

Protecting the dead against sexual violence from the perspectives of international criminal law and international humanitarian law

Alizéa-Maïwenn Ciftcisoïd 

Centre Universitaire Rouennais d'Études
Juridiques (Université de Rouen Normandie),
Rouen, France
Email: alizea.maiwenn.c@gmail.com

Abstract

While sexual violence is receiving increasing attention in terms of international humanitarian and criminal law, and on the world political scene, this does not apply to all aspects of such crimes. Sexual acts on dead bodies are a common practice in times of armed conflict, constituting an affront to universal moral values that exacerbates the violence, domination and humiliation which motivates such abuses. However, such crimes have rarely been prosecuted under international criminal law, and where they have, perpetrators have been charged with umbrella offences or in connection with the protection of human dignity rather than with sexual offences. To explain this tendency, the present article takes stock of the legal treatment of sexual violence on dead bodies, examining the legal, philosophical and moral concepts that apply, with a view to obtaining recognition of such acts as sexual offences.

Keywords: sexual violence, international criminal law, human dignity, protecting the dead, rape, international humanitarian law

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According to Claude Lévi-Strauss, “[t]here is probably no society that does not treat its dead with respect”.¹ Respect for the dead would appear to be a universal value and a basic standard of humanity. While the term “respect” (*égards* in the original French of Lévi-Strauss’s text) may be open to multiple interpretations, in this context we can see it as referring to a community’s rites and practices in relation to the deceased, who are accorded a particular status and protection. The deceased is hence a being that has ceased to live, and the corpse is their body. As a general rule, a body will only be seen as such if it still looks human, if it retains its fleshly form; by contrast, a skeleton represents the body in its most elementary form, allowing us to maintain a certain distance, to objectify and to erect a barrier between ourselves and death. In parallel with this, the anthropomorphic appearance of a corpse accentuates both our desire to protect it and our outrage at any violation of it. The ultimate violation, both for the living and for the dead, is that which affects not only the physical but also the mental and the moral, the individual and the community. The worst type of violation is therefore sexual violence.

Sexual violence is widespread in times of armed conflict. Beyond its generative dimension, sexual violence is above all a tool of domination, humiliation and extreme violence, for the victim and for their community.² This is hence also and especially true of sexual violence against dead bodies, which has occurred in several conflicts, such as those in Rwanda and Chad. Numerous cultures and religions hold human remains sacred,³ and human remains are explicitly protected under international humanitarian law (IHL), notably in the context of protection

- 1 Claude Lévi-Strauss, *Tristes Tropiques*, Plon, Paris, 1993, p. 261 (author’s translation).
- 2 Rhonda Copelon, “Surfacing Gender: Reconceptualizing Crimes against Women in Time of War”, in Alexandra Stiglmeier (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina*, University of Nebraska Press, Lincoln, NE, 1994, p. 207; Rhonda Copelon, “Surfacing Gender: Re-Engraving Crimes against Women in Humanitarian Law”, *Hastings Women’s Law Journal*, Vol. 5, No. 2, 1994, p. 246, available at: <https://repository.uclawsf.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1040&context=hwlj> (all internet references were accessed in January 2025); Christine Chinkin, “Rape and Sexual Abuse of Women in International Law”, *European Journal of International Law*, Vol. 5, No. 3, 1994, p. 341, available at: <https://academic.oup.com/ejil/article/5/3/326/501248>.
- 3 Ahmed Al-Dawood, “Management of the Dead from the Islamic law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics”, *International Review of the Red Cross*, Vol. 99, No. 905, 2017, available at: <https://international-review.icrc.org/articles/management-dead-islamic-law-and-international-humanitarian-law-perspectives-considerations>; Stefan C. Reif, Andreas Lehnardt and Avriel Bar-Lenav, *Death in Jewish Life: Burial and Mourning Customs among Jews of Europe and Nearby Communities*, 1st ed., De Gruyter, Berlin and Boston, MA, 2014; Bhagirath Majmudar, “Cremation Rites in Hinduism: Death, after Death, and Thereafter”, in Ellen L. Idler (ed.), *Religion as a Social Determinant of Public Health*, Oxford University Press, New York, 2014; Mohammad Atari, “Death in Christianity”, in Viviana Weekes-Shackelford and Todd K. Shackelford (eds), *Encyclopedia of Evolutionary Psychological Science*, Springer, Cham, 2016.

against inhuman and degrading treatment.⁴ For instance, Article 3 common to the four Geneva Conventions of 1949 and Article 4 of Additional Protocol II make it an offence to mutilate or otherwise ill-treat a corpse.

The *ad hoc* tribunals had to address this issue early in their history, notably in the *Niyitegeka* and *Bagosora* cases heard before the International Criminal Tribunal for Rwanda (ICTR). Their position has been consistent: they have at all times condemned such acts as inhuman and degrading treatment, without ever categorizing them as sexual violence in their judgments. Only before the Extraordinary African Chambers (EAC) did this dimension make a brief appearance, and then only as an inhuman act against living persons who were forced to perform sexual acts on dead persons. This position reflects the international criminal tribunals' liberal understanding of sexual violence; however, those tribunals have put forward no justification for this view of such crimes.

This article will start by reviewing the jurisprudence before moving on to analyze and explain the possible reasoning behind the way these offences are categorized, whether this be a matter of alignment with human rights jurisprudence on the issue, of seeing the deceased as a thing rather than a person, or of considering sexual autonomy to be the preserve of living persons. The discussion will provide an opportunity to raise certain inconsistencies and the social dimension of this categorization, which could be modified in order to recognize these crimes in all their dimensions, highlight their sexual aspects, and hence enhance both the associated judicial processes and reparations for the harm done.

A review of the legal treatment of thanatological sexual acts⁵

While not universal, sexual acts involving dead bodies have occurred in many armed conflicts. In Rwanda, there were several cases in which genital organs were removed after death⁶ and others in which corpses were desecrated by the insertion of objects into the genitals.⁷ There are reports of naked corpses being put on public display

4 On this subject, see Abdelwahab Biad, "Le respect dû aux morts par les parties au conflit armé", in Anne-Sophie Millet Devalle (ed.), *Religions et droit international humanitaire*, Pedone, Paris, 2008; Claire Moon, "Human Rights, Human Remains: Forensic Humanitarianism and the Human Rights of the Dead", *International Social Science Journal*, Vol. 65, No. 215–216, 2014; Ximena Londoño Romanowsky and Marisela Silva Chau, "The Protection of the Missing and the Dead under International Law", in Roberto C. Parra, Sara C. Zapico, Douglas H. Ubelaker (eds), *Forensic Science and Humanitarian Action: Interacting with the Dead and the Living*, John Wiley & Sons, Hoboken, NJ, 2020.

5 Thanatological, from the Greek: *θάνατος* (death) and *λόγος* (word, and by extension study): related to the study of death.

6 ICTR, *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A, Judgment, 1 December 2003, paras 934–936, available at: <https://tinyurl.com/2r7k8jrh>; ICTR, *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgment, 16 May 2003, paras 303–312, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-14/MSCI1729R0000540696.PDF>.

7 ICTR, *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Indictment of 28 February 2001 annexed to the Judgment of 16 May 2003, para. 6.61, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-96-14/MSCI1729R0000540703.PDF>; ICTR, *Kajelijeli*, above note 6, paras 934–936.

and lynched in Iraq.⁸ In Chad, guards forced detainees to have sex with the bodies of detainees who had been murdered.⁹

We must draw a distinction between such acts and “classical” necrophilia. Necrophilia is a paraphilic psychosexual disorder presenting as recurrent and intense sexual arousal involving corpses that is present for an extended period and causes marked distress or impairment in social, occupational or other important areas of functioning.¹⁰ During an armed conflict, sex acts involving corpses are in line with sexual violence against living persons: the perpetrator is not primarily aiming to satisfy sexual desire, but rather to establish their domination over the victim by means of an act that is humiliating, violent and a violation of the latter’s dignity. In the context of armed conflict, rape and other forms of sexual violence are not individual events, unusual or extraordinary, but are the result of a continuum of violence based on gender,¹¹ sex, humiliation, domination and power, which may be exacerbated by the removal of moral, social and legal barriers that occurs during armed conflict. In armed conflicts, the desire to dominate, to humiliate and to debase becomes all the more pronounced because the body of the victim is a vector of and towards their community. In such a context, raping a person is intended to harm not only the individual but also what they represent in ethnic, religious, national or other similar terms. Because of these intentions, rape in war tends to be committed in an even more violent and degrading manner, including gang rapes, rape committed in public, rape in the presence of or involving family members, violation of primary and secondary sexual characteristics (mutilation of the breasts, hair, genitals, etc.), mutilation and marking to show that the victim has been raped, sexual acts considered humiliating (oral and anal in particular), cannibalism and thanatological sexual acts. In peacetime, necrophiliac or sexual acts following murder are generally linked to abnormal sexuality and involve obtaining sexual satisfaction, whereas during armed conflict they are more a matter of deconsecrating and humiliating the corpse and the person, and hence those who were close to them.

Deconsecrating the body of the deceased dispossess the community of its funerary rites. These rites are social responses¹² and essential steps for all cultures and religions, in that they mark the transition from this life to the hereafter.¹³ Anthropology teaches us that every culture has a set of customs related to the dead.¹⁴ Funerary rites are aimed mainly at the living, at those left behind, both the individual

8 Human Rights Watch, *Iraq: Forces Drag, Mutilate Dead ISIS Fighters*, 15 November 2016, available at: www.hrw.org/news/2016/11/15/iraq-forces-drag-mutilate-dead-isis-fighters.

9 EAC, *The Public Prosecutor v. Hissein Habré*, Judgment, 30 May 2016, para. 622, available in French at: www.legal-tools.org/doc/98c00a/.

10 American Psychiatric Association, *DSM-5*, Elsevier Masson, Paris, 2015, p. 915.

11 Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford, 2011, pp. 509–510.

12 On this subject, see William G. Hoy, *Do Funerals Matter? The Purposes and Practices of Death Rituals in Global Perspective*, Routledge, London, 2021; Peter Metcalf and Richard Huntington, *Celebrations of Death: The Anthropology of Mortuary Ritual*, Cambridge University Press, Cambridge, 1991.

13 Arnold Van Gennep, *Les rites de passage*, Éditions A. et J. Picard, Paris, 1981, pp. 209–212.

14 Adam Rosenblatt, “International Forensic Investigations and the Human Rights of the Dead”, *Human Rights Quarterly*, Vol. 32, No. 4, 2010, p. 939.

and the community, bringing them comfort or freeing them from guilt,¹⁵ helping them to distance themselves from death and move on.¹⁶ To rob the community of all this is a powerful symbol of humiliation that continues even after death.

Death is more taboo today than it was in the past. In the nineteenth century, sexuality was banished from public view while death was more visible; in the intervening years, sex has become more acceptable than death.¹⁷ Thanatological sexual acts combine these two historical, universal taboos, and are intended to cause an absolute form of outrage. Furthermore, many attacks on the dignity of the dead constitute markers of physical and structural violence that persist after the conflict has ended.¹⁸ The sexual desecration of a body is the ultimate moral outrage and an expression of systemic violence.

The international and hybrid criminal jurisdictions have only heard or mentioned a small number of cases that could be described as sexual acts involving dead bodies. The ICTR heard testimony of acts committed against the corpse of the Rwandan prime minister, Agathe Uwilingiyimana: a glass bottle was inserted into her vagina after her naked body had been displayed with her legs spread open.¹⁹ In the *Niyitegeka* case, the same tribunal dealt with the insertion of a piece of wood into the genitals of a dead woman.²⁰ In the *Kajelijeli* case, the Interahamwe raped and killed a Tutsi woman named Joyce in Rwankeri *cellule* on 7 April 1994 and then pierced her side and sexual organs with a spear, before covering her dead body with her skirt.²¹ The ICTR examined an instance in which a man was sexually mutilated in the *Muhimana* and *Niyitegeka* cases: a prominent Tutsi trader, Assiel Kabanda, was tracked down, killed, decapitated and castrated, and his genitals were publicly displayed on a spike.²² The indictment in the *Ntuyahaga* case (withdrawn following the 18 March 1999 decision of the Trial Chamber) stated that four Belgian soldiers of the United Nations Assistance Mission for Rwanda were killed during an attack that was intended to kill the prime minister, and that six survivors were beaten for

15 Louis-Vincent Thomas, *La mort*, Presses Universitaires de France, Paris, 2003, p. 9. See also Louis-Vincent Thomas, *Rites de mort*, Fayard, Paris, 1996.

16 Marie-Laure Cadart, "La mort et son temps", in Patrick Ben Soussan (ed.), *Le cancer: Approche psychodynamique chez l'adulte*, Érès, Ramonville Saint-Agne, 2004, p. 295.

17 Geoffrey Gorer, "The Pornography of Death", *Encounter*, October 1955, available at: www.romolocapuan.com/wp-content/uploads/2013/08/Gorer.pdf.

18 On this subject, see Jaymee Kim and Tricia Redeker-Hepner, "Of Justice and the Grave: The Role of the Dead in Post-Conflict Uganda", *International Criminal Law Review*, Vol. 19, No. 5, 2019.

19 ICTR, *Niyitegeka*, above note 7, para. 6.61; ICTR, *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgment, 18 December 2008, para. 705, available at: www.refworld.org/jurisprudence/caselaw/ict/2008/en/92006; ICTR, *The Prosecutor v. Kabiligi and Ntabakuze*, Case No. ICTR-97-34, Amended Indictment, 13 August 1999, para. 6.8, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-98-41/MSCI7781R0000558336.PDF>; ICTR, *The Prosecutor v. Anatole Nsengiyumva*, Case No. ICTR-96-12, Indictment, 12 August 1999, para. 6.7, available at: www.legal-tools.org/doc/547e9e/.

20 ICTR, *Niyitegeka*, above note 6, paras 463–465.

21 ICTR, *Kajelijeli*, above note 6, paras 677, 934.

22 ICTR, *Niyitegeka*, above note 6, paras 303–312, 417, 499; ICTR, *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Judgment, 28 April 2005, paras 448–450, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-95-01B/MSI28368R0000622132.PDF>.

several hours before being killed.²³ However, the soldiers were also victims of castration, a fact that was omitted from the indictment²⁴ and hence not included in the proceedings.

The judgment of the EAC regarding the abuses of President Hissein Habré stated that

according to Naïb Dallou, several men – including him – had been forced to have sex with dead bodies while detained in the *Locaux*. According to the same person, eight ethnic Arabic women from Kousseri who were accused of being CDR agents were arrested, imprisoned and then killed in the *Locaux*. After their death, the commander of the *Locaux* had ordered several men – including Naïb Dallou – to have sex with their dead bodies. When one man refused to comply, one of the soldiers present had killed him.²⁵

One thing is clear regarding all of these crimes: the corresponding indictments completely ignore their sexual dimension. In the *Bagosora* case, while the acts committed against Prime Minister Uwilingiyimana were described as sexual violence during the hearing, they were prosecuted as inhumane acts.²⁶ However, in its closing brief, the prosecution did not point to the sexual assault against the prime minister as an act of inhumane treatment, but instead mentioned it as evidence that would put the accused on notice of the propensity of the soldiers under his command to commit sexual violence.²⁷ The indictment in the *Niyitegeka* case described these acts as sexual torture and sexual degradation,²⁸ but they were hardly mentioned in the judgment. The Chamber described the acts as sexual assault in its summary of the facts in the *Bagosora* case,²⁹ clearly identifying their sexual aspect, but this is absent from the formal legal categorization.

Likewise, in the *Niyitegeka* case, the insertion of pieces of wood into the vagina of a woman was categorized as an inhumane act.³⁰ A few years previously, the same acts committed on a living person were categorized as rape. In the *Akayesu* case, the ICTR noted that

while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by Witness KK

23 ICTR, *The Prosecutor v. Bernard Ntuyahaga*, Case No. ICTR-98-40-I, Indictment, 26 September 1998, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Indictment/NotIndexable/ICTR-98-40/MS15184R0000529961.PDF>.

24 Chiseche Salome Mibenge, *Sex and International Tribunals: The Erasure of Gender from the War Narrative*, University of Pennsylvania Press, Philadelphia, PA, 2013, p. 82.

25 EAC, *Habré*, above note 9, para. 622 (footnotes omitted).

26 ICTR, *Bagosora*, above note 19, para. 2224.

27 *Ibid.*, fn. 2371.

28 ICTR, *Niyitegeka*, above note 19, para. 6.61: “Her semi-nude, lifeless body was discovered on the morning of 7 April 1994 with indicia of sexual torture and sexual degradation.”

29 ICTR, *Bagosora*, above note 19, fn. 2371, paras 2219, 2224.

30 ICTR, *Niyitegeka*, above note 6, paras 463–465.

in her testimony – the *Interahamwes* thrusting a piece of wood into the sexual organs of a woman as she lay dying – constitutes rape in the Tribunal's view.³¹

The Tribunal emphasized that although the woman was dying, the piece of wood was forced into her vagina while she was still breathing,³² and hence still alive.

In the *Kajelijeli* case, the Chamber found that the piercing of Joyce's genitals with a spear after her death constituted "a serious attack on the human dignity of the Tutsi community as a whole".³³ In the *Niyitegeka* case, the Chamber considered severing the genitals of Assiel Kabanda and publicly displaying them on a spike as aggravating circumstances³⁴ in the commission of inhumane acts.³⁵ In the *Muhimana* case, the accused was prosecuted for the same acts, as a member of the group that had killed Kabanda and mutilated his body. Despite the testimony of several witnesses implicating Mikaeli Muhimana in this crime,³⁶ the Chamber sidestepped the matter of sexual mutilation in this case. That aspect remained simply a factual element³⁷ and did not lead to prosecution, with the Chamber taking account only of the decapitation of the victim following his death.³⁸

Before the EAC, forced sex with dead bodies was addressed only from the viewpoint of the living persons obliged to carry out those acts. Neither the public prosecutor nor the Chamber examined the crime in terms of the violation perpetrated on the corpses.

The position of the tribunals would appear to be clear, and to be entirely in line with IHL: the dead cannot be victims of separate sexual offences, only the subjects of violations of dignity or inhumane acts. However, the tribunals have provided no legal justification for this understanding of such offences.

The underlying issues and justifications related to the categorization of sexual violence on dead bodies

As we have seen in the first part of this study, the law would appear to give little recognition to the sexual nature of offences committed against the dead. In practice, however, the sexual aspect is undeniable, whether it takes the form of exposure, penetration or mutilation. While forced exposure or mutilation are classed as inhumane

31 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, para. 686, available at: <https://www.refworld.org/jurisprudence/caselaw/ictr/1998/en/19275?prevDestination=search&prevPath=/search?keywords=akayesu+judgment&order=desc&sort=score&result=result-19275-en>.

32 *Ibid.*, para. 429.

33 ICTR, *Kajelijeli*, above note 6, paras 934–936.

34 *Ibid.*, paras 417, 499.

35 ICTR, *Niyitegeka*, above note 6, paras 303–312.

36 ICTR, *Muhimana*, above note 22, paras 441–444.

37 *Ibid.*, paras 448–450.

38 *Ibid.*, para. 429.

acts, degrading treatment, violations of dignity or sexual violence, including when they are committed against living persons,³⁹ forced sexual penetration is classed as rape when perpetrated against the living. The question is therefore whether the *mens rea* of rape is still present if the victim is no longer alive, or whether rape can only be committed against the living.

Jurisprudence established at an early stage that the desecration of a body can constitute an inhumane act,⁴⁰ albeit devoid of any sexual aspect. However, in the *Tadić* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that

having regard to the inhumane acts specifically listed under Article 5(a) to (h) of the Statute [(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecution on political, racial and religious grounds], . . . the inhumane act contemplated in Article 5(i) must be one which has to be inflicted on a living individual if it is not to offend the *ejusdem generis* rule.⁴¹

The Chamber offered no explanation for this premise, which appears to have been taken for granted. While it would appear obvious that such acts as deportation, murder or enslavement can only be perpetrated upon a living person, given the very nature of the elements that constitute those crimes, this appears less obvious in the case of rape. Murder is defined as killing one or more persons,⁴² an act that can only be carried out against someone who is alive. The conditions for the crime of deportation are, *inter alia*, that

1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.

39 See, for example, International Criminal Court (ICC), *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, para. 27, available at: www.icc-cpi.int/fr/court-record/icc-01/09-02/11-1-tfra; ICC, *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, 16 December 2011, para. 157, available at: www.icc-cpi.int/fr/court-record/icc-01/04-01/10-465-red; ICC, *The Prosecutor v. Sylvestre Mudacumura*, Case No. ICC-01/04-01/12, Decision on the Prosecutor's Application under Article 58, 13 July 2012, para. 43, available at: www.legal-tools.org/doc/ecfae0/pdf/.

40 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Judgment, 7 May 1997, para. 748, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/IT-94-1/JUD61R0000060781.TIF>. Like the mutilation of a dead body, discharging the contents of a fire extinguisher into the mouth of a dead body can constitute an inhumane act, given that certain acts against a dead body do offend some philosophical and indeed religious notions of respect for the human being upon death.

41 ICTY, *Tadić*, above note 40, para. 748.

42 ICC, *Elements of Crimes*, Art. 7(1)(a), para. 1, available at: www.icc-cpi.int/resource-library/core-legal-texts.

3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.⁴³

These conditions imply that the victim of the crime was alive. Likewise, if enslavement occurs where “[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”,⁴⁴ the notion of deprivation of liberty implies that the person was alive when the act was committed.

However, the definition of rape that emerges from jurisprudence has no such implication. Whether one uses the definition of the ICTR, the ICTY or the International Criminal Court (ICC), rape is the penetration of the victim’s genitals by any object, or of the victim’s mouth by the perpetrator’s penis, if the perpetrator is aware that the victim does not consent. The position of the chambers is consistent, albeit without justification or explanation.

If one follows the doctrine, rape – like murder – becomes a putative crime⁴⁵ if it is perpetrated against a dead body. In theory, a person committing an act that threatens the life of a corpse is guilty only of attempted murder. The perpetrator’s intention is there, and they have been prevented from carrying it out only by an external factor – the death of the intended victim.⁴⁶ It would appear logical that one cannot take the life of someone who is already dead, but the case of rape is not so absolute. The perpetrator’s intention remains the same: they wish to penetrate a person, using their body or an object, knowing that the person does not consent. The same applies to other types of sexual violence, such as forced nudity or mutilation: the perpetrator wishes to inflict these violations on the victim without their consent. In all of the cases mentioned above, it is certain that the victim would not have consented to the insertion of an object into their genitals had they been alive when the facts occurred. The material elements of the offence are also the same. So why restrict oneself to categorizing such deeds as inhumane acts?

Concordance of practice between international criminal tribunals and institutions for the protection of human rights

Categorizing these offences as violations of dignity, or as inhuman or degrading treatment, is in line with human rights jurisprudence, which grants absolute rights to the dead. The only absolute right that can be applied to a dead person is the right to protection against inhuman or degrading treatment,⁴⁷ as the other absolute

43 *Ibid.*, Art. (7)(1)(d) (footnotes omitted).

44 *Ibid.*, Art. (7)(1)(c), para. 1.

45 Mădălina-Elena Toma, “Killing a Corpse – a Putative Crime”, *Logos Universality Mentality Education Novelty: Law*, Vol. 6, No. 1, 2018, available at: <https://doi.org/10.18662/lumenlaw/04>.

46 Coralie Ambroise-Castérot, *Droit pénal spécial et droit pénal des affaires*, 7th ed., Issy-les-Moulineaux, Gualino, 2019, p. 22.

47 One could also consider that the right to recognition as a person before the law may apply, notably as set out in Article 3 of the American Convention on Human Rights.

punishment.⁴⁸

ment. According to the ICC *Elements of Crimes*, a violation of Article 8(2)(b)(xxi) (war crime of outrages upon personal dignity) has occurred if “[t]he perpetrator

- 52 *Ibid.*, para. 18.
- 53 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 113, available at: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule113>; A. Biad, above note 4.

humiliated, degraded or otherwise violated the dignity of one or more persons”,⁵⁴ with the stipulation that “[f]or this crime, ‘persons’ can include dead persons”, and that “[i]t is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation”, and that “[t]his element takes into account relevant aspects of the cultural background of the victim”.⁵⁵ If the person is not aware of the violation suffered, that violation occurs in intersubjectivity if others are aware. As this point yields little clarification, we must look at the way in which the international tribunals perceive a person who has lost their life.

The deceased: Object or person?

The first decision is whether one regards the corpse as a person who has lost their life, or as a thing,⁵⁶ an object, albeit one to which one must grant particular consideration in view of its former humanity or some kind of sacredness.⁵⁷ Planiol affirms that “the dead are no longer persons; they are no longer anything”,⁵⁸ but today it is undeniable that the deceased are not a legal nullity and that they deserve protection, at least in view of moral and religious considerations. The wording chosen by the tribunals would appear to indicate a human rather than a reified view of the corpse. The ICTR, for instance, spoke of “the body of a Tutsi woman”⁵⁹ and the “dead woman’s body”⁶⁰ in the *Niyitegeka* case, and of “Prime Minister Uwilingiyimana”⁶¹ in the *Bagosora* case, without attaching such terms as “corpse” or “body” to the latter designation. This being so, we can say that in semantic terms the ICTR takes an ambivalent position, sometimes essentializing the corpse and sometimes treating it as a person who has lost their life, rather than an object or a thing, by means of metonymy.

However, the law generally treats a corpse as an object. It is a Christian principle that the dead and the living must be diametrically separated, to keep the worlds in balance,⁶² but this approach would appear to be specific to those societies influenced by the major religions. The separation is less clear-cut in traditional societies, where the deceased are somewhere between dead and alive, still capable of expressing themselves in their own way.⁶³ In “archaic” societies, the deceased continued to live

54 ICC, above note 42, Art. 8(2)(b)(xxi), para. 1.

55 *Ibid.*, Art. 8(2)(b)(xxi), para. 1 fn. 49.

56 Jean Carbonnier, *Flexible droit: Pour une sociologie du droit sans rigueur*, Librairie Générale de Droit et de Jurisprudence (LGDJ), Paris, 2014, pp. 238–240. On this subject, see Xavier Labbée, *Condition juridique du corps humain: Avant la naissance et après la mort*, Presses Universitaires de Lille, Villeneuve d’Ascq, 1990.

57 On this subject, see Hélène Popu, *La dépouille mortelle, chose sacrée*, L’Harmattan, Paris, 2009.

58 Marcel Planiol, *Traité élémentaire de droit civil*, LGDJ, Paris, 1935, p. 152 (author’s translation).

59 ICTR, *Niyitegeka*, above note 6, para. 463.

60 *Ibid.*, para. 465.

61 ICTR, *Bagosora*, above note 19, paras 705, 2219, 2224.

62 Philippe Ariès, *L’homme devant la mort*, Le Seuil, Paris, 1977, p. 315.

63 Louis-Vincent Thomas, “En hommage à Louis-Vincent Thomas: Le cadavre”, *Études sur la Mort*, Vol. 129, No. 1, 2006, pp. 12–13.

(painfully in some cases), inducing the living to take care of them, to watch over them and to feed them.⁶⁴ In such societies, the dead continued to be sentient beings.⁶⁵ In the predominant contemporary understanding of things, the corpse ceases to be a legal entity – it becomes a thing, but a sacred thing.⁶⁶ Today, the legal understanding of the body is intrinsically linked to that of the *living* body, which constitutes the medium of the physical person and gives rise to the legal personality.⁶⁷ One could in fact say that the approach taken by the international criminal tribunals stems from the fact that legal personality ends at the moment of death. However, this is true only to a limited degree, in that biological life is not an essential condition for legal personality; for instance, a person can be biologically alive and yet legally dead.⁶⁸

Nonetheless, in terms of patrimonial and extra-patrimonial rights, the body is neither subject nor recipient under the predominant doctrine, notably in civil law or common law countries. If it is unable to enter into contracts, or even have its property or privacy violated, how can a corpse be the victim of a crime? This argument is not absolute, though, as the deceased do have rights under certain circumstances;⁶⁹ in France, for instance, it is possible to marry posthumously,⁷⁰ and most cultures recognize the right to dignity and to the protection of dignity for the dead. However, if one examines these rights closely, it transpires that the dead are not their true beneficiaries: in fact, they are intended to create obligations or rights in favour of the living⁷¹ and are designed from the latter's perspective.⁷² When we allow a dead person to marry, it is not for their benefit but for the benefit of the surviving spouse. When we condemn attacks on graves and on the dead, it is not because of the harm that the dead suffer, but rather to protect the moral framework and to prevent harm to those left behind.⁷³ When sexual violence is perpetrated on a corpse, our focus is therefore not on the harm done to the victim but on the consequences for those close to him or her. This concept is less than perfect, however, in that it is centred on a third person and not on the victim of the act, who should be at the heart of the analysis.

64 *Ibid.*, pp. 13–14

65 *Ibid.*

66 Xavier Labbée, "La valeur de la dépouille mortelle chose sacrée", *Études sur la Mort*, Vol. 129, No. 1, 2006, p. 70.

67 Philippe Raimbault, "Le corps humain après la mort: Quand les juristes jouent au 'cadavre exquis'...", *Droit et Société*, Vol. 61, No. 3, 2005, p. 818.

68 X. Labbée, above note 56, p. 44.

69 On this subject, see Kirsten Rabe Smolensky, *Rights of the Dead*, Arizona Legal Studies Discussion Paper No. 06-27, March 2009, available at: <https://papers.ssrn.com/abstract=924499>.

70 French Civil Code, Art. 171.

71 Antoon De Baets, "A Declaration of the Responsibilities of Present Generations Toward Past Generations", *History and Theory*, Vol. 43, No. 4, 2004, pp. 130, 143, 149, available at: www.concernedhistorians.org/content_files/file/to/279.pdf.

72 *Ibid.*, pp. 135–136.

73 On this subject, see ECtHR, *Elberte v. Latvia*, Appl. No. 61243/08, Judgment, 13 January 2015, paras 117, 142, available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-150234%22%7D>.

Violation of sexual autonomy as a core element of sexual violence

The issue of sexual autonomy may also explain in part the manner in which international criminal tribunals have categorized acts of sexual violence against the dead. If, in a liberal understanding, one sees sexual violence as a violation of the individual's sexual autonomy and self-determination – and hence more as a violation of their autonomy in general – the disappearance of that autonomy at death could partly explain the position of the tribunals. Liberal morality, as formulated by John Locke in his *Treatise of Civil Government*, can be summed up in very broad terms by one single precept: do not violate the natural rights of others. Reciprocity demands that these natural rights come with obligations; according to Kant, these obligations form the core of personal morality, and personal dignity stems from this moral law.⁷⁴ Dignity, as an absolute internal value, is what entitles a human being to respect for their rights from all other rational beings.⁷⁵ Enforceable subjective rights can be held only by the person, defined by their dignity (intrinsic value) and autonomy (moral personality, expressed by the concept of autonomy).⁷⁶ “It is therefore absurd to think of an obligation of a person to things or the reverse.”⁷⁷ Consequently, while the rational living person, possessed of a will, becomes the subject of law by virtue of their basic attributes, this is not the case for a deceased person, who loses reason, will and autonomy when they lose their life. Any violation, any attack, any act that harms a person's physical or moral well-being – and hence harms their autonomy – is prohibited, but if that autonomy is the prerogative of rational beings – and hence of living beings – then rape and other forms of sexual violence, as violations of autonomy, can be committed only against such beings.

This is the view taken by Werle and Jessberger, who assert that the ICTR went too far in classifying the acts committed upon corpses in the *Akayesu* case as sexual violence. They believe that in order to be classified as sexual violence, these acts needed to be of a gravity comparable to those committed against the living, and this could only be the case if one assumes the existence of sexual self-determination on the part of the deceased, in the absence of which the violation of dignity would not be qualitatively equivalent, despite the shocking nature of the act for the outside observer.⁷⁸ However, this reasoning would appear to ignore one major point (apart from the fact that the *Akayesu* judgment involved a person who was dying but not yet dead⁷⁹): dignity does not derive from the simple fact of self-determination.

74 Immanuel Kant, *The Critique of Practical Reason*, trans. Thomas Kingsmill Abbott, 1909 (first published 1788), available at: <https://archive.org/details/20200323kantcritiqueofpracticalreason>.

75 Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor, 2006 (first published 1785), pp. 31–33, available at: <https://adarshbadri.me/wp-content/uploads/2023/04/Kant-Groundwork.pdf>.

76 *Ibid.*, pp. 42–44.

77 Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor, Cambridge University Press, Cambridge, New York and Melbourne, 1991 (first published 1797), p. 82, available at: <https://tinyurl.com/29frym2>.

78 Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law*, Oxford University Press, Oxford, 2014, p. 372, para. 984.

79 ICTR, *Akayesu*, above note 31, para. 686.

Dignity is the foundation of human rights and is inherent, universal and inalienable.⁸⁰ The above-mentioned approach therefore assumes that the deceased person is no longer to be seen as a person, but as a thing, an object, inert. This seems to correspond somewhat, though not entirely, with the interpretation of the criminal tribunals. However, as mentioned above, one can say that a corpse constitutes the remains of a person and hence is not fully a person, but neither is it a thing. Under a different understanding, in line with classical doctrine,⁸¹ this would imply equating sexual violence to violation of the victim's consent. Given that a person who has died has lost the ability to consent, they cannot be the victim of a sexual offence, the act having lost its legal effect.⁸²

However, such an interpretation would be at odds with that of the international tribunals; despite framing their indictments in more general terms and utilizing residual categories, their judgments describe and categorize the sexual acts perpetrated on corpses as "sexual violence". In the *Niyitegeka* case, the Chamber mentions "the sexual violence to the dead woman's body".⁸³ In the *Bagosora* case, the Chamber described how the prime minister was "found, killed and then sexually assaulted".⁸⁴ If we compare the definitions of rape and sexual violence adopted by the international criminal tribunals, we see that both are based on the notion of consent. While the definitions of rape and sexual violence differ between the two above-mentioned cases (the judges in the *Niyitegeka* case⁸⁵ opting for that of the *Akayesu* case⁸⁶ and those in the *Bagosora* case⁸⁷ for that of the *Kunarac* case⁸⁸), the core of the moral element in each definition is commission of the act in the knowledge that the victim does not consent. This point would not, therefore, appear to prevent the international criminal tribunals finding that it is possible to commit sexual violence against a deceased person. Furthermore, the argument put forward above also raises the issue of a person who has temporarily lost the ability to consent (notably if they have temporarily lost consciousness) but who is nonetheless considered capable of being the victim of sexual violence. In principle, given that death is a state of permanent unconsciousness, a dead person will never consent. This being

80 A. Rosenblatt, above note 14, pp. 935–941.

81 Regarding the notion of the impossible crime, see Michèle-Laure Rassat, *Droit pénal général*, Ellipses, 2017, pp. 336–337.

82 X. Labbé, above note 56, p. 211.

83 ICTR, *Niyitegeka*, above note 6, para. 465.

84 ICTR, *Bagosora*, above note 19, para. 18. The same terminology appears at paragraphs 687, 717, 720 and 2219.

85 ICTR, *Niyitegeka*, above note 6, para. 456.

86 ICTR, *Akayesu*, above note 31, paras 688 (rape is "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"), 598 ("Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive").

87 ICTR, *Bagosora*, above note 19, para. 2199.

88 ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (Foča)*, Case Nos IT-96-23 and 23/1, Judgment, 22 February 2001, para. 460, available at: www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf. This judgment defines rape as "penetration:(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim".

so, the essential underlying criterion for classifying a particular act as rape or sexual violence would be the possibility that the victim could experience consequences, harm or suffering, rather than their ability to give their full consent.

Suffering as a core element of sexual violence

One could therefore seek another plausible explanation in the suffering that the victim endures. If, as the ICTY has ruled,⁸⁹ it is not possible to torture a corpse, that is certainly because of the criteria of the infliction and intensity of the suffering that characterize the crime, which cannot apply to a person who has died. Adam Rosenblatt argues that violations perpetrated against the living and the dead cannot be equivalent, even in a moral sense, because it is not possible to evaluate the suffering – if any – inflicted on a dead person.⁹⁰ Regarding this requirement for suffering to have occurred, it is interesting to note that in the cases mentioned above, the ICTR tends to link sexual violence (including rape) to torture. Indeed, in the *Akayesu* case, the ICTR states that

[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁹¹

Following similar reasoning, the amended indictment annexed to the *Niyitegeka* judgment of 16 May 2003 describes the abuse suffered by Prime Minister Uwilingiyimana⁹² (categorized as sexual violence) as torture: “Her semi-nude, lifeless body was discovered on the morning of 7 April 1994 with indicia of sexual torture and sexual degradation.”⁹³ However, the indictment does not say which of these acts were sexual torture and which were sexual degradation, nor does it set out the differences between the two. In parallel, the indictment mentions the rape and sexual torture committed by Niyitegeka without distinguishing between the two when discussing his responsibility for the other crimes of sexual violence committed.⁹⁴ The ICTR has developed its own concept of sexual violence during armed conflict, which has led to the formulation of a conceptual definition and a link between rape and torture.⁹⁵ This being so, one could argue that for the ICTR, there is an indissociable link between rape and the suffering and humiliation that it causes, implying that rape can only be perpetrated against a living person. However, this

89 ICTY, *Tadić*, above note 40, para. 748.

90 A. Rosenblatt, above note 14, p. 942.

91 ICTR, *Akayesu*, above note 31, para. 687.

92 This crime is included in the amended indictment of 31 July 1998 and in the judgment of the *Bagosora* case.

93 See above note 28.

94 ICTR, *Niyitegeka*, above note 19, para. 6.69.

95 Caterina E. Arrabal Ward, *War-time Sexual Violence at the International Level*, Brill Nijhoff, Boston, MA, 2018, p. 66.

would contravene the principle of legality, because none of the definitions of rape or sexual violence adopted by the tribunals or accepted in international law lists the suffering of the victim as one of the elements constituting the offence. The sole criteria for rape are oral penetration by the perpetrator's genitals or penetration of the genitals by a part of the body or by an object, carried out deliberately by the perpetrator without the consent of the victim. Sexual violence consists of a sexual act that violates the physical well-being or personal dignity of the victim, where the perpetrator knows that they would not consent.⁹⁶ To require that the victim undergo physical or mental suffering would also exclude from the category of sexual offences those cases in which sexual violence is perpetrated against a person who is unconscious or in a state of physical or mental incapacity and hence unable to apprehend the act that has been perpetrated against them.

So, if according to the jurisprudence of the international criminal tribunals, sexual violence – and especially rape – can be perpetrated only against a living person, then this is for a number of reasons. When a person dies, they cease to exist in a legal sense; the corpse is merely the remains of what used to be a person, to which certain considerations are due but which no longer possesses any rights. The deceased, having lost the status of person, with rights, autonomy, feelings and the capacity to feel, cannot be the victim of an offence that can only be committed against a person, such as murder, rape or torture. We must therefore add to the *actus reus* and *mens rea* for rape or sexual violence a requirement that the victim be a person, by which we mean a being with the ability to experience the crime or its consequences and possessed of moral autonomy. These arguments are relative, however, with little basis in law – rather, they are founded on moral or philosophical considerations.

⁹⁶ The above elements are common to the definitions of rape and sexual violence that international and hybrid criminal tribunals use today. Regarding rape, see Special Panel for the Trial of Serious Crimes in the District Court of Dili, *The Public Prosecutor v. Jose Cardoso*, Case No. 04c/2001, Judgment, 5 April 2003, para. 452, available at: www.worldcourts.com/spsc/eng/decisions/2003.04.05_Prosecutor_v_Cardoso1.htm; Special Court for Sierra Leone (SCSL), *The Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (AFRC), Case No. SCSL-04-16-T, Decisions on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, para. 106, available at: www.rscsl.org/Documents/Decisions/AFRC/469/SCSL-04-16-T-469.pdf; ICTR, *The Prosecutor v. Pauline Nyiramasuhuko et al. (Butare)*, Case No. ICTR-98-42, Judgment, 24 June 2011, para. 6075, available at: <https://ucr.irmct.org/scasedocs/case/ICTR-98-42#trialJudgement>; ICTR, *The Prosecutor v. Karemera et al. (Government I)*, Case No. ICTR-98-44, Judgment, 2 February 2012, para. 1677, available at: <https://ucr.irmct.org/LegalRef/CMSDocStore/Public/English/Judgement/NotIndexable/ICTR-98-44/MS22535R0000565274.PDF>; SCSL, *The Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Judgment, 18 May 2012, paras 415–416, available at: www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf; ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18, Judgment, 24 March 2016, para. 511, available at: http://icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf; EAC, *Habré*, above note 9, para. 1508; ICC, above note 42, Art. 7(1)(g)-1. Regarding sexual violence, see ICTR, *Akayesu*, above note 31, para. 598; ICTY, *The Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Judgment, 10 December 1998, para. 186, available at: www.refworld.org/jurisprudence/caselaw/icty/1998/en/20418; SCSL, *AFRC*, above, para. 720; ICTY, *The Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Judgment, 26 February 2009, paras 195 ff, available (in four parts) at: www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf, www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e2of4.pdf, www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf and www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e4of4.pdf; ICTY, *The Prosecutor v. Vlastimir Dordević*, Case No. IT-05-87/1, Judgment, 23 February 2011, para. 1768, available at: www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf; ICTY, *Karadžić*, above, para. 513; ICC, above note 42, Art. 7(1)(g)-6.

The international criminal tribunals do indeed hold that perpetrating such acts on a corpse should be punished, but by reason of the offence to certain philosophical and religious notions of respect for the human being after death.⁹⁷ Penalizing the perpetration of penetrative sexual violence on a corpse as an inhumane act or as a violation of dignity punishes a violation of society's moral beliefs that shocks and affects that society rather than the violation against the person themselves, as they are considered to no longer exist.

The need to recognize sexual violence on corpses

While categorizing sexual violence as inhuman or degrading treatment or a violation of dignity is not a problem in itself, and is even necessary as a means of recognizing certain aspects of the harm caused, it nonetheless raises certain questions. The first problem arises when this categorization is given preference over one that would be more precise or appropriate. Such a prosecution policy is questionable because it helps to hide the sexual violence suffered by various legal subjects, including persons, and hence does not allow the taboo and stigma regarding such acts to be broken. It also leads to only partial recognition of the direct or indirect harm that the victim has suffered, and it will not be possible to repair that harm appropriately and completely.

Categorizing sexual acts differently when they are performed on a corpse limits recognition of the violation perpetrated upon the person, prioritizing a moral approach over a victim-based approach, for the same material and moral elements, on the basis of balancing *actus reus* and *mens rea*. This interpretation would imply a concept of justice that is more reparative or restorative than retributive. As we have seen, tribunals appear to see the suffering and harm caused to the victim as criteria for categorizing such acts, whereas if one were to consider only the acts and intentions of the perpetrator, the categorization would be the same regardless of the state of the victim. To illustrate this argument, let us consider a case of collective rape in which the victim dies during the act. On the basis of current jurisprudence, anyone who had carried out a sexual act on the victim while they were still alive (even if they were unconscious) would be charged with rape, whereas those who had done so after the victim had died would be charged with inhumane acts, even if they had been unaware that the victim was dead. Apart from the length of sentence, the issue is that of recognizing and naming the act to which the victim was subjected. Furthermore, this interpretation limits recognition of sexual harm in cases where a person is forced to have sex with a corpse, an offence in which both the person penetrating and the person penetrated are victims.

The taboo surrounding this type of violence is significant enough to affect its legal treatment. One result of this is the “trial and error” approach to the doctrine and jurisprudence related to justification for this categorization. While this is motivated by a sense of juridicity, it is limited as regards examination of the concepts used and the practice of crimes or jurisdictions. This is explained by the persistent

97 ICTY, *Tadić*, above note 40, para. 748.

cognitive bias at institutional level whereby sexual violence is seen as something that can only be perpetrated upon the living, an approach that tends to erase the sexual dimension of such crimes. Recognizing this sexual dimension is of vital importance, as it makes it possible to refer to and account for all aspects of the crimes committed, their motives and the harm they cause. To overcome these problems, it would be valuable to expand the understanding of sexual violence in international humanitarian and criminal law, allowing the definition of sexual violence to include new forms of absence of consent and enabling more comprehensive recognition of the sexual harm suffered.

Conclusion

As this article has shown, the courts have dealt with sexual acts on corpses on various occasions, but while these acts are often described as sexual offences in statements of facts and in arguments, they are never categorized as such in indictments or verdicts. This is true of acts ranging from mutilation to forced penetration of the genitals of the deceased, most often by an object. The present categorization stems from contemporary religious, philosophical and moral perceptions that create a clear divide between the living and the dead. The dead cannot suffer the same crimes as the living on account of the doctrinal concept whereby death causes them to lose their legal personality, their ability to consent, their capacity to suffer and even their status as a person. This understanding is relative, however, because it depends upon subjective readings of the concepts mentioned. For instance, it would be quite possible to accept that the deceased remains a person and that, as for a person in a prolonged state of unconsciousness, one may presume the absence of consent. As regards the crimes of rape and sexual violence, there is a need to widen the focus, making it possible to concentrate on the material elements of the crime and the intent of the perpetrator, or an extension of the absence of consent, rather than on subjective criteria such as the suffering endured by the direct victim. Such a change of conception would make it possible to transpose definitions of sexual violence to cases in which it is perpetrated on people who have died. The aim would be not only to judge, punish and make reparation for acts that affect the community of the deceased and those close to them but also to render justice to the person who has died, for the sexual violation committed against their person.

Naming and giving separate status to sexual violence, whether committed against the living or the dead, is an essential precondition to recognizing it, rendering it visible, punishing the perpetrators and ensuring reparation. Given the obstacles that we have mentioned in this study, rewriting the definitions in humanitarian and criminal law, allowing both harmonization and also the inclusion of new forms of inability to give consent, would pave the way for recognition of the sexual dimension of these crimes, which has hitherto gone unpunished.