protects persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. By now, Common Article 3 is generally considered to constitute a peremptory norm of international customary law. Simultaneously, the *ius cogens* argument is not backed by any solid evidence found in the general practice of states (Dinstein, 2021: 175). The wording of Common Article 3 suggests it protects living persons only. On the other hand, its efficacy is diminished by leaving undefined some critical expressions, such as “mutilation” (ibid.). As far as penal sanctions are concerned, neither the Geneva Conventions nor Additional Protocols prescribe them, although violations of their provisions constitute grave breaches of international law of armed conflict. Their provisions do incontestably establish a basis for the perpetrator’s individual criminal responsibility, and even for universal jurisdiction, but it had been left to the contracting states and to international judicial bodies to prescribe penal sanctions (Meron, 2006: 102).

Thus, concrete criminal acts, classified as war crimes, under the ICC Statute are derived from the provisions of the 1949 Geneva Conventions and international customary law. Thereat, a “special casuistic approach” was applied, resulting in an extensive list of criminal acts (Škulić, 2022: 371). The ICC Statute lists some 50 separate instances of war crimes (Strauss, 2016: 38). Regarding the examples of mutilation of the bodies of the dead policemen and soldiers in Croatia, Somalia and Rwanda, or civilians elsewhere, the question is whether the ICC Statute applies solely to living persons or also to the bodies of the dead. Or, in other words, is it feasible to claim that its provisions are grounded in the principle of the integrity and dignity of the deceased human body, worth of wide support not only as a moral obligation but also as a legal one. Although reading the text of the ICC Statute would suggest it is insufficiently precise regarding the protection of the bodies of the dead in armed conflicts from mutilation, the associated document entitled “Elements of Crimes” does clarify the content of the expression “mutilation”, as well as the exact scope of protection of the

bodies of the dead. Now we shall analyze both the ICC Statute and the Elements of Crimes in more detail.

In Part 2 of the ICC Statute (2013: 7, 9), addressing the “other serious violations of the laws and customs of war”, the following act is classified as a war crime: “subjecting persons who are in the power of an adverse party to physical mutilation ... which cause death or seriously endanger the health of such person or persons”. That provision is applicable in both international (Article 8 Paragraph 2 (b) (x) of the Statute) and non-international (Article 8 Paragraph 2 (e) (xi)) armed conflicts. When it comes to war crimes committed in non-international armed conflicts, the Statute also includes “serious violations of article 3 common to the four Geneva Conventions” (Article 8 Paragraph 2 (c)) (ICC, 2013: 8). These violations include “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” and “committing outrages upon personal dignity, in particular humiliating and degrading treatment” (Article 8 Paragraph 2 (c) (i) and (ii)) (ICC, 2013: 8; Dörmann, 2003: 377). It must be noted that both “mutilation” as a kind of violence to the life, health, or physical or mental well-being of persons, and “outrages upon personal dignity”, in particular humiliating and degrading treatment, shall remain prohibited at any time and in any place whatsoever. They are listed among the fundamental guarantees provided by both Article 75 of Protocol I and Article 4 of Protocol II. As far as criminal acts related to the violations of Common Article 3, i.e., associated with non-international armed conflicts are concerned, they essentially mirror the afore-mentioned criminal acts classified as “other serious violations of the laws and customs of war” (Dörmann, 2003: 345).

Even before the ICC Statute was enacted, the UN Secretary General stressed – concerning the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) – that the *nullum crimen sine lege* principle requires the application of “rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise” (Meron, 1994: 79).⁴ According to the Secretary-General, the „part of conventional international humanitarian law which has beyond doubt become part of international customary law“, is the law embodied in the 1949 Geneva Conventions, the 1907 (IV) Hague Convention (and annexed Regulations), the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the 1945 Charter of the International Military Tribunal (Meron, 1994: 79). International customary law mandates that parties to armed conflicts, particularly after combat operations, to take all possible measures – whenever circumstances permit – to promptly search for, recover, and remove the deceased, without making any distinction between them (Rule 112) (ICRC, 2005). The ICRC emphasizes that international customary law prohibits the mutilation of the bodies of the dead (Rule 113) (Henckaerts and Doswald-Beck, 2005: 409). State practice establishes that rule as applicable in both international and non-inter-

⁴ The ICTY was established by UN Security Council Resolution 827, adopted on 25 May 1993, under Chapter VII of the UN Charter. It was created following the serious violations of international humanitarian law committed during the armed conflicts in the former Socialist Federal Republic of Yugoslavia, with the aim of prosecuting those responsible for genocide, crimes against humanity and war crimes.

national armed conflicts and no official contrary practice was found (Henckaerts and Doswald-Beck, 2005: 409, 411). The outrages upon personal dignity are also prohibited by international customary law (Rule 90) (Henckaerts and Doswald-Beck, 2005: 315).

Since 2002, the Assembly of the States Parties to the ICC Statute has been maintaining the standpoint that “a dead person could potentially be a victim of the crime of committing outrages upon the personal dignity” (Petrig, 2009: 350). Hence, under the ICC Statute, the prohibition of mutilating dead bodies is covered by the war crime of “committing outrages upon personal dignity” (Henckaerts and Doswald-Beck, 2005: 409). Namely, the Assembly established that the term “person” in respective provisions of the ICC Statute includes the dead (ICC, 2013: 18,23). It is exactly in relation to the war crime of “outrages upon personal dignity”, in both international and non-international armed conflicts” (Article 8 (2) (b) (xxi) and Article 8 (2) (c) (ii)), when footnotes 49 and 57 of the document entitled “Elements of Crimes” contain the above-mentioned view (ICC, 2013: 18-19,23). Due to the gravity of such crime, this represents a positive law codification (O’Brien, 2011: 45). Although denominating the dead as persons was endorsed by the German Federal Supreme Court in 2017 (as we will present later in this article), there are still some scholarly objections to such a standpoint (Dinstein, 2021: 235). Simultaneously, identical standpoint cannot be found neither among elements of crime nor in footnotes related to the crime of mutilation (Article 8 (2) (b) (x)-1 regarding the international and Article 8 (2) (c) (i)-2 regarding the non-international armed conflicts) (ICC, 2013: 22, 28). Instead, the “mutilation” is committed “in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage” (ICC, 2013: 15). Such acts are physical by nature and include amputations, injury to limbs, removal of organs and forms of sexual mutilations (Klamberg et al.,2023: 258). Victims of such crime in international armed conflict are described as person or persons “in the power of an adverse party” (ICC, 2013: 16). Regarding the non-international armed conflict, the victims are defined as “either hors de combat, or ... civilians, medical personnel or religious personnel taking no active part in the hostilities” (ICC, 2013: 22). Hence, as far as non-international armed conflicts are concerned, such a formulation obviously very much follows the general framework of Common Article 3 of the four Geneva Conventions of 1949.

OPINIONS OF SCHOLARS CONCERNING THE LEGAL CLASSIFICATION OF PHYSICAL ILL-TREATMENT OF THE BODIES OF THE DEAD IN ARMED CONFLICTS

In general, causing extreme fear in enemy soldiers is not prohibited, even by relentless bombings, as long as military targets and weapons used are lawful (Casey-Maslen, 2024: 91). However, terrorizing civilians is a war crime under international customary law, in particular when such acts overcome threats (Casey-Maslen, 2024: 91). To reach a threshold of a war crime, a violation of the law of armed conflict must offend important values and involve serious consequences for the victims. In such situations, despite numerous and various policy issues worldwide, it is essential to devote adequate efforts to address the grave and exceptional cases of violence (Strauss, 2016: 30). In other words, as serious violations of the law of armed conflict, war crimes must be criminalized (Casey-Maslen, 2024: 142). Consequently, a variety of international judicial and quasi-judicial bodies has become a common feature globally (Geiss and Bulinckx, 2006: 49). Likewise, various fact-finding missions or commissions of inquiry, usually set up by international organizations like the UN or by individual states, have become beneficial in investigating grave uses of force (Henderson, 2024: 65-66).

A particular role is dedicated to forensic experts – to advocate for the dead, but also for the survivors for whom the justice is also sought (Stover and Shigekane, 2002: 865). Through the work of forensic experts, the dead body becomes an avenue towards the end of uncertainty for families of the missing, for the prosecution of war criminals, and for the political stability (Rosenblatt, 2010: 923). Their work can be vitally important because the prosecution, when concentrating on a specific accused, usually files charges for only those crimes it believes it can prove with strong evidence and compelling legal arguments (Vukušić, 2023: 17). Unfortunately, if not charged, even violent accidents could *de facto* become marginal (or even nonexistent) in the record (*ibid.*). Judges, for their part, approach cases from a legal standpoint, seeking to reconstruct the events, to determine who did what and who gave the orders, to identify who was aware of the actions, and to assess which aspects, if any, were illegal (Vukušić, 2023: 18). Unfortunately, the international judicial bodies may sometimes be short of resources or a political will to undertake forensic investigations necessary for identifying all the dead (Stover and Shigekane, 2002: 846).

In general, the examination of specific violations related to the dead can be useful in determining what actions can be taken on their behalf (Rosenblatt, 2010: 947). As observed by Tsgourias and Morrison (2023: 60), international humanitarian law and international human rights law both apply during armed conflicts. Thereat, national and international jurisprudence offer responses regarding how these two bodies of law should be applied in specific situations and how conflicts between their differing scopes and contents are resolved. In some cases, the *lex specialis* principle is applied, prioritizing international humanitarian law over international human rights law. In other instances, international human rights law is seen as complementing international humanitarian law by filling gaps or assisting in the interpretation of its rules (*ibid.*). This “complementarity approach” is described by Tsgourias and Morrison (2023:

96), who argue that the two bodies of law influence and reinforce each other. In our opinion, such complementarity is most welcome, but must ensure a balance between these bodies of law and maintain a clear distinction between acts involving physical desecration and other acts that offend the dignity.

Regarding the violations of international law related to the management of dead bodies in armed conflicts, Wels (2016: 36, 40) provides a variety of additional examples, ranging “from the booby-trapping of dead bodies, unauthorized exhumations or destruction of gravesites, and deliberately frustrating identification by putting clothes and articles on bodies that do not match their identities, to leaving bodies to be despoiled, failure to record information on the dead, or not sharing information on the whereabouts of the dead”. However, Wels (2016: 40) observes that the only violations officially prescribed as war crimes in the ICC Statute are mutilations of the bodies of the dead legally categorized as “outrages upon personal dignity”. For her part, Parrin (2023: 1051) concludes that Rule 113, although applicable in both international and non-international armed conflicts, has not been fully implemented in the ICC Statute yet. Additionally, Wels (2016: 40) objects that “deliberate attempts to confuse identities or the hiding of grave locations may be part of the contributory evidence in international criminal tribunals or courts”, but are “not war crimes in themselves and any accountability achieved is therefore not for the violation of dead body management”.

Concerning the respect for the *nullum crimen, nulla poena sine lege* principle in application of international customary law to acts of physical ill-treatment of the bodies of the dead, Kolb (2024: 272) points out that international customary law must be applied as it stood at the time the crimes were committed. As far as international treaty law is concerned, a treaty applicable on the state on whose territory the acts were committed is sufficient to initiate criminal responsibility, if it was in force at the relevant time and if it was properly inserted within the state’s legislation. Kolb (ibid.) claims that even purely internal legislation would suffice if it clearly addressed the situations in question. In Mancini’s (2017: 88) opinion, Article 75 of Protocol I clarifies that the term *lex* refers to both national and international law. Namely, according to Paragraph 4 (c) of Protocol I, no one may be tried for acts that were not criminal offences “under the national or international law” at the time of their commission. This ensures that a trial for an act that was not a criminal offence under domestic law at the time of its commission is permissible if the act was already criminalized under international law.

Furthermore, Meron (2006: 102) states the *nullum crimen sine lege* principle is designed to protect individuals only from being punished for acts they reasonably believed to be lawful at the time of commission. Thus, no person who committed acts of physical ill-treatment of the bodies of the dead could reasonably claim they did not understand that their actions were criminal. Or, to illustrate this from a non-legal perspective, it is appropriate to quote Major Douglas Powell of the U.S. Marine Corps, who once said in similar context: “As a God-fearing person, it violates all moral laws of everything I’ve been raised to know ... I don’t need to look in the Uniform Code of Military Justice to tell you that you can’t walk off the battlefield with the remains of the enemy.” (Malone, 2003: 1). As for the principle *non bis in idem*, Article 75 of Protocol I restricts it to prosecutions by the same belligerent state. According to Paragraph 4

(h), no one may be prosecuted or punished by the same party to the conflict for an offence for which a final judgment has already been rendered. However, this means that a subsequent prosecution for the same offence by the opposing party is not prohibited (Bothe et al., 1982: 522).

In general, Petrig (2009: 350-351) states that ICRC's 2005 Study on Customary International Humanitarian Law shows that most of customary rules on the dead also apply to non-international armed conflicts. Furthermore, Petrig (2009: 350) looks at the requirement for respect of "mortal remains" as "a concretization of the general obligation to protect the dignity of persons and the prohibition of outrages upon personal dignity". Hence, despite the lack of specific provisions dealing with mortal remains in international treaty law concerning the non-international armed conflicts, Petrig (2009: 351) concludes there are no major protection gaps. To illustrate, Petrig claims that "the prohibition of ill-treatment and mutilation protects the mortal remains as such". Moreover, Petrig (2009: 352) adds that all four Geneva Conventions of 1949 demand the dead body to be examined, preferably by physicians, to confirm death (and identity), which international customary law then extends to non-international armed conflicts, too. The exception is the obligation to return the mortal remains and personal effects of the dead, which is not applicable to non-international conflicts (Petrig, 2009: 343-344).

In our opinion, the Assembly of the States Parties to the ICC Statute could have applied its standpoint regarding the applicability of war crime of outrages upon personal dignity to the dead, to war crime of (physical) mutilation, too. Thus, it would have strengthened the scope of provisions of the ICC Statute concerning the dead persons by clearly delineating acts of physical ill-treatment of the bodies of the dead from other, non-physical acts to the detriment of the dead, such as those listed by Wels. Instead, the Assembly only stated that elements of crime entitled "war crime of mutilation" mean conduct which "caused death or seriously endangered the physical or mental health" of person or persons. Thus, no supplementary reference to the dead has been made in footnotes of the Elements of Crime document, as done concerning the outrages upon personal dignity.

In his analysis of German Federal Supreme Court Judgment of 27 July 2017, Ambos (2018: 1105-1106) questions the applicability of the concept of person to the dead. In his opinion, both Frankfurt Higher Regional Court (germ. Oberlandesgericht – OLG), as a trial court, and the German Federal Supreme Court (germ. Bundesgerichtshof – BGH), as an appeals court, interpreted the term "person" too broadly and violated the prohibition of analogy. The facts of the case encompassed participation of a German national in beheading (while or after killing them) two detained Syrian soldiers in 2014 during the non-international armed conflict in Syria, as well as taking photographs with the heads displayed like trophies (Dauster, 2020: 25). The OLG established that Syrian soldiers were in the power of the adverse party during non-international armed conflict and were protected under international humanitarian law (Ambos, 2018: 1107). The German national was sentenced to two years' imprisonment for the war crime of treating a protected person "in a gravely humiliating and degrading manner", prescribed in the German Code of Crimes against International Law (germ. Völkerstrafgesetzbuch

– VStGB). That Code provides a legal foundation to prosecute nationally the crimes prescribed in the ICC Statute, which is in accordance with the ICC’s subsidiary jurisdiction prescribed in Article 1 of the ICC Statute (Dauster, 2020: 24, 26).

Hence, in the case in question, the legal protection was extended to dead persons based on the view that dignity of the dead, or human dignity, continues to be effective after death and should be protected (Ambos, 2018: 1108). In BGH’s view expressed in the judgement, it was exactly the German legislator’s intention to base the Article 8 (1) no. 9 of the VStGB upon the Article 8 (2) (b) (xxi) and (c) (ii) of the ICC Statute, including the Elements of Crimes “formulated to accompany the Statute” (ibid.). The BGH further explained that Elements of Crimes were largely based on elaborations prepared by the International Committee of the Red Cross (ICRC) and the states parties to the ICC Statute (Ambos, 2018: 1109). With regard to article 8 (2) (b) (xxi) of the ICC Statute, Ambos (ibid.) admits the ICRC’s 2005 Study showed “that the prohibition of the desecration of corpses formed part of customary IHL”; moreover, that the customary law Rule 113 prohibits the mutilation of dead bodies. However, in Ambos’ (2018: 1114) opinion, “deceased human beings are only meant when they are referred to as such”.

To support such opinion, Ambos (2018: 1115) gives an example of Article 168 of the German Criminal Code (Strafgesetzbuch – StGB), which does not refer to “a human being” or “a person”, but to “a deceased person”. On the other hand, concerning the international law, Ambos states that it does not support the BGH’s opinion either, because the so-called Geneva Law, upon which the war crimes are based, “makes a distinction between “persons” and “the dead” in various provisions. Also, Ambos questions the legal reach of Rule 113 by saying that “it does not state that protected persons also include deceased persons” (sic!). Moreover, Ambos claims that Elements of Crime cannot be viewed as a source of law, but as “merely ... interpretative aids”, which in his opinion confirms that states parties of the ICC Statute could not reach the consensus during negotiations that preceded the enactment of the Statute (ibid.). In our opinion, such an opinion or even a standpoint that the dead should not be automatically considered “persons”, especially in criminal law, cannot overrun the fact that international customary law does prohibit a mutilation of the bodies of the dead for a very long time. Regarding that, here follows the analysis of international jurisprudence.

INTERNATIONAL JURISPRUDENCE REGARDING THE PHYSICAL ILL TREATMENT OF THE BODIES OF THE DEAD IN ARMED CONFLICTS

In 1947, the General Military Government Court in Dachau, Germany, found German Captain Max Schmid, a medical doctor who served with the Air Corps as a commanding officer of a dispensary in France, guilty and sentenced him to 10 years imprisonment (UN War Crimes Commission, 1949: 151). Facts of the case were the following: "... severed the head of an American flyer from the body with a saw, boiled the head for several hours, removed the skin and flash, and bleached the skull in hydrogen peroxide. The skull later was seen on the accused's desk where it remained until about 20 August 1944, at which time the accused sent the skull to his wife in Germany as a souvenir." (USA vs. Schmid, 1947: 2). Before that, after the American flyer was brought to dispensary, "the accused gave him three injections and he died from bleeding of the lungs within three minutes after his arrival". "Previously, the accused had said that he would kill any American with an injection" (ibid.).

From the legal side, the Court established that Schmid committed "a violation of the laws and usages of war" by "willfully, deliberately and wrongfully" encouraging, aiding, abetting and participating in the "maltreatment of a dead, unknown member of the United States Army" (USA vs. Schmid, 1947: 1). The exact legal foundation was the "Geneva Red Cross Convention of 1929 (Article 3)", specifically "the obligation upon belligerents to take measures to search for the wounded and dead and to protect them from robbery and ill treatment". The Court was of opinion that "dead soldiers must not be disgracefully treated or mutilated". In support of that, the Court also referred to "Oppenheim's, International Law, Volume II, Sixth Edition, Revised 1944, p 288", as well as "War Department Basic Field Manual 27-10, "Rules of Land Warfare", paragraph 176, 1 October 1940." (USA vs. Schmid, 1947: 3). Apart from that, no reference to any national legislation, either German or French, was made.

In 1946, the Military Commission in Yokohama, Japan, found Japanese Captain Masaaki Mabuchi and Second Lieutenant Jutaro Kikuchi guilty for their acts against the dead body of the American prisoner of war. According to the facts of the case, Mabuchi "was the commanding officer of a raid company" and "failed to discharge his duty as CO to control and restrain his men from bayonetting and mutilating the dead body of 2d Lt. Darwin T. Emry, a deceased PW" (USA vs. Mabuchi and Kikuchi, 1946: 2-3). Mabuchi admitted "ordering the decapitation of the flyer and later granting permission to a non-com to use the dead body for bayonet practice by the inexperienced recruits" (USA vs. Mabuchi and Kikuchi, 1946: 4). Kikuchi admitted "that he came upon the scene while the bayoneting was being done, took a rifle with fixed bayonet, and, after stabbing the body twice himself, returned the weapon to one of the trainees and departed". During the trial, the witnesses confirmed that "the deceased was alive when beheaded but dead when bayoneted" and that Kikuchi, "as a company officer who instructed in bayonet technique, gave permission for the men, especially the new recruits, to practice bayoneting on the dead body" (ibid.).

In Commission's opinion, Mabuchi committed the "violation of the Laws and Customs of War" and "serious violation of the Law of Nations", as "the act charged ... is a universally recognized crime against International Law" (USA vs. Mabuchi and Kikuchi, 1946: 1, 8). For his part, by "willfully and unlawfully" bayonetting and mutilating the dead body of a deceased PW, Kikuchi committed "wanton and inhuman atrocities ... in violation of the Laws and Customs of War". Mabuchi was finally sentenced to death ("to be hanged by the neck until dead") and Kikuchi to "confinement at hard labor for twenty-five (25) years" (USA vs. Mabuchi and Kikuchi, 1946: 2,8-9). From the legal side, the reference made to Japanese Criminal Code was not decisive for the verdict, but rather of supplementary character ("... condemned alike by the Laws and customs of War, International Treaties and Covenants, Japanese Criminal Law, Shinto Ethics, and the Bushido Code itself") (USA vs. Mabuchi and Kikuchi, 1946: 10). The decisive legal foundation in this case was international law, particularly customary law.

In the above-presented cases, the ill-treatment of the bodies of the dead was regarded as an exceptionally horrific war crime which shows a deep disregard for the dead enemy. In the first case, the physical acts against the dead body were labeled as "maltreatment", while in the second case, the term "mutilation" was used. These cases were especially important in presenting that war crime trials should not be confined to high-ranking officers and officials only but also to lower-ranking officers and soldiers as immediate perpetrators. In sum, the cases presented above show that some clear standards of responsibility had been set up already after World War II, both regarding the prosecutions irrespectively of the perpetrator's position and, especially, concerning the mutilation (maltreatment) of the bodies of the dead as a war crime that should be prosecuted under a separate charge from the crimes of murder or crimes of ordering the killing or failing to control and restrain the subordinates.

The Trial Chamber of the ICTR, acting in Bagosora *et al.* case (Military I), concerning the indictments over the "sexual assault" on Prime Minister Uwilingiyimana, established that "a bottle was inserted into her vagina after her death" and that "after the killing of Prime Minister Agathe Uwilingiyimana her genitals were mutilated with a bottle". From legal perspective, this was labeled as an "inhumane treatment" or an "inhumane act" (ICTR, 2008: 559-560). The Chamber elaborated that "the crime of inhumane acts is a residual clause for serious acts which are not otherwise enumerated in Article 3" of the ICTR Statute and that "they must be similar in gravity to the acts envisaged in Article 3 and must cause mental or physical suffering or injury or constitute a serious attack on human dignity" (ICTR, 2008: 559). Although Bagosora was found guilty, the Appeals Chamber found that according to the Indictment, the Prime Minister was "first sexually assaulted and subsequently killed", so that Bagosora was convicted for an act that he was not charged of (sic!) (ICTR, 2011: 246).

Indeed, according to the Indictment, the "Prime Minister Agathe Uwilingiyimana was tracked down, arrested, sexually assaulted and killed" (ICTR, 1998a: 33). Hence, the sequence of criminal acts was somewhat different in comparison with the Trial Chamber's findings. As no formal amendments to the Indictment were made following the Trial Chamber's findings and before its Judgement was delivered, the Appeals Chamber did not find Bagosora guilty on that account. Still, the Appeals Chamber did

underscore that “the desecration of Prime Minister Uwilingiyimana’s corpse constituted a profound assault on human dignity meriting unreserved condemnation under international law” (ICTR, 2011: 247). Furthermore, the Appeals Chamber noted that in 1994 “many domestic criminal codes, including the Rwandan criminal code, explicitly criminalised acts degrading the dignity of the corpse or interfering with a corpse” and “that any review of customary international law regarding this issue would need to take into account the large number of jurisdictions that criminalise degrading the dignity of or interfering with corpses” (ibid.).

For its part, the Trial Chamber clearly demonstrated that the behavior in question, as described in their Judgement, is perceived as a crime against the body of a dead person and as judicially relevant irrespectively of the legal qualification applied (“inhumane act” or “serious attack on human dignity”, as a “crime against humanity”). Obviously, both chambers considered dead persons as persons who should be protected under international criminal law. In addition, if we consider the above-presented jurisprudence of war tribunals established decades ago, including the legal logic inherent in their judgements, it remains unclear why drafters of the ICTR Statute did not use much more precise legal language based on applicable long-existing international customary law regarding the protection of the bodies of the dead from mutilation or ill-treatment. Viewing from that perspective, the Appeals Chamber’s reference to the status of international customary law and national legislation as of 1994 appears to be short of awareness of legal and humane values adopted internationally long ago.

Although aware of the tragic events like those presented in the introduction of this research, as well as those committed in Rwanda, the drafters of the ICTR Statute decided to use a quite broad terminology such as “other inhumane acts”, as a category of crimes against humanity “when committed as part of a widespread or systematic attack against any civilian population” (in Article 3) and “violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment”, within the violations of Article 3 common to the Geneva Conventions of 1949 (Article 4 of the ICTR Statute) (ICTR Statute, 2010). Similar terminology can be found in the 2009 ICTY Statute, too. Consequently, the acts against the bodies of the dead in armed conflicts in former Yugoslavia were dealt with sporadically and modestly. An example is the Trial Chamber’s Judgement in case against Radoslav Brđanin (IT-99-36), which stated that “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” (ICTY, 2004: 331). In Trial Chamber’s view, such acts amounted to the level of gravity of crimes against humanity (ibid.). However, no particular criminal act of such kind was attributed to Brđanin.

In 2007, the Trial Chamber of the Special Court for Sierra Leone (SCSL), acting against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, implemented the provisions of the Statute of the SCSL regarding *inter alia* “the crime of

mutilation” (SCSL, 2007: 223-224).⁵ The overall factual findings in this case showed the attacks “exhibited a characteristic modus operandi: amputation of limbs, mutilation, actual or attempted decapitation, rape, burning alive of men, women and children, destruction of homes, abduction and looting”, while “civilians suffered amputations including arms, hands, feet, breasts, lips and ears” (SCSL, 2007: 88). The legal foundation for the charges of mutilation was found in Article 3 of the SCSL Statute, which encompassed various “Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II”. Within that group of crimes, mutilation was listed among the crimes entitled “Violence to life, health and physical or mental well-being of persons”, together with murder, as a kind of cruel treatment along with the torture and other forms of corporal punishment (SCSL Statute, 2002).

When applying these provisions, the Trial Chamber established the following elements of crime of mutilation: firstly, “the perpetrator intentionally subjected the victim to mutilation, in particular by permanently disfiguring the victim, or by permanently disabling or removing an organ or appendage of the victim”; secondly, “the perpetrator’s conduct was neither justified by the medical, dental or hospital treatment of the victim, nor carried out in the victim’s interest” (SCSL, 2007: 223-224). Furthermore, the Trial Chamber noted that an additional element requires that “the perpetrator’s conduct caused death or seriously endangered the physical or mental health of the victim” (SCSL, 2007: 224). However, the Prosecutor submitted that this additional element is superfluous and should not have been retained in the Indictment, and the Trial Chamber agreed with that (ibid.). The Trial Chamber found the only act of mutilation specified in the Indictment was “cutting off limbs” (SCSL, 2007: 345). It was established that the mutilations were usually inflicted with machetes or axes (SCSL, 2007: 346). In Trial Chamber’s view, the primary purpose “could only reasonably be inferred to have been to terrorise the civilian population” (SCSL, 2007: 410).

Apart from the crimes of violence to life, health and physical or mental well-being of persons, Article 3 of the SCSL Statute (2002) also contained the group of crimes entitled “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”. The Trial Chamber stated that “the crime of outrages upon personal dignity must be interpreted in light of the purpose behind Common Article 3 of the Conventions, which is: “to uphold the inherent human dignity of the individual” or to safeguard “the principles of humane treatment” (SCSL, 2007: 221). In the opinion of the Trial Chamber, that crime – “first articulated in the 1949 Geneva Conventions and ... firmly entrenched in customary international law” – is “formulated in a manner which ensures broad and flexible interpretation”. The Trial Chamber stressed that a list of offences subsumed under outrages against personal dignity is non-exhaustive, with humiliating and de-

⁵ The Special Court for Sierra Leone (SCSL) was established by the agreement between the UN and the Government of Sierra Leone, signed on 16 January 2002, and pursuant to Security Council Resolution 1315 (2000). It was founded to prosecute those responsible for serious violations of international humanitarian law committed during the civil war in Sierra Leone.

grading treatment, rape, enforced prostitution and indecent assaults of any kind, as examples (*ibid.*).

The Amended Indictment against Charles Ghankay Taylor included a variety of criminal acts. Mutilations were deliberated within the crimes against humanity and other inhumane acts committed by way of physical violence, which included “cutting off limbs and other body parts and carving “AFRC” and “RUF” on the bodies of the civilians” (SCSL, 2006: 5-6). Outrages upon personal dignity mostly included “widespread acts of sexual violence against civilian women and girls” (SCSL, 2006: 4-5). Murder, considered as a crime against humanity, predominantly meant unlawful killings, while other criminal acts included the conscription and use of child soldiers to participate actively in hostilities (as “other serious violations of international humanitarian law”), acts of terrorism (against the civilian population), etc. (SCSL, 2006: 6). As far as the topic of this research is concerned, the Trial Chamber *inter alia* did establish, for example, that “the Prosecution has proved beyond reasonable doubt that between April and May 1998 during an attack on Koidu Town: ... an RUF Commander Emmanuel Williams a.k.a. “Rocky” acting under the orders of an AFRC Brigade commander called “Rambo”, intentionally executed 101 captured men and had their bodies decapitated ...” (SCSL, 2012: 254). However, following the Amended Indictment and the Trial Chamber’s judgement, the Appeals Chamber’s judgement also subsumed the acts of decapitation of the dead under the crimes of murder (or unlawful killings), use of child soldiers, and acts of terrorism (SCSL, 2013).

Thus, the jurisprudence of the SCSL showed that crimes of mutilation could be committed against living persons only, and not against the bodies of the dead. Such practice can also be found at the ICC. Namely, in case against Callixte Mbarushimana, for crimes against humanity and war crimes allegedly committed in 2009 in the Kivus, the Democratic Republic of Congo, the Pre-Trial Chamber noted – among a number of charges – that “the acts allegedly inflicted on the body of Witness 694 [REDACTED] after she was killed cannot amount to the war crime of mutilation which presupposes an act committed against a person and not a dead body” (ICC, 2011: 71). Thus, the Chamber concluded those acts cannot be analyzed under the charge of mutilation. However, the Chamber did not make any reference to outrages upon personal dignity, as another potential legal foundation for qualifying the above-mentioned acts as crimes. Namely, as evident from this research, the mutilation of dead bodies may constitute a war crime of outrages upon personal dignity, under Article 8 (2) (c) (ii) of the ICC Statute, which is applicable regarding the dead bodies in the context of non-international armed conflicts (Klamberg et al., 2023: 328). Hence, the acts committed against the bodies of the dead were not treated as a separate crime of outrages against dignity in this case, which was also the case in trial against Charles Taylor before the SCSL. Regardless, the Pre-Trial Chamber I finally declined to confirm the charges against Mbarushimana and did not commit the case to trial. The Prosecution’s appeal was dismissed and Mbarushimana was released from the ICC custody on 23 December 2011 (ICC, 2011).

CONCLUSION

The ill-treatment or desecration of the bodies of fallen enemies has been an appalling practice in both international and non-international armed conflicts. As a result, more than a century ago, international treaty law began to provide comprehensive protection of the dead in the context of armed conflicts. These treaties provided clear guidelines on the respectful treatment of the dead, prohibiting ill-treatment of their bodies and ensuring dignified disposal of remains. Additionally, as evidenced in documents of various international organizations and other entities, international customary law further reinforced these protections, offering both a legal and moral framework to prevent such violations and hold perpetrators accountable. The ICRC plays a particularly important role in this effort. Nevertheless, there have been numerous instances where the bodies of the dead have been ill-treated, including physically. To that end, the trials conducted after World War II strongly contributed to the awareness of such crimes and the necessity of punishing the perpetrators and their superiors.

As far as physical violations of the bodies of the dead are concerned, according to the ICRC's Study on customary international law, "mutilation" of dead bodies is prohibited (Rule 113). State practice recognizes this rule as applicable in both international and non-international armed conflicts, and no contrary practice has been officially identified. Under the ICC Statute, the prohibition of mutilating dead bodies is covered by the war crime of "committing outrages upon personal dignity". Simultaneously, the expression "mutilation" is used in the ICC Statute only in relation to living persons, as a separate crime. Although open-ended, the phrase "outrages upon personal dignity" clearly encompasses physical and potentially all other acts of ill-treatment or desecration of the mortal remains. Moreover, the above-mentioned ICRC's Study confirmed that outrages upon personal dignity are also prohibited by international customary law (Rule 90). Furthermore, the practice establishes both of these rules as norms applicable in both international and non-international armed conflicts.

Thus, it has been a long time since the bodies of the dead have enjoyed legal protection from physical and other ill-treatment. This became evident during the trials conducted immediately after World War II, and that cannot be disputed. The examples of trials in Dachau and Yokohama analyzed in this article show how the courts approached the cases and how they identified, interpreted and – what is particularly important – implemented the rules of international treaty and customary law. Hence, by enacting the ICC Statute and adopting the Elements of Crimes, the states merely codified the long-existing and widely recognized legal standards. To that end, the content of German criminal law and the standpoint of German courts, briefly exposed in this article, are particularly illustrative of the states' appropriate will and accurate legal attitude. No scholarly objections can overrule or relativize that, as it is ultimately up to states to express their determination when it comes to the content of the law to be created or declared, imposed and decisively implemented.

Consequently, viewed from the contemporary perspective, it becomes of secondary importance whether the dead should be labeled as "persons" or whether the criminal acts should be classified as "mutilation" or "outrages upon personal dignity". What

is crucial is that such crimes, as evidenced by trials after World War II, are considered separately from crimes of murder or unlawful killing, or crimes against humanity in general. They must not be subsumed into other crimes or simply considered an aggravating circumstance. For example, even the former Socialist Federal Republic of Yugoslavia, long before its dissolution, prescribed “violations of the integrity of the body” and “inhuman treatment” as crimes in both international and non-international armed conflicts, committed to the detriment of the wounded, the sick and the prisoners of war. However, this research has shown that the practice of the ICTR, ICTY and SCSL did not bring satisfactory outcomes in concrete cases where physical ill-treatment of the bodies of the dead was found. Unfortunately, such acts were usually subsumed into other crimes.

While the gravity of such acts were not either factually or legally disputed in those trials, the fact remains that these acts were not given particular and sufficient importance in judgments. Hence, despite the condemnations of such acts during the trials conducted before international criminal tribunals in the 1990s, there is a visible setback in comparison with the jurisprudence records dating from the late 1940s. For both general and individual prevention concerning the ongoing and future armed conflicts, such legal practice must be corrected, starting from prosecutions. Meanwhile, based on international customary law, primarily Rules 90 and 113, there is nothing to prevent states from, if necessary, either prescribing more precisely the physical and other acts of ill-treatment of the body of a dead person as a criminal offense in their national legislation, regardless of what and how the ICC Statute states, or from applying the long-existing and undisputable rules of international customary law, or from interpreting their existing national regulations in the way the German courts did several years ago.

Civilized societies should never tolerate any form of desecration of human remains – a person’s dignity must be respected even after death and carried into the grave. If mankind allows such violations to go unpunished, it risks reverting to the barbaric practices of warfare that we believed were left in the past. Furthermore, such neglect could ultimately undermine the international legal framework that has been carefully established and upheld for decades. However, it must be noted that proving the criminal acts in question can be difficult, as evidence is often hard to collect, and such acts are typically part of a broader pattern of violence affecting both the living and the dead. Success lies in a better-prepared and more focused approach to investigation, documentation, and prosecution, as well as in increased international cooperation, which could ensure that such violations are not overlooked. Also, if the accused were not initially charged with the physical ill-treatment of the bodies of the dead in international or non-international armed conflict, there is still time to do so in newly initiated trials, either before international courts and tribunals or before national courts.

In practical terms, the findings of this article call for an evolution of legislative, prosecutorial, and judicial strategies to recognize these acts as distinct crimes, not merely as elements or aggravating factors of broader offenses. To that end, to conclude this article by referring once more to the horrifying example presented at its beginning, which happened in Croatia on 2 May 1991, let us quote Miroslav Rožac, the former

Croatian military prosecutor and county court investigating judge, who once said: ... the crime in Borovo Selo can ... be tried again on a different basis, i.e., when new elements are proven that could qualify as a war crime (Rupić, 2022: 74). In this and all other similar cases, based on the widespread and long-existing legal and moral reasoning of the states and the jurisprudence elaborated in this article, where the acts of physical ill-treatment of the bodies of the dead were not adequately legally addressed, neither *nullum crimen sine lege*, *nulla poena sine lege* nor *non bis in idem* principles of criminal law should be successfully invoked by the perpetrators and their superiors. Prosecutors and the courts must focus on the available evidence, and here the role of pathologists and forensic experts becomes crucial in explaining what exactly happened with the bodies before and after death. Such findings and the testimonies of survivors would significantly facilitate the determination of accountability.

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Pravna zaštita tijela umrlih u oružanom sukobu od fizičkog zlostavljanja

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SAŽETAK

Ovaj rad pruža analizu utemeljenu na doktrini i studijama slučaja pravnog okvira primjenjivog na zaštitu tijela umrlih u oružanom sukobu od fizičkog zlostavljanja, s posebnim osvrtom na kršenja koja uključuju sakaćenje i druge oblike degradacije. Rad kritički razmatra sadržajne i interpretativne dimenzije relevantnih međunarodnih normi, posebice Pravila 113 (zabrana sakaćenja umrlih) i Pravila 90 (zaštita osobnog dostojanstva) kako su opisani u Studiji o običajnom međunarodnom humanitarnom pravu Međunarodnog odbora Crvenog Križa iz 2005. godine. Te su norme analizirane na temeljima odredaba međunarodnih ugovora koji uključuju Ženevske konvencije, Rimski statut Međunarodnog kaznenog suda, te u kontekstu međunarodne sudske prakse unatrag zadnja dva desetljeća, osobito sudske prakse Međunarodnog kaznenog suda, Međunarodnog kaznenog suda za ratne zločine počinjene na području bivše SFRJ, Međunarodnog kaznenog suda za ratne zločine počinjene na području Ruande i Posebnog suda za ratne zločine počinjene u Sierra Leoneu. Rad se temelji na kvalitativnom istraživanju širokog spektra primarnih i sekundarnih izvora, uključujući studije slučaja, sudske odluke, izvješća međunarodnih organizacija i mišljenja stručnjaka. Kroz kritičko razmatranje reprezentativnih incidenata, uključujući Borovo Selo 1991., Mogadishu 1993., Kigali 1994. itd., u radu se istražuju izazovi u dokazivanju i optuživanju koji ometaju praktično prepoznavanje ovih djela kao zasebnih zločina. Nalazi istraživanja otkrivaju značajnu podzastupljenost *post-mortem* fizičkog zlostavljanja u međunarodnim sudskim postupcima, pri čemu su takva djela svrstana pod šire optužbe kao za ubojstvo, nehumano postupanje, ili zločine protiv čovječnosti, umjesto da ih se progoni kao zasebne povrede međunarodnog prava. Usporedbom suvremene međunarodne sudske prakse i one nakon Drugog svjetskog rata, posebno suđenja u Dachauu i Yokohami, u radu se identificira normativna regresija u tužiteljskim i sudskim pristupima pravnoj kvalifikaciji i kažnjavanju ovih zločina. Potrebna je prilagodba tužiteljskih strategija, odvažna interpretacija zakonskog okvira te odgovarajući obzir prema forenzičkim utvrđenjima kako bi se osiguralo pozivanje na odgovornost.

Ključne riječi: zlostavljanje umrlih, povrede osobnog dostojanstva, ratni zločini, međunarodni kazneni sudovi, međunarodno običajno pravo

