‘We Demand Dignity for the Victims’ – Reflections on the Legal Qualification of the Indecent Disposal of Corpses

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Abstract

‘We demand dignity for the victims’. Such was the pledge of the Dutch Minister of Foreign Affairs following the crash of Malaysia Airlines flight MH17 in rebel-held territory in eastern Ukraine and the looting of the corpses of the 298 victims. Although not an isolated instance, the indecent disposal of the corpses of the victims seems to have escaped legal scrutiny. Drawing from this and other case studies, this article addresses the legal qualification of acts of mistreatment perpetrated against the corpses of victims of international crimes. It analyses all relevant dispositions pertaining to international humanitarian law, international criminal law and the law of trafficking in human beings. While these provisions fail to legally characterize such acts, the judiciary however tends to recognize their criminality; a recognition which, in the authors’ views, could make its way into the text of international (criminal) law.

Keywords

indecent disposal of corpses – dignity of victims of international crimes – Malaysia Airlines flight MH17
1 Introduction

‘Robbing the dead, even without the added offense of killing, is and always has been a crime’.2

When Malaysia Airlines flight MH17, flying from Amsterdam to Kuala Lumpur, crashed in rebel-held territory in eastern Ukraine on 17 July 2014, and when it appeared that the corpses of the 298 victims were being looted, the event understandably prompted emotional distress. It also raised a series of legal questions – most of which have remained unasked, let alone answered – attached to the treatment of the corpses of the victims of the plane crash3 and its legal qualification.

The crash of flight MH17 is not an isolated instance of mistreatment of corpses of victims. To the contrary, an intrinsic and material consequence of mass violence and armed conflict4 is the mass production of human corpses. Depending on each particular instance of mass atrocity, the fate of these corpses can vary from severe mistreatment, looting, mutilation, traffic and transport to concealment and/or destruction, as evidenced by allegations of organ removal at the “yellow house” in Kosovo, the use of primary, secondary and tertiary mass graves in Bosnia-Herzegovina or the acts of sexual violence perpetrated against the dead during the Rwandan genocide.

For use of better terminology, this article has chosen to categorize all of these different acts perpetrated against the corpses of the victims under the expression ‘indecent disposal of corpses’.5 Although taken from international

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3 The legal characterization of the downing of flight MH17 as a war crime is still under discussion, which is why throughout this article, the expression ‘alleged war crime’ will be utilized.
4 Regardless of whether the downing of flight MH17 is characterized as a war crime or not, it still seems safe to assert that it occurred in the context of a military crisis situation between Russia and Ukraine. See infra.
humanitarian law, this terminology – and arguably the acts that fall under its scope – has yet to refer to criminal acts systematically triggering individual responsibility. Indeed, these post-mortem acts and the ill-treatment of the corpses of the victims fail to be adequately covered by international legal instruments, making their criminal qualification the product of a common sense reasoning rather than of a strictly legal one and their prosecution and punishment inadequate, if not non-existent. Put bluntly, while any reasonable person would know that these acts against the dead are wrong and unlawful, their criminality fails to be explicitly acknowledged by the text of the law. Are such actions indeed crimes? And if they are, which international norms should apply? If one could answer these questions by reverting back to the domestic law of the states where the corpses are located (provided however that they are found), it seems fair to assert that, in contexts involving the transport of corpses across borders – such as was possibly the case in Kosovo – or in occurrences of international crimes – such as in the Former Yugoslavia and Rwanda – resort to domestic law can be illusory. What holds true for crimes perpetrated against the living here holds equally true for acts committed against the dead. International humanitarian law and international criminal law were created precisely to address armed conflicts and occurrences of mass violence, the inevitable corollary of which is the production en masse of corpses of victims, and if acts against these corpses were to be legally characterized and effectively prosecuted, they should fall under the ambit of international norms.

Before embarking on any critical examination of these norms, it is necessary to recall that the legal status of the corpses of victims and the question whether dead bodies have human rights is yet to be legally solved. Can the dead be victims of human rights violations and/or of crimes? Can they actually be harmed? To paraphrase Rosenblatt, the indecent disposal of the corpses of victims of mass violence occurs only after the victims ‘have already had their most fundamental rights violated, irrevocably’ and, as he further notes, ‘the violation of the dead can render them permanently “rightless”’. In this context, whose interests do the legal norms explored here actually serve? Those of ‘rightless’ corpses, those of their relatives or those of the community of the living at large? As the following developments will highlight, the legacy of the different legal dispositions is one of uncertainty and while certain

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6 See AP II, Art. 8.
8 Rosenblatt, supra note 5, p. 926.
9 Ibid., p. 942.
provisions seem to afford protection directly to the corpses of the victims,10 others focus on the rights of the families to know the fate of their deceased relatives11 and certain judicial decisions even hint at the protection of the dead victims’ community.12

As for the legal qualification of acts perpetrated against the corpses of the victims of international crimes, the terminology of the different legal instruments is far too brief and elusive to be efficient and effective, regrettably leaving these corpses generally unprotected and their indecent disposal unpunished. In the current state of international law, and as it will be further developed, the only disposition explicitly criminalizing acts against the dead is the war crime of ‘committing outrages upon personal dignity, in particular humiliating and degrading treatment’, whether in the course of an international armed conflict13 or of a non-international one,14 for which the Elements of Crimes of the Rome Statute of the International Criminal Court specify that “persons” can include dead persons.15 This criminalization is however a mere possibility – as induced by the use of the verb ‘can’ – rather than an automatic criminal qualification of acts perpetrated against the dead. It is also limited to the context of armed conflicts and would not apply to instances of mass violence occurring in peacetime.

10 See infra for the analysis of norms protecting corpses against pillage, ill-treatment and outrages and requesting their decent burial in individualized graves.
11 See e.g., Art. 32 of AP I. In particular, Sassoli, Bouvier and Quintin have stressed that “[i]t is not primarily to protect the dead and the missing themselves that IHL contains specific rules concerning them. The main concern is “the right of families to know the fate of their relatives””. Marco Sassoli, Antoine A. Bouvier and Anne Quintin, How Does Law Protect in War: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law – Volume I: Outline of International Humanitarian Law (3rd edn, ICRC, Geneva, 2006), chapter 7, p. 12. See also Anna Petrig, ‘The war dead and their gravesites’, [91] 874 International Review of the Red Cross (2009) 341–369, p. 369: ‘while international humanitarian law is an important body of law protecting the deceased and their next of kin, it is not the only one. International human rights law – despite the absence of specific rules on the dead – contains general rules which could also be effective in protecting the human dignity of the deceased and safeguarding the rights and needs of their relatives’ (emphasis added). Confirming Petrig’s analysis, see Elberte v. Latvia, 13 January 2015, European Court of Human Rights, no. 61243/08, <hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-150234>, 3 June 2015.
13 ICCST., Art. 8(2)(b)(xxi).
14 Ibid., Art. 8(2)(c)(ii).
15 Elements of Crimes, Art. 8 (2) (b) (xxi), note 49.
Different provisions pertaining to other legal corpuses, although falling short of criminalizing acts perpetrated against the dead, still seem to grant them protection. To illustrate this assertion, and drawing from several case studies, this research reviews and explores these relevant legal instruments. After examining the pertinent dispositions enshrined in the law of armed conflict, this article will explore the letter of international criminal law and its interpretation by the ad hoc International Criminal Tribunals before contemplating the possibility of resorting to the legal corpus which focuses precisely on the human body namely, the international law of trafficking.

2 **Left to the Capricious Willingness of States: The Indecent Disposal of Corpses as a Violation of the Law of Armed Conflict?**

In their analysis of international humanitarian law written in 1915, Professors Baty and Morgan had very strongly condemned ‘molestation of the wounded’:

> After an engagement the commander in possession of the field of battle should take measures to search for both the enemy’s wounded and his own, and should protect ... the dead against pillage and maltreatment. It is enjoined that there shall be mutual provision of information by one belligerent to the other as to the identity of the dead and wounded who have come into his possession. *Molestation of the wounded can be punished as a “war crime”*. “Persons who rob, mishandle, or kill the wounded lying defenceless on the field of battle are ‘hyenas of the battlefield’ (*Hyänen des schlachtfelds*),” and will receive, no mercy.16

The contemporary law of armed conflict is however less adamant. In the current state of the law, none of the humanitarian law norms relative to the corpses of victims of conflicts criminalize acts of disrespect or indecency against the dead. Non-compliance with these norms is neither a grave breach of the Geneva Conventions and their Protocols nor war crimes.

Common Article 3 of the 1949 Geneva Conventions,17 which constitutes a minimum yardstick with which all States Parties have to comply in all types of conflicts, whether international or non-international, fails to contemplate the

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17 See GC I; GC II; GC III; GC IV.
treatment of the dead resulting from an armed conflict. It indeed only affords protection to the living, prohibiting ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’\textsuperscript{18} and requiring from the High Contracting Parties that the ‘[t]he wounded and sick shall be collected and cared for’.\textsuperscript{19}

Nevertheless, it still appears that, at least from a strictly textual viewpoint, international humanitarian law is probably the legal corpus which affords the most protection to corpses, as evidenced by a series of specific dispositions on burials and on human remains; some covering prisoners of war, others civilian persons in time of conflict; some being applicable in international armed conflicts, others in non-international ones.\textsuperscript{20}

The Geneva Conventions contain a general obligation for the Parties to the conflict ‘to search for the dead and prevent their being despoiled’\textsuperscript{21} or, in the case of civilian persons, ‘to search for the killed ... and to protect them against pillage and ill-treatment’.\textsuperscript{22} In the words of Petrig, ‘[t]his concretization of the general prohibition of pillage is intended to guard the dead from those who may seek to lay hands on them and to prevent them from falling prey to the ‘hyenas of the battlefield’’.\textsuperscript{23}

Belligerents to a conflict have to ensure that both prisoners of war and civilian internees, who have died either in captivity or internment, are ‘honourably buried’.\textsuperscript{24} Perhaps in an attempt to specify this admittedly blurry concept of \textit{honourable burial}, and to take a principled stance against the use of mass graves, the Geneva Conventions also state that deceased prisoners of war and deceased internees ‘shall be buried in individual graves unless unavoidable circumstances require the use of collective graves’.\textsuperscript{25}

Further, the belligerents also have to fulfil the three-fold obligation that the graves of both deceased prisoners of war and deceased internees ‘bear the necessary indications and are treated with respect and suitably maintained’.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{18} \textit{Ibid.}, Art. 3(1)(a).
\item \textsuperscript{19} \textit{Ibid.}, Art. 3(2).
\item \textsuperscript{20} For an extensive overview of the provisions related to the dead in armed conflicts and their graves, see Petrig, \textit{supra} note 11.
\item \textsuperscript{21} \textit{GC I}, Art. 15; \textit{GC II}, Art. 18(1).
\item \textsuperscript{22} \textit{GC IV}, Art. 16(2).
\item \textsuperscript{23} Petrig, \textit{supra} note 11, p. 351.
\item \textsuperscript{24} For prisoners of war, see \textit{GC III}, Arts. 76 and 120. For civilian internees, see \textit{GC IV}, Art.130.
\item \textsuperscript{25} For prisoners of war, see \textit{GC III}, Art. 120. For civilian internees, see \textit{GC IV}, Art. 130.
\item \textsuperscript{26} \textit{GC III}, Art. 76. This obligation is also repeated in Art. 120: ‘The detaining authorities shall ensure that ... their graves are respected, suitably maintained and marked so as to be found at any time’. For civilian internees, Art. 130 of \textit{GC IV} similarly provides that: ‘The detaining
\end{itemize}
The obligation that graves ‘bear the necessary indications’ is homogeneous. The law relative to prisoners of war specifies that their graves should be ‘marked so as to be found at any time’ and that relative to civilian internees indicates that their graves should be ‘marked in such a way that they can always be recognized’. In the case of prisoners of war, this obligation of availability of information regarding the location of the graves also entails the duty to draw up ‘documents relative to the certification of the death’. The death certificates or certified lists shall show particulars of identity ..., and also the date and place of death, the cause of death, the date and place of burial and all particulars necessary to identify the grave. In the case of civilian internees, it embodies the obligation for the ‘Detaining Power’ to

[a]s soon as circumstances permit, and not later than the close of hostilities ... forward lists of graves of deceased internees to the Powers on whom the deceased internees depended, through the Information Bureaux ... Such lists shall include all particulars necessary for the identification of the deceased internees, as well as the exact location of their graves.

Where the traditional humanitarian law divide between combatants and civilians emerges is in the States Parties’ obligations to suitably maintain graves; a concept as blurry as that of honourable burial and which is only specified with respect to deceased prisoners of war over whom a control principle, according to which the state controlling the territory is responsible ‘for the care of these graves and for records of any subsequent moves of the bodies’ (or ashes), applies. Interestingly, there is no such disposition relative to the graves of deceased civilian internees, for which – as indicated above – the law of Geneva Convention IV merely states that they should be ‘suitably maintained’.

authorities shall ensure that ... their graves are respected, properly maintained, and marked in such a way that they can always be recognized.’

27 GC III, Art. 120.
28 GC IV, Art. 130.
29 GC III, Art. 76.
30 Ibid., Art. 120.
31 GC IV, Art. 130.
32 GC III, Art. 120: ‘Responsibility for the care of these graves and for records of any subsequent moves of the bodies shall rest on the Power controlling the territory, if a Party to the present Convention. These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.’
33 See GC IV, Art. 130.
Excluding from its scope of application prisoners of war and civilian internees altogether since their remains and gravesites would ‘[receive] more favourable consideration under the Conventions and this Protocol’, Additional Protocol I applicable in times of international armed conflicts still imposes a two-fold obligation to respect the remains and to respect, maintain and mark the gravesites of ‘persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and ... persons not nationals of the country in which they have died as a result of hostilities’. As explained by the Commentators of Additional Protocol I, this provision seems to apply to the ‘whole population of occupied territories’ apart from civilian internees, nationals of the Occupying Power and persons who have died for reasons not related to the occupation. Yet, as immediately observed by the same Commentators, this does not mean in any way that these categories are left unprotected. While, as noted above, the remains of deceased civilian internees ‘enjoy greater protection under the Conventions’; the nationals of the Occupying Power, ‘under Article 75 (Fundamental guarantees) ... are entitled to humanitarian treatment if they are detained for reasons related to the conflict, and it is clear that such humanitarian treatment implies a respect for their remains and a decent gravesite’. As for persons who have died for reasons unrelated to the occupation, the Commentators noted that they are covered by Article 27 of the fourth Convention, which provides in particular that they are entitled in all circumstances “to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs”, and that “they shall at all times be humanely treated”. It is clear here, too, that such a provision implies, at the very least, a respect for the remains of the dead and a decent burial in accordance with their religious practices.

34 AP I, Art. 34 (1).
35 Ibid. According to the Commentators of this instrument, this excludes ‘combatants who have died in battle and who are covered by Articles 15–17 of the first Convention, and by Articles 18–20 of the Second Convention; prisoners of war who have died during a period of detention and who are covered by Articles 120 and 121of the Third Convention; protected civilians who have died during internment and who are covered by Articles 129–131 of the fourth Convention’. Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, Martinus Nijhoff Publishers, 1987) p. 366, para. 1297.
36 Ibid., para. 1299.
37 Ibid., pp. 366–367, para. 1299 (emphasis added).
38 Ibid. (emphasis added).
If this obligation to respect human remains and gravesites seems ‘clear’, it is still noteworthy that its practical meaning and implications are fairly opaque. The Commentators of Additional Protocol I did identify this lacuna. Regarding remains of the deceased, they first observed that ‘Article 34, paragraph 1, is very brief ..., simply stating that the remains of certain persons “shall be respected”, without any further clarification’, before explaining that ‘this 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’.39 Regarding gravesites, the Commentators noted that Article 34 of Additional Protocol I refers to Article 130 of Geneva Convention IV which ‘mentions respect for graves without any explanation or guidance’, adding that this ‘shows how much this is considered self-evident’;40 a self-evidence which would however still necessitate clarification as to its practical meaning and as to the exact obligations of States Parties.

This obligation of respect for graves in Article 34 (1) may also be read in conjunction with Article 34 (4) which, in its unequivocal requirement that exhumations of remains should be ‘necessary’ in the public interest and only in response to ‘compelling reasons’,41 links respect for graves with respect for human remains:

In the cases examined above where exhumation is carried out for reasons relevant to the State in whose territory the graves are situated, three additional obligations are specified with which it must comply [among which] to treat the remains of the deceased with respect at all times. This reminder was not essential inasmuch as this obligation already follows from paragraph 1. Nevertheless, it is appropriate to emphasize that even reasons of overriding public necessity cannot in any case justify a lack of respect for the remains of the deceased.42

In support of their explanation, the Commentators of Additional Protocol I quoted the acting Rapporteur of the Working Group who highlighted the inherent risk of exhumations, stating that:

Where adequate protection and maintenance was not otherwise possible – for instance, in the case of scattered and temporary graves made during a battle – exhumation for the purpose of regrouping graves in one location would be a matter of public necessity. There was, however, no clause on

39 Ibid., p. 369, para. 1307.
40 Ibid., p. 369, para. 1309 (emphasis added).
41 Ibid., p. 378, para. 1359.
42 Ibid., pp. 378–379, para. 1362 (emphasis added).
More specifically addressing the issue of access to, and maintenance of, gravesites, Article 34(2) states that:

As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

(a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
(b) to protect and maintain such gravesites permanently;\(^{44}\)
(c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.\(^{45}\)

As observed by the Commentators,

\[\text{[t]he fact that “other locations of the remains” of such persons are mentioned in addition to graves is in order to take into account all eventualities, lawful or unlawful, such as, in particular, cremation, collective graves, and even mass graves consequent upon atrocities committed during hostilities.}\]\(^{46}\)

While this endeavour of the drafters to encompass all of these possibilities within the scope of Article 34 is of course commendable, practice has shown that, with respect to ‘unlawful eventualities', compliance with the terms of

\(^{43}\) Ibid., p. 378, para. 1359 (emphasis added).
\(^{44}\) In this respect, Art. 34(3) clarifies that: ‘In the absence of the agreements provided for in paragraph 2(b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves’.
\(^{45}\) Emphasis added.
\(^{46}\) Sandoz et al., supra note 35, p. 370, para. 1314.
Article 34(2) generally remains purely illusory. ‘Cremation, collective graves, and even mass graves consequent upon atrocities’ are generally used by perpetrators as means to conceal their crimes.\(^{47}\) Even after the cessation of hostilities, it is very scarce that successor authorities would be willing and/or able to facilitate access to such places and even scarcer that these will be protected and maintained. Even when there is political willingness, these operations require both practical information as to the location of the graves – which very often can only be obtained by the perpetrators themselves, thereby amounting to confessions – and financial resources, which the successor authorities might be lacking.

Problematically, Additional Protocol II, applicable to non-international armed conflicts, does not contain a provision similar to Article 34. Its Article 8 only contains a general obligation of means – rather than result – to respect the deceased:

Whenever circumstances permit, and particularly after an engagement, all possible measure shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.\(^{48}\)

In particular, Article 8 does not contain any obligation that gravesites be marked. For the Commentators of Additional Protocol II,

It would not have been realistic to lay down such detailed rules for the specific circumstances resulting from non-international armed conflicts. However, it is worth noting how important it is for families to be informed of the fate of their missing relatives and, when appropriate, the location of their graves, particularly in an internal fratricidal conflict. It may also be a factor facilitating a return to peace at the end of the confrontation. Experience shows the importance of such information about missing persons; in fact, in countries engaged in conflict where an ICRC delegation is carrying out activities of assistance and protection in accordance with the humanitarian mandate entrusted to it, the number of requests for searches received from families is always extremely high. The responsible authorities should, as far as possible, inform families about the fate of


\(^{48}\) See AP II (emphasis added).
their relatives, or when appropriate facilitate the task of the ICRC in this field, which is a fundamental humanitarian activity for the benefit of the victims of armed conflicts of any kind.49

The previous quote was worth reproducing for two reasons. First, and although it was published in 1987, the Commentary of Additional Protocol II already emphasized the ‘extremely high’ number of ‘requests for searches received from families’, a number which in the context of the gradual recognition of the right to the truth is ever-increasing.50 Second, the discrepancy between the text of Article 8 and the reality that families of victims want to find and decently bury their loved ones is acutely symptomatic of the failure of international humanitarian law to satisfactorily afford protection to the dead.51

It is absolutely correct, and as the previous developments have shown, that international humanitarian law neither ignores the corpses of the victims in cases of armed conflicts, nor does it ignore the importance of a decent burial...
and of the protection of gravesites. Yet, these provisions see their scope inher-ently reduced and their application limited both by the requirement of state ratification and by the traditional humanitarian law divides between combatants and civilians and between international and non-international armed conflicts. Practically speaking, this means that the application of the norm depends on the identification and the identity of the victims as well as on the characterization of the conflict.

In this regard, the case of the crash of flight MH17 can be used as a telling illustration of the inability of these international humanitarian law norms to apply in practice. Regardless of whether the downing of the plane is characterized as a war crime or not, there seems to be little controversy as to the fact that it occurred in a zone of conflict. If we accept that it did, the civilian victims of the crash – as persons who have died for reasons unrelated to the conflict – would at best only benefit from the general obligation contained in Article 27 of Geneva Convention IV according to which

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They 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.

As noted above, the Commentators of this disposition read in it an obligation of ‘respect for the remains of the dead and a decent burial in accordance with their religious practices’, even though this is nowhere in the actual text of this provision.

Second, even if we concurred with the Commentators of Geneva Convention IV that Article 27 applies to the deceased, the zone of conflict in which the crash occurred does not fall neatly into either international or non-international conflict characterization. Considering however that this conflict has

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international aspects and that the identifiable potential belligerents namely, the Russian Federation\(^{54}\) and Ukraine,\(^ {55}\) have both ratified the 1949 Geneva Conventions and their Protocols, this could be seen as a moot point. Yet, in spite of their applicability, the relevant provisions of international humanitarian law – including, and probably limited to, Article 27 of Geneva Convention IV – relative to the deceased were omitted from all the discussions.

In other words, and regardless of the criminality of the crash of flight MH17\(^ {56}\) and of the identity of those who looted the corpses of the victims,\(^ {57}\)


\(^{56}\) In a statement published on 28 July 2014, the UN High Commissioner for Human Rights, Mavi Pillay, said: ‘This violation of international law, given the prevailing circumstances, may amount to a war crime’ and called for a prompt and efficient investigation. See BBC News, ‘Downing of MH17 jet in Ukraine ‘may be a war crime’ – UN’, 28 July 2014, <www.bbc.com/news/world-europe-28520813>, 11 March 2015. The investigation launched by Dutch prosecutors in July 2014 in Ukraine has however yet to be concluded. See David K. Li, ‘Dutch prosecutors launch war-crimes probe into Flight MH17’, The New York Post, 21 July 2014, <nypost.com/2014/07/21/dutch-prosecutors-launch-war-crimes-probe-into-flight-mh17>, 11 March 2015. The report of the Dutch Safety Board, released on 9 September 2014, found that ‘the aircraft broke up in the air’ (p. 27) and concluded that ‘[t]he pattern of damage observed in the forward fuselage and cockpit section of the aircraft was consistent with the damage that would be expected from a large number of high-energy objects that penetrated the aircraft from outside’ (p. 24). The report further concluded that ‘no indications of any technical or operational issues were found with the aircraft or crew’ (p. 30). While this is only a preliminary report and while ‘it doesn’t say flight MH17 was knocked from the sky by a missile … it pretty much rules out anything else’. See Dutch Safety Board, Preliminary report – Crash involving Malaysia Airlines Boeing 777–200 flight MH17 – HraboveUkraine, 17 July 2014, September 2014, <static.onderzoeksraad.nl/uploads/phase-docs/701/b3923acadeoceprem-rapport-mh-17-en-interactief.pdf>, 11 March 2015. See also BBC News, ‘MH17 crash: Dutch experts say numerous objects hit plane’, 9 September 2014, <www.bbc.co.uk/news/world-europe-29119024>, 11 March 2015. However, the view that the downing of MH 17 is a war crime has yet to be endorsed by any state thus far. Opting for other rhetoric, Russian President Vladimir Putin characterized it as an ‘accident’ and ‘terrible tragedy’ while Ukrainian President Petro Poroshenko identified it as an ‘act of terrorism’. US President Barack Obama has described it as an ‘outrage of unspeakable proportions’ while Malaysian Prime Minister Najib Razak classified it as an ‘inhumane, uncivilized, violent and irresponsible act’. See William Burke-White, ‘The framing of MH-17’, The Independent, 1 September 2014, <www.peacepalacelibrary.nl/2014/09/the-framing-of-mh-17/>, 11 March 2015.

\(^{57}\) It is still unclear whether the individuals responsible for shooting the plane down were the same as, or related to, those who then looted the corpses.
international humanitarian law – although applicable – remains impotent in efficiently protecting the corpses of civilian victims. As observed by Tavernise and Sneider, the remains of the victims found themselves ‘hostages to high politics and mutual distrust’, and at no point were the applicable norms of international humanitarian law requiring respect for the deceased even mentioned.

Ultimately, by referring to such concepts as ‘honourable burial’ of the deceased and ‘respect’ for the human remains and the graves, which also require ‘suitable maintenance’, the text of international humanitarian law lacks precision and defers too much to the good will of States Parties. Further, and as stated at the very beginning of this analysis, non-compliance with the dispositions relative to the corpses of dead victims do not constitute grave breaches of the Geneva Conventions and their Protocols or war crimes. Put differently, breach of these norms does not entail criminal responsibility of their authors. It is absolutely correct that a prohibition contained in international humanitarian law should not be systematically interpreted as a reason for its criminalization. Without going as far however, it seems fair to assert that the sole reliance on the good will of States Parties is a weak mechanism of protection of the dead and of enforcement of the right of their relatives to know the truth as to the fate of their deceased relatives.

3 Left to the Discretion of the Judges: The Indecent Disposal of Corpses as a Violation of International Criminal Law?

When defining violations of humanitarian law and war crimes for the purpose of prosecuting them, international criminal law does not explicitly address the question of the legal status of the corpses of the victims. Yet, the Elements of Crimes of the Rome Statute of the International Criminal Court do specify that for the war crime of ‘committing outrages upon personal dignity, in particular humiliating and degrading treatment’, whether in the course of an international armed conflict or of a non-international one, “persons” can include dead persons. They further add that ‘[i]t is understood that the victim need

59 ICCST, Art. 8(2)(b)(xxi).
60 Ibid., Art. 8(2)(c)(ii).
61 Elements of Crimes, Art. 8(2)(b)(xxi), note 49.
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’.  

This is however the only disposition potentially applicable to dead persons. It interestingly refers to the concept of ‘dignity’, which has yet to be defined as a legal concept, and which mirrors somehow the language of the international humanitarian law of human remains and of gravesites which, as previously observed, uses the notions of honourability and of respect, without however defining them.

If the respective definitions of crimes against humanity and of genocide do protect the individual in his/her physical and moral integrity, they both fall short of explicitly providing any form of protection to the corpses of the victims of such crimes. This is however not to say that the dead are left unprotected under international criminal law, as evidenced by findings – although cautious – of both the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY).

Resorting also to the concept of ‘human dignity’ while protecting the interests not of the dead victims but rather of the community they belonged to, the ICTR – on different occasions – condemned acts of sexual violence perpetrated against corpses of victims. In the Niyitegeka case, the Trial Chamber found that

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62 Ibid. (emphasis added).
63 ICCST, Art. 7
64 Ibid., Art. 6.
65 As reported by Petrig, already ‘in the aftermath of the Second World War [trials] revealed odious acts of mutilation of dead bodies’. She refers in particular to the Kikuchi and Mahuchi case, in which Japanese soldiers were sentenced for ‘bayoneting and mutilating the dead body of a United States prisoner of war’ (Trial of Jutaro Kikuchi and Masaak Mahuchi, 20 April 1946, Military Commission at Yokohama summarized in Law Reports of Trials of War Criminals, Vol. XIII, 1949, p. 152.) and to the Schmid case, in which a German medical officer was found ‘guilty of maltreating the body of a deceased US airman’. (Trial of Max Schmid, 19 May 1947, General Military Government Court at Dachau, summarized in Law Reports of Trials of War Criminals, Vol. XIII, 1949, p. 151). See Petrig, supra note 11, p. 351. In the Pohl case, the US Military Tribunal also noted that: ‘When Jews died in concentration camps, additional loot became available. The clothing was stripped from their bodies and, after being carefully searched for hidden valuables and the distinguishing Jewish Star removed, was distributed to still living inmates or to German civilians. Camp commandants were cautioned not to ship clothing which was stained with blood or showed bullet holes. To complete the desecration, the hair was shorn from the heads of the dead (one report showed a carload of 3,000 kilograms) and all the dental gold was extracted and deposited through WVHA in the vaults of the Reich Bank’. See Pohl case, supra note 2, p. 977.
the acts committed with respect to Kabanda and the sexual violence to the dead woman’s body are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole.66

Using a similar language in the Kajelijeli case, the Trial Chamber held that:

these acts constitute a serious attack on the human dignity of the Tutsi community as a whole. Cutting a woman’s breast off and licking it, and piercing a woman’s sexual organs with a spear are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them. Furthermore, given the circumstances under which these acts were committed, the Chamber finds that they were committed in the course of a widespread attack upon the Tutsi civilian population.67

These findings must however be handled with care and were met with some reluctance on the part of the legal doctrine. For instance, Werle and Jessberger argue that:

The inclusion of other forms of sexual violence of comparable gravity has a catch-all character. According to the Elements of Crimes, the perpetrator must commit an act of a sexual nature against one or more persons or cause such a person or persons to engage in an act of a sexual nature by force, threat of force, or coercion. The Conduct must be in comparable gravity to the acts listed in Article 7(1)(g) of the ICC Statute. The Elements of Crimes are based on the judgment of the Rwanda Tribunal in the Akayesu case. The Tribunal applied this concept to the order to strip a female student and force her to perform gymnastics naked before a large crowd of people. Carrying out sexual acts on dead bodies was also classed by the Rwanda Tribunal as a form of sexual violence of comparable severity. This jurisprudence extends the crime too far. It is not clear whether

66 Nyirahige, supra note 12, para. 465 (emphasis added).
discretion of dead bodies can even be classified as ‘violence’. In addition, comparable severity can only be justified if we presume the existence of sexual self-determination after death; otherwise it is not possible to find a qualitatively equivalent violation of dignity. The shocking effect of such acts on observers does not justify equivalency.\textsuperscript{68}

In the same vein, and while stressing that the violation of the dead ‘has its own special horror’, Rosenblatt contends that ‘[w]e cannot say that it is morally equivalent to violations of the living because we do not know what suffering, if any, it causes to the dead’.\textsuperscript{69}

Moving away from both the question of equivalence and the concept of human dignity, the ICTY has considered the issue of primary, secondary and even tertiary mass graves in Bosnia-Herzegovina. For the Tribunal, primary graves are those ‘in which individuals were placed soon after their deaths’ and secondary graves are those ‘into which the same individuals were later reburied’;\textsuperscript{70} ‘[the] disturbance of the primary graves “seriously hamper[ing] the investigations” into the executions’.\textsuperscript{71} Insofar as they are not expressly criminalized in the Statute of the Tribunal, it is doubtful that the use of primary, secondary and tertiary mass graves could qualify as a criminal act by and of itself. Interestingly however, Krstić was charged with participation ‘in a second attempt to conceal the killings and executions by digging up the bodies from the initial mass graves and transferring them to secondary graves’; an act which in the indictment fell under the counts of genocide and complicity to commit genocide, extermination as a crime against humanity, murder as a crime against humanity and as a violation of the laws or customs of war, and persecutions as a crime against humanity.\textsuperscript{72} The indictment must however be read cautiously as the Trial Chamber’s verdict only discreetly addressed these charges, finding that


\textsuperscript{69} See Rosenblatt, \textit{supra} note 5, p. 942.


\textsuperscript{71} Ibid.

the Drina Corps [over which General Krstić exercised effective control] rendered tangible and substantial assistance and technical support to the detention, killing and burial ... The need for their involvement was unavoidable ... for complicated operations like these detentions, executions and burials on Drina Corps territory.73

Perhaps further highlighting the complexity of burial and reburial operations as ones which require a certain degree of organization, the ICTY Prosecutor indicted Blagojević and Jokić with having

knowingly participated in a Joint Criminal Enterprise, the common purpose of which was ... and to capture, detain, summarily execute by firing squad, bury, and rebury thousands of Bosnian Muslim men and boys aged 16 to 60 from the Srebrenica enclave from 12 July 1995 until and about 19 July 1995.74

Under the count of complicity to commit genocide, Jokić, ‘as Chief of Engineering of the Zvornik Brigade’ was accused of having ‘assisted in the planning, monitoring, organising and carrying out of the burials involved in the murder operation’.75 He was charged with having participated, together with other individuals and units, to the ‘removal of the victim’s bodies and burial operation’ at the Kravica Warehouse,76 of having ‘used heavy equipment to bury the victims in mass graves at the execution site’ in Orahovac,77 of having, together with other individuals and units, ‘used excavators and other heavy equipment to bury the victims while the executions continued’ at the ‘Dam’ near Petkovci,78 ‘buried the victims of the Pilica School executions in a mass grave at the Branjevo Military Farm’,79 ‘buried hundreds of victims [of the Branjevo Military Farm] in a nearby mass grave’,80 and ‘buried the victims of the executions in a mass grave nearby’ Kozluk.81

73 Ibid., para 623. See also Krstić, supra note 47, para. 624.
75 Ibid., para. 36.
76 Ibid., para. 46.4.
77 Ibid., para. 46.6.
78 Ibid., para. 46.8.
79 Ibid., paras. 46.9 and 47.11.
80 Ibid., para. 46.10.
81 Ibid., para. 46.12.
The Trial Chamber devoted a considerable part of its judgment to the ‘organised mass executions and burial operations,’\(^8\) giving due consideration to ‘the forensic evidence from the exhumation of the human remains,’\(^8\) and a substantial part to the reburial operation that occurred between 1 August 1995 and 1 November 1995.\(^8\) Jokić was ultimately found guilty of aiding and abetting murder, as a crime against humanity and as a violation of the laws or customs of war in relation to the acts perpetrated in Orahovac, Branjevo Military Farm and Kozluk.\(^8\)

Although this verdict addressed the issue of burials and possible reburials in mass graves, reading into it the criminalization of such acts would be too far-fetched and the Trial Chamber ultimately refrained from qualifying the acts perpetrated against the dead. In particular, it did not find the defendant guilty of participation in a joint criminal enterprise, as referred to in the indictment. Rather, with respect to the reburials, the Trial Chamber referred to *ex post facto* aiding and abetting, finding that ‘the efforts to conceal the crimes a few months after their commission could only be characterised by a reasonable trier of fact as *ex post facto* aiding and abetting in the planning, preparation or execution of the murder operation,’\(^8\) and explaining that ‘[i]t is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime’. It thereby dismissed the plea of the Prosecutor ‘that the reburials were “a natural and foreseeable consequence of the execution and original burial plan conceived by the Joint Criminal Enterprise”’\(^8\) and held that ‘[a]s the reburial operation was a direct result of the scrutiny of the international community of the events following the take-over of Srebrenica, ... the evidence does not support a conclusion that the reburial operation itself was agreed upon at the time of the planning, preparation or execution of the crimes’.\(^8\)

The legacy of this judgment on this point is thus one of uncertainty, and it is noteworthy that the Appeals Chamber subsequently dismissed both Jokić’s and the Prosecution’s appeals in their entirety\(^8\) thus shedding no further light

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\(^8\) *Blagojević and Jokić*, supra note 47, paras. 291–379.
\(^8\) *Ibid.*, para. 798.
\(^8\) *Ibid.*, para. 730.
\(^8\) *Ibid.*
\(^8\) *Ibid.*, para. 731.

on the issue. What seems clearer however is the evidentiary value attached to the use of mass graves by perpetrators to bury and possibly rebury the victims. In Krstić, the ICTY Trial Chamber expressly recorded the scientific analysis of the evidentiary elements related to the executions carried out in Srebrenica and explicitly referred to the disturbance of the mass graves. It demonstrated a particular interest for the treatment of cadavers and especially their concealment, perpetrated by the same individuals or groups of individuals who had committed the crime in the first place:

Most significantly, the forensic evidence presented by the Prosecution also demonstrates that, during a period of several weeks in September and early October 1995, Bosnian Serb forces dug up many of the primary mass gravesites and reburied the bodies in still more remote locations. The reburial evidence demonstrates a concerted campaign to conceal the bodies of the men in these primary gravesites...

It is noteworthy in this respect that the Chamber devoted an entire part of its decision to the reburials, with the consideration that ‘[t]he forensic evidence presented to the Trial Chamber suggests that, commencing in the early autumn of 1995, the Bosnian Serbs engaged in a concerted effort to conceal the mass killings by relocating the primary graves to remote secondary gravesites.’

Most interestingly, it also inferred genocidal intent from the treatment inflicted on the bodies:

Finally, there is a strong indication of the intent to destroy the group as such in the concealment of the bodies in mass graves, which were later dug up, the bodies mutilated and reburied in other mass graves located in even more remote areas, thereby preventing any decent burial in accord with religious and ethnic customs and causing terrible distress to the mourning survivors, many of whom have been unable to come to a closure until the death of their men is finally verified.

If these judicial interpretations of the law are undoubtedly considering the treatment of the corpses of the victims of international crimes, it still remains

90 See Krstić, supra note 47, para. 71 (emphasis added).
91 Ibid., para. 78.
92 Ibid., paras. 257–261 (emphasis added).
93 Ibid., para. 257 (emphasis added).
94 Ibid., para. 596.
that, in the absence of any explicit legal norm, the legal classification of acts perpetrated against the dead is left to the discretion of judges. Further, as the – fairly minimal – judicial decisions on the issue have highlighted, acts perpetrated against the dead will at best be qualified as accessory crimes rather than as self-standing criminal offences.

4 The Indecent Disposal of Corpses as a Violation of the International Law of Human Trafficking?

Aside from international humanitarian law and international criminal law which, as it has been demonstrated, only afford a discreet and variable protection to the human corpse, the international law of human trafficking focuses precisely on the human body and, although it must be stressed from the outset that equating trafficking in human beings and crimes of mass violence would be abusive, this legal corpus is still worthy of exploration to assess whether some of its norms could extend to the corpses of victims of mass violence.

The contemporary law of trafficking in persons is encapsulated in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children to the United Nations Convention on Transnational Organized Crime.\(^95\) In its Article 3, the Protocol defines trafficking in persons as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

To be characterized as trafficking in persons under international law, the alleged violation must thus satisfy three cumulative conditions: an action; a means; and for the purpose of exploitation.

The action element encompasses a variety of deeds including recruitment, transportation, transfer, harbouring or receipt of persons, which are not without reminding certain of the acts covered by contemporary international criminal law as embodied in the Rome Statute of the ICC. And indeed, the crime of genocide encompasses the act of forcibly transferring children of the group to another group as a genocidal act,96 crimes against humanity include the deportation or forcible transfer of population97 and war crimes, in the context of international armed conflicts, cover the unlawful deportation or transfer98 and the cross-border deportation or transfer of civilian populations.99 To a certain extent therefore, the action element under the law of trafficking in human beings could be satisfied in events of mass violence involving the deportation or transfer of victims.100 Yet, this assertion finds itself inherently limited by the fact that, under the law of trafficking, the action does not need to be in and of itself criminal101 whereas all the acts covered by international criminal law are in essence crimes.

The connections between the law of trafficking and international criminal law with respect to the means element are even harder to establish. Indeed, the means element under the law of trafficking in human beings incorporates methods used to distort the ‘free will of the person’ including threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.102 While there is strictly no doubt that all international crimes, as defined by the Rome Statute of the ICC, are perpetrated by force, the

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97 Ibid., Art. 7(d).
98 Ibid., Art. 8(2)(a)(vii).
99 Ibid., Art. 8(2)(b)(wiii).
100 It is doubtful however that this would apply to the corpses of the victims. For instance, in the Blagojević and Jokić case, although it extensively reviewed the burials and reburials in mass graves of the victims’ corpses and analysed the forcible transfer of population, at no point did the Trial Chamber established a link between the two types of crimes. Blagojević and Jokić, supra note 47, paras. 595–602.
102 Ibid., p. 30.
underlying intent or motives of their perpetrators is not the distortion of the free will of the victims. In this context, any attempt to establish a link between the means element under the law of trafficking in human beings and crimes of mass violence would therefore be a distortion of the law.

Furthermore, these two types of criminal behaviour respond to diverging purposes. As mentioned earlier, the final element of the Palermo Protocol requires that the purpose of trafficking be exploitation. If numerous international legal instruments utilize the concept of exploitation, they all fail to define it and the Palermo Protocol is no exception. Yet, it still interestingly enumerates—in a non-exhaustive fashion as evidenced by the use of the expression ‘shall include, at a minimum’—a series of exploitative practices: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Although it remains unclear what its qualifying characteristics are in reality,


105 Palermo Protocol, supra note 95, Art. 3. It may be noted that, although he recognizes the non-exhaustive nature of this element, Allain maintains that the current confines of exploitation in the law of human trafficking are those enumerated offenses. Jean Allain, Slavery in International Law: Of Human Exploitation and Trafficking (Martinus Nijhoff, Leiden, 2013), pp. 2–3.

106 See Vladislava Stoyanova, ‘The Crisis of a Definition: Human Trafficking in Bulgarian Law’ 5 Amsterdam Law Forum (2013) 64–79, p. 68. This enumeration short of definition in the Palermo Protocol still paved the way for practitioners and jurists to turn to other closely related international instruments such as the 1930 Forced Labour Convention to explain and interpret ‘forced labour or services’; the 1926 Slavery Convention to explain and interpret ‘slavery or practices similar to slavery’; the 1956 Supplementary Convention on the Abolition of Slavery to explain and interpret ‘servitude’. The Palermo Protocol however
exploitation has generally been described as ‘associated with particularly harsh and abusive conditions of work’, as ‘conditions of work inconsistent with human dignity’,107 as the ‘unfair, if not illegal, treatment or use of somebody or something, usually for personal gain’,108 as the ‘making use of someone or something unjustly or unethically’109 and as ‘when one person obtains a benefit through the use of a second person’.110 In brief, and using Gallagher’s words, the use of the term ‘exploitation’ in the Palermo Protocol ‘prioritizes an intent to harm’.111

From the outset, it seems extremely doubtful that events of mass violence could fit with this purpose of exploitation. Although international crimes of course qualify as ‘harm’, it is very unconvincing that they could ever be characterized as forms of exploitation. Considering acts of genocide, crimes against humanity and war crimes as exploitative practices would not only misunderstand the very essence of these crimes, it would also dangerously trivialize them. The issue does however leave a grey area, that of the assessment of the benefits perceived by the perpetrators of mass violence. While it is correct that the majority of exploitative practices are perpetrated for a financial benefit, this is not the only applicable form of gain. In cases of mass violence, the

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107 See UN Office on Drugs and Crime (UNODC), Model Law against Trafficking in Persons, (V. 09-81990 (E)), p. 28. See also UN Secretary-General’s Bulletin on protection from sexual exploitation and abuse (PSEA), (ST/SG/2003/13).

108 The UN General Assembly also considered ‘benefit’ as a component of exploitation. See UN General Assembly, Traffic in Women and Girls, (A/RES/49/166).


display of corpses to intimidate the victim group targeted for genocide – as in Rwanda\(^\text{112}\) – or the disturbance of their graves as ‘a concerted effort to conceal the mass killings’\(^\text{113}\) can both be said to benefit the perpetrators, in one case as a form of threatening propaganda to weaken and terrify the victim group and in the other as a way to hide their criminal deeds.

This remark notwithstanding, it still appears that it would be too far-fetched to assert that the law of trafficking in persons applies – or even should apply – to the corpses of victims of mass violence. In fact, the Palermo Protocol itself falls short of expressly contemplating the trafficking of deceased human bodies. The only possible reference to corpses therein is in Article 3’s inclusion of ‘the removal of organs’ in the list of exploitative behaviour and, even then, this inclusion proved fairly controversial as a number of delegates argued that the law should focus on the person rather than on body parts.\(^\text{114}\) What is interesting for the purposes of the present analysis is that since its inception, the law of human trafficking for the purpose of organ removal has been concerned with the protection of the human body and parts of the body.\(^\text{115}\) Perhaps even more interestingly, the European Court of Human Rights very recently upheld the law of human trafficking for the purpose of organ removal, qualifying the emotional distress caused by the removal of human tissues from the applicant’s husband’s body without her knowledge or consent as a violation of her private life and as prohibited degrading treatment. It also explicitly stressed that ‘the human body must still be treated with respect even after death’.\(^\text{116}\)

\(^\text{112}\) See e.g., the testimony of Dr Zachariah, member of Médecins sans frontières, before the ICTR Trial Chamber in the Akayesu case: ‘All the way through we could see on the ... hillside, where there were communities, people ... being pulled out by people with machetes, and we could see piles of bodies. In fact the entire landscape was becoming spotted with corpses, with bodies, all the way from there until almost Burundi’s border’. Prosecutor v. Akayesu, 2 September 1998, International Criminal Tribunal for Rwanda, Trial Judgment, Case No. ICTR-96-4-T, para. 158, <www.unictr.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>, 11 March 2015.

\(^\text{113}\) Krstić, supra note 47, para. 257. See also Blagojević and Jokić, supra note 47, para. 382.

\(^\text{114}\) See travaux préparatoires of the Palermo Protocol, supra note 106, p. 344, note 28: ‘One delegation noted that, while trafficking in persons for the purpose of removing organs was within the mandate of the Ad Hoc Committee, any subsequent trafficking in such organs or tissues might not be. Another delegation noted that dealing with organ trafficking as such might make it necessary to develop additional measures, since the other provisions of the draft protocol dealt with trafficking in persons and not organs.’

\(^\text{115}\) Expressly upholding the law, and as noted earlier, the European Court of Human Rights. See Elbêre v. Latvia supra note 11.

\(^\text{116}\) Ibid., para. 142.
As early as the 1990s, the World Health Organization widened its definition of 'organ trafficking' to include both the living and the deceased.\textsuperscript{117} Since, the United Nations Office on Drugs and Crime (UNODC) has included the removal of organs from both living and deceased persons in its construct of human trafficking.\textsuperscript{118} Moreover, protections for deceased donors were included in the 2008 Declaration of Istanbul on Organ Trafficking and Transplant Tourism.\textsuperscript{119} In July 2014, the Council of Europe codified a separate and distinct legal instrument on organ trafficking which explicitly recognizes that the dead can be trafficked.\textsuperscript{120} In this context, it might not be too far-fetched to suggest a possible application of the law of trafficking in human beings for the purpose of organ removal to corpses of victims of international crimes.

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\textsuperscript{117} World Health Organization (WHO), Global Glossary of Terms and Definitions on Donation and Transplantation (November 2009), p. 14, para. 74, \texttt{<www.who.int/transplantation/activities/GlobalGlossaryonDonationTransplantation.pdf?ua=1>}, 11 March 2015. It defines 'organ trafficking' as: 'The recruitment, transport, transfer, harboring or receipt of living or deceased persons or their cells, tissues or organs, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of cells, tissues and organs for transplantation'.

\textsuperscript{118} See UNODC, Toolkit to Combat Trafficking in Persons, (E.08.V.14).

\textsuperscript{119} Declaration of Istanbul on Organ Trafficking and Transplant Tourism adopted by the Transplantation Society (TTS) and the International Society of Nephrology (ISN) at the International Summit on Transplant Tourism and Organ Trafficking (30 April – 1 May 2008), \textit{Nephrol Dial Transplant} (2008) pp. 3375–3380. The OSCE has also addressed the issue of organ removal from deceased persons finding that 'there are reports which involve deceased donors. This has been the case in some South American and Asian countries, where organs from deceased donors have been provided on a commercial basis for foreigners requiring transplants, including kidneys, livers and hearts. There is a well-known example of an Asian country where organs from executed prisoners have allegedly been used for the majority of the transplants performed in the country. Doubts concerning the validity of consent obtained from the executed prisoners, as a vulnerable group, and the fact that organs were mainly allocated to foreigners might lead this practice to be regarded as a particular form of trafficking in organs'. Organization for Security and Co-Operation in Europe (OSCE), Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, \textit{Trafficking in Human Beings for the Purpose of Organ Removal in the OSCE Region: Analysis and Findings} (2013), p. 59, \texttt{<www.osce.org/secretariat/103393?download=true>}, 11 March 2015.

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In her autobiography *Madame Prosecutor*, Carla del Ponte, former Prosecutor at the ICTY, disclosed allegations about members of the Kosovo Liberation Army (KLA) who, in the aftermath of the Kosovo war, allegedly abducted and transported Serbs to harvest their organs before executing them.\(^{121}\)

Following the publication of this sensational disclosure in 2008, the Council of Europe charged Swiss politician and former prosecutor Dick Marty with the task of looking into the alleged trafficking in human organs in Kosovo.\(^{122}\) His report corroborated the majority of Del Ponte's allegations but for two points. First, it concluded that victims comprised 'a handful of persons';\(^{123}\) a conclusion that was later confirmed by the Special Investigative Task Force (SITF) established to conduct a full-scale criminal investigation.\(^{124}\) Its chief prosecutor indeed found that 'there are compelling indications that this practice did occur on a very limited scale and that a small number of individuals were killed for the purpose of extracting and trafficking their organs'.\(^{125}\) Second, and most interestingly for the purposes of this analysis, while Del Ponte's allegations were that organs had been removed from living individuals,\(^{126}\) the Marty Report found that the victims 'were taken into central Albania *immediately before having their kidneys removed* in a makeshift operating clinic'.\(^{127}\) As further explained by Marty, '[t]he testimonies ...spoke credibly and consistently for a methodology by which all of the captives were killed, usually by gunshot wound to the head, before being operated on to remove one or more of their organs. We learned that this was principally a trade in “cadaver kidneys”, i.e., the kidneys were extracted posthumously'.\(^{128}\) In other words, the alleged crimes were perpetrated against deceased victims.

Yet, the investigations conducted by the Serbian investigators, the EU and the Council of Europe all failed to uncover physical evidence of any trafficking


\(^{123}\) *Ibid.*, para. 156.


\(^{125}\) *Ibid.*, p. 3.

\(^{126}\) *See* Del Ponte, *supra* note 121, p. 277.

\(^{127}\) *See* Marty Report, *supra* note 122, para. 156 (emphasis added).

of organs of Serb captives by the KLA, thereby generating suspicion as to the
veracity of these allegations.\textsuperscript{129} In the words of Matti Raatikainen, head of the
war crimes unit of the European Law and Justice Mission in Kosovo (\textsc{eulex}),

[t]he main problem ... was that the scandal created by the allegations has
distracted attention from the real work of finding the remains of 1,861
people still missing from the war and its aftermath, and prosecuting their
killers – in Serbia, Kosovo and Albania.\textsuperscript{130}

Whether the full truth on what seems to be a highly sensitive issue with politi-
cal ramifications will ever emerge is doubtful, yet close to irrelevant for the
purpose of the present research since the questions it raises as to the legal
protection of corpses of victims are no less real and crucial. In particular, it is
unclear why, in the absence of any express reference to the trafficking in
human beings for the purpose of organ removal in the text of international
criminal law, the ICTY deemed within its mandate to conduct ‘an initial exami-
nation on the spot to establish the existence of traces of possible organ traf-
ficking’\textsuperscript{131} and why its former Prosecutor considered these alleged acts as
falling under her jurisdiction. The interest shown by the ICTY in this instance
could indicate that, provided it is perpetrated on a widespread or systematic
scale against a civilian population, this act would fall under inhumane acts as
crimes against humanity.\textsuperscript{132}

Yet, apart from this very specific scenario of posthumous organ removal, the
international law of trafficking falls short of providing any protection to
the corpses of the victims of mass violence, as evidenced by the fact that it
would be totally inapplicable – and admittedly rightly so – to the different case
studies mentioned in this research namely, the Rwandan genocide, the inter-
national crimes committed in the Former Yugoslavia, including the genocide
in Srebrenica, and the crash of flight MH17. As a result, indecently disposing of
the corpses of victims of mass violence still remains an act which has yet to be
expressly criminalized under international law.

\textsuperscript{129} See \textit{e.g.}, Nick Thorpe, ‘End of the road for Kosovo organ claims?’, \textsc{BBC News}, 27 May 2010,
‘Kosovo : les faiblesses du rapport sur les trafics d’organes’, \textsc{Le Monde}, 17 December 2010,
<www.lemonde.fr/europe/article/2010/12/17/kosovo-les-faiblesses-du-rapport-sur-les-

\textsuperscript{130} Thorpe, \textit{supra} note 129.

\textsuperscript{131} Marty Report, \textit{supra} note 122, p. 2, para. 8.

\textsuperscript{132} See \textsc{iccst.}, Art. 7(1)(k).
5 Conclusions

In the Pohl case, the US Military Tribunal not only considered that ‘[r]obbing the dead, even without the added offense of killing, is and always has been a crime’, it further added that ‘when it is organized, planned, and carried out on a hundred-million-mark scale, it becomes an aggravated crime, and anyone who takes part in it is a criminal’.133

The above study of the different legal dispositions applicable to the corpses of victims of international crimes has however shown that the legal characterization of acts perpetrated against them is not as straightforward. The case studies drawn from different instances of international crimes have acutely exemplified this legal loophole. International humanitarian law undeniably encompasses corpses within its realm of protection and imposes on States Parties a series of obligations relative to the deceased and their burial. Yet, it fails to criminalize violations of these obligations, leaving the fate of the victims after their death at the discretion of belligerent states.

Far from filling this gap, international criminal law only grants the dead very discreet protection in two sub-articles, thereby leaving the fate of the victims after their death at the discretion of judges. As for the law of trafficking in human beings, it was never aimed to cover international crimes and mass atrocities and therefore cannot – and should not – be applicable. It is however possible that that the judicial application of international criminal law to the corpses of victims, as timidly initiated by both the ICTR and the ICTY, will pave the way for the criminalization of what this article has termed the indecent disposal of corpses.

When speaking before the UN Security Council, Frans Timmermans, Dutch Minister of Foreign Affairs, expressed a concern shared by many when he pledged that ‘[o]nce the investigation ascertains who was responsible for the downing of the flight MH17, accountability and justice must be pursued and delivered. We owe it to the victims, we owe it to justice, we owe it to humanity’.134

In the current state of international law, only those responsible for the downing of the flight could be held accountable. It is indeed extremely unlikely that the indecent disposal of the corpses of the victims will be prosecuted and punished, even though we would also owe it to the victims, to justice, and to humanity.

133 Pohl, supra note 2, p. 995.
134 Statement by Frans Timmermans, supra note 1.