

Visual representation of armed conflict-related deaths and the evolving standards of protecting the dignity of the deceased

Viola Santini 

PhD Candidate in International Law, University of Florence, Florence, Italy

Email: viola.santini@unifi.it

Abstract

The circulation of harrowing war images on traditional and social media – beheaded soldiers, mutilated bodies and civilians burned alive by flames – underscores a profound and enduring connection between war, death and photography. While this nexus is not novel, contemporary developments in the speed, scale and permanence of visual media have opened new questions worth examining. This article aims to dig deeper into whether and how the normative landscape for protecting the inherent dignity of the deceased is evolving and the role that new challenges posed by digital media and the pervasive nature of contemporary visual media play in this process. The relevance of this study rests on the premise that ongoing academic and public debates tend to

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focus on the issue of media censorship, overshadowing critical inquiries into the legitimacy and legality of the display of certain images. Thus, it is argued that, in the context of publishing and disseminating images of the war dead, it is essential to examine not only what is hidden but also what is shown and how. This is especially pertinent given the asymmetric representation of death and conflict in the Western media, which frequently reinforces distant, “othering” perspectives. Finally, by examining the issue through multiple lenses, namely those of international humanitarian law, international human rights law and international criminal law, this study aims to provide a more comprehensive framework for addressing the ethical and legal dilemmas posed by war photography in the digital age.

Keywords: international humanitarian law, international human rights law, international criminal law, protection of the dead, dignity, social media, war crimes.

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Introduction

In recent times, social networks and media have been inundated with harrowing images: beheaded soldiers on the front lines, mutilated bodies and civilians burned alive, contorted corpses covered by dust. These images hint at a deep connection between war, death and photography – but this connection is far from a contemporary phenomenon.¹ Similarly, concerns over the proliferation of information about the agonies occurring on and around the battlefield are not new. As early as 1888, Gustave Moynier, then president of the International Committee of the Red Cross (ICRC), argued that the advent of the electric telegraph, enabling near-instantaneous transmission of information, had effectively created a form of “photography” of war in the press. He suggested that the rapid spread of vivid accounts of those dying on the battlefield had eventually led to public desensitization, as people had grown “weary of the revelations of the invisible courier who is outpacing the sun itself”.² However, while there is a conceptual continuity with earlier concerns, we are currently observing a significant transformation in the intersection between visual media and the atrocities of war. Contemporary developments in this regard include qualitative and quantitative shifts in the production and dissemination of images, the speed and ubiquity with which they are created and shared, and their infinite permanence in the digital sphere. These changes are pervasive and structural, requiring a critical examination under international law as well as from an ethical, political and social point of view.

1 Jorge Lewinsky, *The Camera at War: A History of War Photography from 1848 to the Present Day*, Chartwell Books, Secaucus, NJ, 1978; Sonya de Laat, “The Camera and the Red Cross: ‘Lamentable Pictures’ and Conflict Photography Bring into Focus an International Movement, 1855–1865”, *International Review of the Red Cross*, Vol. 102, No. 913, 2021.

2 Gustave Moynier, *Les causes du succès de la Croix-Rouge*, A. Picard, Paris, 1888, pp. 13–14 (author’s translation).

This contribution is an expansion of a piece written by the present author and published on the *Opinio Juris* blog in 2024.³ It seeks to examine the contemporary intersection of war, visual media and the treatment of the dead. Engaging with the concept of “digital dignity in death”,⁴ it aims to tackle the question of how the protection of the inherent dignity of the deceased is evolving vis-à-vis the new challenges posed by digital media and the pervasive nature of contemporary photography. While the notion of dignity is articulated differently across international humanitarian law (IHL), international human rights law (IHRL) and international criminal law (ICL), a common normative shift seems to be emerging: namely, an increased legal and ethical sensitivity toward the use and dissemination of images of the dead. Thus, the rapid expansion of digital platforms and the democratization of visual technologies have not only exposed gaps in existing legal frameworks but have also prompted a re-evaluation of posthumous dignity as a subject of legal concern in its own right. This evolution is reflected in a deeper reckoning with how societies regulate death and how law engages with shifting cultural practices of witnessing, memory and respect in the context of armed conflict.

The first section of this article will examine the intricate relationship between photography, war and death, setting the foundation for the rest of the study. The analysis then shifts to IHL, exploring the concept of public curiosity and its significance for the dignity of the war dead amid today’s technological challenges. In the third section, the focus turns to IHRL; dignity of the dead will be considered in relation to privacy and freedom of expression, with the aim of defining the limits of publishing and sharing certain images on mass-distributed media platforms. The fourth section assesses the relevance of the Rome Statute of the International Criminal Court (ICC), as well as the dual role of war-related images as both evidentiary tools in open-source intelligence (OSINT) investigations and potential means of degradation against victims and communities.⁵ Finally, the conclusion maps the evolution of the inherent dignity of the dead and proposes a tentative protective framework for publishing war dead-related visual material.

- 3 Viola Santini, “Regarding (Pictures of) the Pain of Others: Photographic Images of Conflict-Related Deaths under International Law”, *Opinio Juris*, 21 November 2024, available at: <https://opiniojuris.org/2024/11/21/regarding-pictures-of-the-pain-of-others-photographic-images-of-conflict-related-deaths-under-international-law/> (all internet references were accessed in May 2025).
- 4 This phrasing is found in Sarah Ashbridge, “Digital Dignity in Death: Are the Geneva Conventions Fit for Purpose in the Age of Social Media?”, Royal United Services Institute, 29 March 2022, available at: <https://rusi.org/explore-our-research/publications/commentary/digital-dignity-death-are-geneva-conventions-fit-purpose-age-social-media>.
- 5 Sarah Zarmisky, “Contemporary International Criminal Law after Critique Symposium: ICL’s Potential to Address Online Harms in Ukraine, Palestine, and Beyond”, *Opinio Juris*, 10 September 2024, available at: <http://opiniojuris.org/2024/09/10/contemporary-international-criminal-law-after-critique-symposium-icls-potential-to-address-online-harms-in-ukraine-palestine-and-beyond/>.

Zooming in on the relationship between photography, death and war

Ever since the invention of the camera in 1861, photography has had a profound connection with death,⁶ and it comes as no surprise that war contexts have always proved to be fertile ground for the manifestation of this intertwining.⁷ The influential American intellectual Susan Sontag, in her essay “Regarding the Pain of Others”, noticed that technical developments in the field of photography played a crucial role in shaping the portrayal of war’s destruction.⁸ She recalled that initially, a close-up and dynamic reportage of war was beyond the reach of the camera, and that conflict photos thus retained an epic character and generally depicted the aftermath of combat, showing destroyed landscapes, trenches and villages that the war had passed through.⁹ It was with the introduction of lightweight and quicker cameras that it became possible to take photos in the heat of battle and, especially, to focus up close on casualties and soldiers. This technical development made the Spanish Civil War (1936–39) the first to be “covered” in the modern sense of the term, with photographers in the field whose work was immediately visible in newspapers and magazines, both in Spain and abroad.¹⁰ Similarly, years later, the spread of television cameras during the Vietnam War (1954–75) made real-time footage of battles and casualties a routine feature of the continuous media stream, “introduc[ing] the home front to a new tele-intimacy with death and destruction”.¹¹ Analogously, a shift can be observed in the role of the recipients of these images, who transitioned from passive, distant witnesses to intense explorers of the horrors of war.¹²

The most recent evolution of photography, namely its democratization through the widespread adoption of smartphones with integrated cameras and the rise of social media, has further transformed the taking and dissemination of images. Unlike traditional media outlets, such as television and newspapers, which operate under editorial and ethical guidelines,¹³ the rise of social media and direct, instantaneous sharing allows anyone to broadcast images to a vast audience. This shift has

6 Fausto Colombo, *Imago pietati: Indagine su fotografia e compassione*, Vita e Pensiero Editrice, Milan, 2018.

7 The first photos of combat were taken shortly after the invention of the camera, between 1846 and 1848, when an anonymous photographer took fifty daguerreotypes of the Mexican war. J. Lewinsky, above note 1, p. 35.

8 Susan Sontag, *Regarding the Pain of Others*, Picador, New York, 2003, pp. 13–16.

9 See, for example, the work of the photographer Roger Fenton during the Crimean War (1853–56), depicting battlefield landscapes (“The Valley of the Shadow of Death”, 1855), staged group portraits of soldiers (“Colonel Doherty and the Officers of the 13th Light Dragoons”, 1855), intimate details of life in military camps, and generals posing in fierce stances.

10 The work of the photo reporters Capa and Seymour during the Spanish war is illustrative of this. The twentieth century gave way to the diffusion of graphic war images, with photographs becoming a crucial form of media in the war effort. Jason Francisco, “War Photography in the Twentieth Century: A Short Critical History”, in Lynne Warren (ed.), *Encyclopedia of Twentieth Century Photography*, Routledge, New York, 2006, pp. 1636–1643.

11 S. Sontag, above note 8, p. 14.

12 J. Lewinsky, above note 1.

13 See e.g. National Press Photographers Association, “Code of Ethics”, available at: <https://nppa.org/code-ethics>.

expanded the reach and immediacy of photography, enabling unprecedented visibility and engagement. What distinguishes contemporary practices is not merely the vast increase in available and consumed images, but also a shift in their qualitative characteristics. A trend has emerged in visual culture, characterized by a shift toward more explicit and personalized depictions of death and suffering, often featuring close-up perspectives and clearly recognizable individuals.

Some have noticed that smartphones and social media are transforming the documentation of human rights violations, with the aim of “catalys[ing] some kind of response from an international community” in order to “let them know the horrors”¹⁴ that people face. One might ask, however, what kind of response these images elicit, or are intended to elicit. Photography, as claimed by Andrew Hoskins, enables “distant witnessing”¹⁵ of suffering occurring in other countries, which is further mediated through its portrayal in mainstream and social media. According to many, such exposure can mobilize radically effective forms of public response;¹⁶ however, a growing number of commentators in various disciplines have suggested that it might merely fuel a “bemused awareness, continually restocked by photographic information, that terrible things happen”,¹⁷ rather than an active opposition to the losses that war entails.¹⁸

Finally, it is contended that the ideas explored in this article are particularly relevant in relation to the current focus, in both academic and public debate, on the issue of media censorship, during peace and wartime alike. The emphasis on the concealment of certain images often eclipses discussions on the legitimacy, or even legality, of the display of others, thus creating an imbalance in the discourse. On the contrary, it is argued here that the focus on concealing certain images and the debate over displaying others are two non-mutually exclusive faces of the same coin. In fact, media outlets play a crucial role in the “distribution of the sensible” – or “*partage du sensible*”, in Rancière’s phrasing¹⁹ – not only through what they withhold from publication but also through what they decide to show, as distribution implies both exclusion and inclusion. This duality is well reflected in Article 10 of the European Convention on Human Rights (ECHR), which, on the one hand, safeguards against

14 Edward Lempinen, “Images of War Are Shocking. They Also Can Strengthen Our Humanity”, *UC Berkeley News*, 10 January 2024, available at: <https://news.berkeley.edu/2024/01/10/images-of-war-are-shocking-they-also-can-strengthen-our-humanity/>.

15 “Distant” is understood here from an occidental, privileged point of view and with limited fear of warfare, as clarified in Andrew Hoskins, “Media and Compassion after Digital War: Why Digital Media Haven’t Transformed Responses to Human Suffering in Contemporary Conflict”, *International Review of the Red Cross*, Vol. 102, No. 913, 2021, p. 119.

16 For an overview of the key debates in this area, see Katy Parry, “The Political Work of War and Conflict Images”, in Darren Lilleker and Anastasia Veneti (eds), *Research Handbook on Visual Politics*, Edward Elgar, Cheltenham, 2023.

17 S. Sontag, above note 8, p. 8. This concept is also mentioned by many contemporary academics as “compassion fatigue”: see A. Hoskins, above note 15, p. 123.

18 Judith Butler, *Frames of War: When Is Life Grievable?*, Verso Books, New York, 2009, p. 13. More recent analysis asks whether algorithmically charged outrage has come to be a proxy for political action: see A. Hoskins, above note 15.

19 Jaques Rancière, *Le partage du sensible: Esthétique et politique*, La Fabrique Éditions, Paris, 2000.

censorship by prohibiting unlawful restrictions of freedom of expression,²⁰ and, on the other, emphasizes that media outlets bear certain “duties and responsibilities”²¹ vis-à-vis the general public and society at large.

When it comes to the topic of publishing and sharing images of the dead, the relevance of critically investigating not only what is hidden, but also what is shown and how, is exemplified by instances of unequal use of images of death in the media. It has been found that, often, the dignity of one group, an “us”, is protected, while the publication of graphic images of the “other” is permitted.²² This dynamic is often referred to as “othering”, or the creation of an “otherness”, as the result of “a discursive process by which a dominant in-group (‘Us’, the Self) constructs one or many dominated out-groups (‘Them’, Other) by stigmatizing a difference – real or imagined – presented as a negation of identity and thus a motive for potential discrimination”.²³ The findings of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions further substantiate this intuition. In examining how States manage the protection of the bodies and human remains of minorities and the indigent, the Rapporteur observes that patterns of discrimination evident in life persist in death.²⁴

Protecting the dignity of the dead in armed conflict: What role for the notion of public curiosity under international humanitarian law?

The significant emphasis placed on rules designed to protect the deceased during armed conflict traces back to ancient Greek practices.²⁵ Commanders were required to recover the bodies of fallen soldiers, and failure to fulfil this duty often resulted in condemnation by fellow citizens.²⁶ Moreover, the desecration of bodies was widely regarded as a violation of universally accepted norms.²⁷ These practices underscore the early principles mandating for the recovery, identification and dignified

20 Convention for the Protection of Human Rights and Fundamental Freedoms, CETS 005, 4 November 1950 (entered into force 3 September 1953) (ECHR), Art. 10.

21 *Ibid.*, Art. 10(2).

22 Tal Morse, “Dynamics of Death Images in Israeli Press”, *Bulletin Centre de recherche français à Jérusalem*, Vol. 23, 2012; Helen Lewis, “How Newsrooms Handle Graphic Images of Violence”, *NiemanReports*, 5 January 2016, available at: <https://niemanreports.org/how-newsrooms-handle-graphic-images-of-violence/>.

23 Jean-François Staszak, “Other/Otherness”, in Rob Kitchin and Nigel Thrift (eds), *International Encyclopedia of Human Geography*, Elsevier, Amsterdam, 2009, p. 43.

24 *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/56/56, 25 April 2024, para. 25.

25 Welmoet Wels, *Dead Body Management in Armed Conflict: Paradoxes in Trying to Do Justice to the Dead*, Jongbloed, The Hague, 2016, p. 3.

26 Carlo Focarelli, *Introduzione storica al diritto internazionale*, Giuffrè Editore, Milan, 2012, pp. 70–74.

27 “Aeginetan, ... you cast me down to mere nothingness when you advise me to insult the dead, and say that I shall win more praise if I do so. That would be an act more proper for barbarians than for Greeks and one that we consider worthy of censure even in barbarians.” Herodotus, *The Histories*, Book IX, ca. 426 BCE, trans. A. D. Godley, Harvard University Press, Cambridge, MA, 1920, para. 79.

burial²⁸ of the dead. However, the care afforded to the dead coexisted with, and often responded to, practices of desecration or instrumentalization of enemy bodies,²⁹ which were employed as tools for spreading fear and propaganda. It was to prevent looting or commodification of corpses by enemy soldiers that the Romans typically buried their war dead *in situ* and in unmarked mass graves.³⁰

In contemporary IHL, the dead are considered as a “distinct category of victim”³¹ and their dignity is protected and upheld through a multifaceted set of norms and practices,³² applicable in both international and non-international armed conflicts.³³ This corpus of rules shows that the perspective on the protection of the dead under IHL is, as in its historical antecedents, twofold. On the one hand, it has an underlying functional aim, which is to avoid the instrumentalization of corpses by the enemy. On the other hand, it substantially attributes a dignified status to those who have lost their lives during conflict.³⁴ These norms protect the dead against pillaging and ill-treatment,³⁵ mandate the steady and continuous search for casualties³⁶ and establish rules on identification,³⁷ emphasizing sensitivity towards next of kin and towards social or religious communities of belonging. Additionally, rules

- 28 The idea of a “universal law” underlying the treatment of the dead resurfaces in various examples. See Euripides, *The Suppliants*, ca. 423 BCE, trans. E. P. Coleridge, Random House, New York, 1938, line 670: “we have come for the bodies of the slain, wishing to bury them in observance of the universal law of Hellas”; Katerina Zacharia, “Funerary Rituals, Aeschylus’ *Eumenides* and Sophocles’ *Antigone*”, *Classics and Archaeology Faculty Works*, Vol. 12, 2010, p. 62. Antigone places the unwritten law regulating the treatment of the dead above human law.
- 29 Welmoet Wels, “Dead Bodies of War in Legal-Historical Context”, *Articles of War*, 28 March 2023, available at: <https://lieber.westpoint.edu/dead-bodies-war-legal-historical-context/>.
- 30 Valerie Margaret Hope, “‘Dulce et Decorum est Pro Patria Mori’: The Practical and Symbolic Treatment of the Roman War Dead”, *Mortality: Promoting the Interdisciplinary Study of Death and Dying*, Vol. 23, No. 1, 2018, p. 9.
- 31 Oran Finegan, “Dignity in Death: Remembrance and the Voice of the Dead”, *Humanitarian Law and Policy Blog*, 1 November 2017, available at: <https://blogs.icrc.org/law-and-policy/2017/11/01/dignity-in-death-remembrance-and-the-voice-of-the-dead/>.
- 32 For example, humanitarian forensics practices: see ICRC, “Humanitarian Forensics: Applying Forensic Science for Humanitarian Purposes”, available at: www.icrc.org/en/what-we-do/humanitarian-forensics. See also Eadaoin O’Brien, “Forensic Science, International Criminal Law and the Duties towards Persons Killed in War”, in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future*, Edward Elgar, Cheltenham, 2012.
- 33 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 113, p. 409, available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules>; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 8.
- 34 Sheelagh McGuinness and Margaret Brazier, “Respecting the Living Means Respecting the Dead Too”, *Oxford Journal of Legal Studies*, Vol. 20, No. 2, 2008.
- 35 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 16.
- 36 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 18(1); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 15(1).
- 37 GC I, Art. 16.

govern the honourable disposal or burial of the dead,³⁸ ensuring respect for religious beliefs³⁹ and the will of the deceased.⁴⁰

Having outlined the general framework, we now turn our attention to norms that are relevant to the case at hand, which can be found in Article 13 of Geneva Convention III (GC III)⁴¹ and Article 27 of Geneva Convention (GC IV).⁴² Notably, subsequent interpretation by the 2020 ICRC Commentary on GC III⁴³ will be delved into, as this Commentary addresses the unique challenges posed by the digital age, particularly the sharing of video and photographic materials in the media. It is argued that through this interpretation, the scope of protection attributed to the dead – and to images depicting them – under IHL has been significantly expanded, with a particular emphasis on the dignity rationale underpinning such protection.

Article 13 of GC III deals with the treatment of prisoners of war (PoWs)⁴⁴ during international armed conflicts (IACs), mandating that they must be protected from “acts of violence or intimidation, and from insults and public curiosity”.⁴⁵ The latter concept of public curiosity also appears in Article 27 of GC IV, concerning protected persons, and applies analogously to this category.⁴⁶ The delineation in digital terms of the concept put forward by the ICRC Commentary on GC III provides a useful framework for analyzing the legal implications of sharing images of the conflict dead. GC IV still relies on an older Commentary that does not account for the complexities introduced by digital technologies;⁴⁷ nevertheless, it can be inferred that the clarifications regarding the concept of public curiosity articulated in the context of GC III, as discussed above, would similarly apply to the use of the term in Article 27 of GC IV.

38 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 8.

39 GC I, Art. 17(2); GC II, Art. 20(2); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 120(5); GC IV, Art. 130(2).

40 GC I, Art. 17(3); GC III, Art. 120(4); GC IV, Art. 130(1).

41 GC III, Art. 13.

42 GC IV, Art. 27.

43 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (ICRC Commentary on GC III).

44 PoWs are defined as combatants who have fallen into the hands of the enemy, or specific non-combatants to whom the status of PoW is granted by IHL. GC III, Art. 4.

45 *Ibid.*, Art. 13.

46 Protected persons are defined in Article 4 of GC IV as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. See also a relevant analysis of the Swedish Supreme Court, which finds that the dead, when in the hands of the enemy, are “protected persons since, at the time of the acts, they were placed *hors de combat* as wounded or deceased or because they were civilians”. Supreme Court of Sweden, *Public Prosecutor v. Saeed*, Case No. B 5595-19, Judgment, 5 May 2021, para. 2.

47 It remains to be seen, however, how this issue will be addressed in the forthcoming revised Commentary on GC IV.

Initially intended for protecting PoWs from humiliating practices as well as from unlawful reprisals, the ICRC Commentary on GC III explains that “as technology advanced, prisoners became exposed to public curiosity via photographic images and video footage”,⁴⁸ and thus, “[i]n modern conflicts, the prohibition [against public curiosity] also covers ... the disclosure of photographic and video images ... irrespective of which public communication channel is used, including the internet”.⁴⁹ The 2020 revision of the Commentary further clarifies that the publication of images of PoWs can constitute exposure to public curiosity even without accompanying insult, humiliation or ill intent, thus broadening the scope of protection.⁵⁰ The expansion of the concept is a consequence of the risks inherent in the global nature of modern telecommunications. This factor has also resulted in the territorial limits of the standard being extended to bind third States and actors that are not party to the conflict, as images of prisoners and protected persons “leaked to the press or posted on the internet can be quickly picked up and retransmitted by television channels, newspapers or websites all over the world”.⁵¹ On this note, the ICRC Commentary on GC III clarifies that all States bear this responsibility, both parties to the conflict and non-parties, under Article 1 common to the four Geneva Conventions (common Article 1), which prohibits any aid or assistance in violations of IHL,⁵² and Article 129(3) of GC III, which mandates measures to suppress acts contrary to the Conventions.⁵³ The Commentary also recognizes due diligence obligations of media outlets such as media channels and television networks, with implications for social media platforms, which are increasingly influential in shaping public perceptions of war. This evolving interpretation is consistent with similar provisions in international law, most notably with the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, which concludes that Detaining Powers must prevent their networks from being used to “violate the respect or honour owed to prisoners of war”.⁵⁴ This includes a specific prohibition bearing, although indirectly, on traditional and social media with regard to “posting information or images on the Internet that could be demeaning or that could subject prisoners of war or interned protected persons to public ridicule or public curiosity”.⁵⁵

48 ICRC Commentary on GC III, above note 43, para. 1622.

49 *Ibid.*, para. 1624.

50 Prior to the 2020 revision, it was unclear whether the publication of images of PoWs was always prohibited or only when depicting them in degrading circumstances and with humiliating intent. See Gordon Risius and Michael A. Meyer, “The Protection of Prisoners of War against Insults and Public Curiosity”, *International Review of the Red Cross*, Vol. 33, No. 295, 1993.

51 ICRC Commentary on GC III, above note 43, para. 1632. On this, see also Tilman Rodenhäuser, “The Legal Boundaries of (Digital) Information or Psychological Operations under International Humanitarian Law”, *International Law Studies*, Vol. 100, 2023, p. 543.

52 This is a widely accepted interpretation of common Article 1, which provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for [the Geneva Conventions] in all circumstances”.

53 ICRC Commentary on GC III, above note 43, para. 1632.

54 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017, p. 215.

55 *Ibid.*

The ICRC Commentary on GC III further specifies that the prohibition against exposing identifiable images of PoWs to public curiosity “applies equally to deceased prisoners of war: their remains must be treated with respect. The prohibition on exposing prisoners or their identifiable images to public curiosity therefore applies in the same fashion to their dead bodies.”⁵⁶ This suggests that the exposure of identifiable images of deceased prisoners and protected persons would violate the respect owed to the dead under IHL. Regarding the transmission, publication or broadcasting of images, it is provided in the Commentary that publicly sharing any materials enabling identification or depicting prisoners in humiliating or degrading situations would amount to subjecting them to public curiosity. Therefore, such materials may not be transmitted, published or broadcasted, unless there is a compelling reason of public interest.⁵⁷ It is worth mentioning here that in IHL, the threshold for invoking public interest is notably high.⁵⁸ Moreover, even in instances where the justification of public interest holds, media outlets are expected to make every effort to protect the dignity and identities of the individuals depicted, ensuring that images fulfil their purpose without disclosing the identities of those involved, and thus maintaining a balance between freedom of the press, the public’s right to information and the individual’s right to privacy and dignity.⁵⁹

In conclusion, the emergence of digital media appears to have triggered, or at least facilitated, the expansion of the protective regulatory framework designed to uphold respect for the deceased. To further explore the evolving protection and nuanced understanding of the inherent dignity of the conflict dead, particularly through the regulation of their images, this issue will be now examined under the lens of IHRL. Human rights are recognized to apply both online and offline⁶⁰ and, save through derogations,⁶¹ they are applicable in wartime.⁶² IHRL binds States in their interactions with everyone within their jurisdiction, as well as imposing due diligence obligations on private actors operating within their jurisdiction. Resorting to IHRL also offers the possibility to evaluate, and eventually bridge, the extent of protection afforded under IHL. In fact, the categories examined in this section, along with their associated protective scope, are limited to IACs and, more specifically, to

56 ICRC Commentary on GC III, above note 43, para. 1629.

57 *Ibid.*, para. 1627.

58 *Ibid.*, para. 1627: “for instance, to bring serious violations of humanitarian law to public attention”.

59 *Ibid.*, para. 1627.

60 UN Human Rights Council, Res. 20/8, “The Promotion, Protection and Enjoyment of Human Rights on the Internet”, 5 July 2012.

61 As recognized by the International Court of Justice, human rights law applies in times of conflict, save through the effect of provisions for derogation: International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports* 1996, para. 25. When it comes to the interplay between IHRL and IHL, “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law”: *ibid.*, para. 106.

62 Mary Ellen O’Connell, “Data Privacy Rights: The Same in War and Peace”, in Russell Buchan and Asaf Lubin (eds), *The Rights to Privacy and Data Protection in Times of Armed Conflict*, NATO CCDCOE Publications, Tallinn, 2022.

individuals that are under the control, within the territory or under the occupation of a power of which they are not nationals.

Privacy in times of conflict and the evolving notion of inherent dignity of the dead in international human rights law

Human rights treaties, with a few notable exceptions,⁶³ generally lack provisions directly addressing the treatment of the dead; therefore, the protection of deceased persons can typically be inferred from broader human rights principles. For instance, States are bound, under human rights treaties, to respect the right to life, including its procedural limb, requiring effective investigations and reparations in case of breaches.⁶⁴ Similarly, the protection of human dignity, the right to private and family life⁶⁵ and the prohibition of cruel, inhuman or degrading treatment or punishment⁶⁶ have all been interpreted by regional human rights courts as encompassing obligations related to the dignity of the dead. While all these principles are relevant and require States to comply with certain obligations regarding the dead, this paper wishes to focus on the right to privacy. While the right to life and the prohibition of inhuman and degrading treatment relate to the circumstances of death itself, this research instead focuses on a subsequent concern – namely, the public exposure of those who have died. The right to privacy therefore offers a particularly insightful lens through which to examine the challenges posed by publicly shared images of the war dead. Furthermore, through a balancing analysis with freedom of expression, it enables an exploration of the tension between dignity, media exposure and the legal-ethical limits of publication, shedding light on how the sharing of such images may intersects with other rights.

To begin with, the right to privacy is a concept traditionally pertaining to human rights. Due to rapid technical advancement in warfare, privacy and data protection in armed conflicts have recently begun to be scrutinized.⁶⁷ However, there are no IHL provisions regulating privacy, making human rights law a valuable general framework for addressing these concerns.

At this point, the jurisprudence of the European Court of Human Rights (ECtHR) comes to the fore. The ECtHR has developed one of the most robust standards on privacy, specifically in the context of media and photographic

63 Cairo Declaration on Human Rights in Islam, 5 August 1990 (revised version adopted 28 November 2020), Arts 3–4; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3, 18 December 1990 (entered into force 1 July 2003), Art. 71; International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 23 December 2010 (entered into force 23 December 2010), Arts 7(2)(b), 15, 17(3)(g), 24; United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295, 13 September 2007, Art. 12.

64 European Court of Human Rights (ECtHR), *Abakarova v. Russia*, Case No. 16664/07, 15 October 2015; Inter-American Court of Human Rights (IACtHR), *Guerrero, Molina et al. v. Venezuela*, 3 June 2021.

65 ECtHR, *M. L. v. Slovakia*, Case No. 34159/17, 14 October 2021.

66 See e.g. ECtHR, *Akkum v. Turkey*, Case No. 21894/93, 26 June 2005, para. 259; IACtHR, *Nadege Dorzema v. Dominican Republic*, 24 October 2012, para. 252.

67 R. Buchan and A. Lubin (eds), above note 62.

representations, under Article 8 of the ECHR.⁶⁸ Moreover, its extensive jurisprudence on the balancing of privacy and freedom of expression, along with its authoritative and binding nature, makes it a valuable point of reference for this analysis.

The ECtHR has recognized that a “person’s image constitutes one of the chief attributes of his or her personality”, and that “[t]he right to the protection of one’s image ... presupposes the individual’s right to control the use of that image, including the right to refuse publication”.⁶⁹ During conflicts, however, the chaotic nature of events might result in a lack of consent concerning the use of images by the victim’s next of kin. Thus, decisions regarding the publication of images must undergo a careful balancing test, weighing privacy rights against other interests – in particular, freedom of expression, as “freedom of expression includes the publication of photos” and is “an area in which the protection of the rights and reputation of others takes on particular importance”.⁷⁰ Freedom of expression is governed by Article 10 of the ECHR.⁷¹ Paragraph 2 of Article 10 sets out that it is not an absolute right and that the exercise of this freedom carries with it “duties and responsibilities”.⁷² Thus, freedom of expression can be restricted in some circumstances, provided that the restriction is prescribed by law, is aimed at protecting one or more overriding interests, and is necessary in a democratic society.⁷³ Limitations on freedom of expression may result from interference with another equally protected fundamental right, such as the protection of the reputation or privacy of others, and in such cases, the ECtHR’s analysis consists in finding the right balance between freedom of expression, the public’s interest in knowing, and the conflicting right. A key element applicable to the matter at hand is that a private individual, who is unknown to the public, can claim heightened protection of their right to privacy vis-à-vis freedom of expression, especially when the photos or videos in question are aimed only at satisfying public curiosity. In such cases, the ECtHR has ruled that freedom of expression should be interpreted more narrowly.⁷⁴ The concept of public curiosity is outlined, by the ECtHR, through testing whether the information has a “value for the general public”⁷⁵ and whether

68 ECHR, above note 20, Art. 8.

69 ECtHR, *Von Hannover v. Germany* (No. 2), Case Nos 40660/08, 60641/08, Judgment (Grand Chamber), 7 February 2012, para. 96.

70 *Ibid.*, para. 103; ECtHR, *MGN Limited v. The United Kingdom*, Case No. 39401/04, Judgment (Fourth Section), 18 January 2011, para. 143.

71 ECHR, above note 20, Art. 10.

72 *Ibid.*, Art. 10(2). See also ECtHR, *Hachette Filipacchi Associés v. France*, Case No. 71111/01, Judgment (First Section), 14 June 2007, para. 42.

73 This is the so-called “three-part test” used by the ECtHR for assessing the lawfulness of restrictions on certain rights. ECHR, above note 20, Art. 10(2).

74 ECtHR, *Hachette Filipacchi*, above note 72, para. 42; ECtHR, *MGN*, above note 70, para. 143; ECtHR, *Rubio Dosamantes v. Spain*, Case No. 20996/10, Judgment (Third Section), 21 February 2017, para. 34.

75 In this regard, “[t]he Court reiterates in this connection that the public interest cannot be reduced to the public’s ... or to the reader’s wish for sensationalism or even voyeurism”. ECtHR, *Couderc and Hacette Filipacchi Associés v. France*, Case No. 40454/07, Judgment (Grand Chamber), 10 November 2015, para. 101.

the photo or report “contributed to a factual debate”.⁷⁶ If not, the material in question is considered to be aimed merely at satisfying public curiosity.

The publishing outlet’s duties and responsibilities connected with the choice of publication medium are also influenced by the “situation and technical means”⁷⁷ used, as well as by the “potential impact of those means”, which “must be taken into account when considering the proportionality of the interference”.⁷⁸ For instance, in a case concerning the publication of a photo showing a French prefect’s lifeless body, the ECtHR determined that the circumstances of the prefect’s death, which were violent and traumatic for the family, should have been considered.⁷⁹ The publication medium was also scrutinized, and the Court reached the conclusion that the publication of the picture in a widely distributed magazine⁸⁰ intensified the trauma connected with the death of the victim. Therefore, it can be argued that the publication of a photo on social media would entail a heightened threshold of responsibility and duty, due to the inherent characteristics of the technical means of publication. This is particularly true given that images shared online are not only exposed to a vast audience but also enter a state of potentially perpetual circulation.⁸¹ The obligation becomes more pronounced when the circumstances depicted in the image are especially traumatic or humiliating, as the way an individual is represented in an image is a significant factor in the balancing test, alongside how the image is published.

A further element that, according to the ECtHR jurisprudence, raises the threshold of due diligence in publication decisions is the absence of consent for publication. On this point, the ECtHR offers valuable insight, despite not directly or definitively solving the issue. The Court has held that when the press intends to publish a photograph without the consent of the persons concerned, it must provide evidence of the circumstances under which the photograph was taken. This allows the relevant courts or authorities to assess whether the publication respects the legitimate expectations of privacy held by the person depicted⁸² or, in the case of the dead, by their family members and next of kin.

In sum, IHRL seems to provide numerous elements that can extend the reasoning advanced in this article. The reference to public curiosity, and the imperative to protect individuals from it – especially where the ECtHR narrows freedom of expression in cases involving private individuals and content serving only public curiosity – is particularly significant, because it suggests that the concept could

76 ECtHR, *Von Hannover*, above note 69, paras 33, 114.

77 ECtHR, *Hachette Filipacchi*, above note 72, para. 42.

78 *Ibid.*, para. 42.

79 *Ibid.*, para. 48.

80 *Ibid.*, para. 42: “when photographs are published the protection of the rights and reputation of others takes on particular importance, especially when it involves large-scale dissemination of images containing very personal or even intimate ‘information’ about an individual”.

81 “While videos of this nature may often be removed by platforms for violating their terms of use, it is virtually impossible to stop the footage from being reshared.” S. Zarmsky, above note 5.

82 ECtHR, *Von Hannover*, above note 69, para. 97.

be meaningfully expanded beyond the categories of PoWs and protected persons in the sense of GC IV to encompass contexts involving non-international armed conflicts (NIACs) and scenarios involving non-State actors. Furthermore, the flexible threshold envisioned by the ECtHR in defining responsibility within the framework of freedom of expression is particularly relevant. This threshold, influenced by situational and technical factors as well as the legitimate expectations of privacy of the individual depicted, could be relevant to cases involving the dissemination of particularly graphic or humiliating photographs on media platforms.

Resorting to IHRL might, however, have its limits. The main one is that unlike in IHL, which attributes inherent dignity to the dead, in the field of international human rights the obligation to respect and protect those who have lost their legal capacity upon death seems to be derived from the rights of surviving next of kin. The lack of recognition of the residual rights of the deceased person, together with the plausible absence of surviving or trackable close relatives in contexts of war, implies a significant protective gap.

However, especially in the context of the *post-mortem* protection of personal data and related privacy rights, the question increasingly arises⁸³ as to how to protect deceased individuals and their extra-patrimonial rights.⁸⁴ In various legal systems, such rights can be subject to acquisition *iure proprio* by the deceased's successors, who may exercise them limitedly, in the event of injury and for matters of protection of the memory or image of the deceased.⁸⁵ While this affords a certain degree of protection, it usually implies that these rights are exercised in the capacity of those affected or harmed by the tortious action against the deceased, rather than directly exercised for the protection of the residual rights of the person concerned.⁸⁶

Similarly, most of the international jurisprudence seems to confirm that dignity and the rights ensuing therefrom belong to the surviving family members. This interpretation is confirmed in ECtHR case law,⁸⁷ but the emphasis on survivors is not unique to the latter Court and rather reflects a broader consensus among

83 Studies on *post-mortem* protection of personality and privacy are emerging since the majority of the material preserved in digital archives relates to deceased people. Mikuláš Čtvrtník, "Personality Rights, Privacy, and *Post-Mortem* Privacy Protection in Archives: International Comparison, Germany and 'Protection of Legitimate Interests'", in Mikuláš Čtvrtník, *Archives and Records: Privacy, Personality Rights, and Access*, Palgrave Macmillan, Cham, 2023, p. 21. See also Anita L. Allen and Jennifer E. Rothman, "Postmortem Privacy", *Michigan Law Review*, Vol. 123, No. 2, 2024.

84 Unlike *post-mortem* publicity rights, which are commercial in nature and typically transferable as part of the deceased's estate (such as under the so-called California Celebrities Rights Act, where the right of publicity can be enforced for up to seventy years after death), moral or personality rights related to data and image protection are generally non-transferable and exercised by successors only in a limited, dignitary capacity.

85 See e.g. Repubblica Italiana, Codice Civile, Art. 10.

86 See e.g. République Française, Loi du 29 juillet 1881 sur la liberté de la presse, Art. 34.

87 ECtHR, *Polat v. Austria*, Case No. 12886/16, Judgment (Fourth Section), 20 July 2021, para. 48: "[T]he exercise of Article 8 rights ... pertains, predominantly, to relationships between living human beings. However, the possibility cannot be excluded that respect for family and private life extends to certain situations after death ..., [falling] within the scope of the 'private life' of the surviving family members."

other relevant human rights adjudicatory bodies. For instance, both the Human Rights Committee⁸⁸ and the Inter-American Court of Human Rights (IACtHR)⁸⁹ have determined that the disrespectful treatment of a deceased individual generally constitutes a form of ill-treatment inflicted upon their relatives.

However, more recent developments, often engaging interrelated concepts of the right to privacy, the right to be forgotten and personality rights, appear to favour the interpretation that the concept of inherent human dignity can be applied posthumously.⁹⁰ For instance, while the ECtHR has generally found violations of privacy only when the offence against the deceased significantly impacts the rights of a living applicant,⁹¹ in a recent reasoning it appears to suggest that the right to be forgotten might directly apply to a deceased person, while eventually being exercised by a next of kin.⁹² Similarly, the Court pointed to the inherent dignity of a dead person in a defamation case by stating that insults directed to the deceased were contradicting “respect for human beings” and constituted an “attack on the core of personality rights”.⁹³ While the Court refrained from fully recognizing the protection of the reputation of the dead person, this seems to point to a plausible legal development with respect to the trend observed in previous case law.

Similarly, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in a recent report dedicated to human rights and the treatment of the dead, has noted that there is a growing recognition within national legal frameworks that inherent human dignity does not terminate upon death.⁹⁴ In the report, the Special Rapporteur mentions various and diverse jurisdictions, such as Chile, France, India and Kenya, that explicitly acknowledge this notion through laws or jurisprudence. Notably, German courts have affirmed that deceased individuals possess posthumous rights, using the concept of dignity to protect personality rights such as the right not to be defamed.⁹⁵ Similarly, the Spanish Ley Orgánica

88 “The Committee has indicated that the disrespectful treatment of remains may amount to cruel, inhuman or degrading treatment of the family of the deceased.” *Report of the Special Rapporteur*, above note 24, para. 11.

89 IACtHR, *Moiwana Community v. Suriname*, Series C, No. 124, Judgment, 15 June 2005, paras 99–103; IACtHR, *Blake v. Guatemala*, Series C, No. 48, Judgment, 24 January 1998, paras 115–116.

90 Claire Moon, “What Remains? Human Rights After Death”, in Kirsty Squires, David Errickson and Nicholas Márquez-Grant (eds), *Ethical Approaches to Human Remains: A Global Challenge in Bioarchaeology and Forensic Anthropology*, Springer, Cham, 2019; W. Wels, above note 25, p. 35.

91 Federica Casarosa, “The (Posthumous) Exercise of the Right to Be Forgotten”, *MediaLaws: Rivista di Diritto dei Media*, Vol. 3/2022, 2023, p. 292.

92 ECtHR, *M. L.*, above note 65.

93 ECtHR, *Genner v. Austria*, Case No. 55495/08, 12 January 2016, para. 45.

94 *Report of the Special Rapporteur*, above note 24, paras 8, 18. See also Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives*, Cambridge University Press, Cambridge, 2011; Kirsten Rabe Smolensky, “Rights of the Dead”, *Hofstra Law Review*, Vol. 37, No. 3, 2009.

95 Bundesverfassungsgericht, *Mephisto*, BVerfGE 30, 173, 1971, para 5. The German Federal Constitutional Court (Bundesverfassungsgericht, BVerfGE) has held that the protection of human dignity under Article 1(1) of the Basic Law for the Federal Republic of Germany extends beyond death. Similarly, in a recent pronouncement, the BVerfGE reaffirmed that a violation of the dignity of the deceased arises when their moral, personal and social value, shaped by their life’s work, is infringed. BVerfGE, *Pressemitteilung Nr. 108/2022*, 15 December 2022, available at: www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2022/bvg22-108.html?nn=68080.

1/1982 mandates that, although the death of a subject would extinguish his or her personality rights, the memory of the deceased constitutes an extension of those rights which is protected by the law. Therefore, legal protection of the memory of the deceased is triggered only when an injury to that memory occurs, at which point either a next of kin or the Public Prosecutor's Office may intervene to seek redress.⁹⁶ Finally, in India, it is a well-established legal principle that the rights to life, fair treatment and dignity, enshrined in Article 21 of the country's Constitution, extend not only to living individuals but also to their deceased bodies. Among the basic principles for upholding the dignity of the dead in India, there is the right to be protected from defamation as well as the right to privacy.⁹⁷ Notably, many of these national laws draw on the language of human rights, particularly in relation to privacy and personality rights.

The trend outlined by the Special Rapporteur has a twofold significance. First, it broadens the analytical scope beyond the practice of the ECtHR, pointing to a potential normative shift towards a more expansive interpretation of posthumous rights. Second, the invocation of human rights language by States may point towards the emergence of an *opinio juris* supporting the recognition of the dignity of the dead under the framework of IHRL.

In conclusion, recent developments in international and national law suggest an evolution beyond the focus on survivors and toward an (albeit embryonic) recognition of the inherent dignity of the deceased through privacy and personality rights. Divergent interpretations persist across jurisdictions, but the emergence of this concept in different legal systems may signal a developing *opinio juris* recognizing the enduring dignity of the deceased and allowing heightened protection thereof.⁹⁸

Turning to international criminal law: Changing meanings of humiliating and degrading treatment of the war dead in the digital era

ICL provides us with the third lens through which to look at the issue under discussion. The Rome Statute of the ICC codifies the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment.⁹⁹ The dissemination of footage has been confirmed by the ICC to possibly constitute "cruel, dehumanizing,

96 Gobierno de Espana, Ley Orgánica 1/1982 de 5 de mayo de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen, Arts 4–6.

97 National Human Rights Commission, India, *Advisory for Upholding the Dignity and Protecting the Rights of the Dead*, New Delhi, 14 May 2021, pp. 2–3.

98 Supreme Court of Sweden, *Saeed*, above note 46, para. 25: "Support for the notion that dead persons are to be treated as 'persons' in conjunction with offences which have their origins in international humanitarian law and war crimes in accordance with Article 8(2)(c)(ii) of the Rome Statute is also found in case law of the national courts of States."

99 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Arts 8(2)(b)(xxi), 8(2)(c)(ii). The former refers to crimes committed during IACs, while the latter refers to those happening in NIACs.

and degrading” treatment.¹⁰⁰ Similarly, lack of respect for the dead can fall within the scope of this war crime. More precisely, the *Elements of Crimes* clarify that the term “persons” found in Articles 8(2)(b)(xxi) and 8(2)(c)(ii) of the Rome Statute extends to deceased individuals, as “the victim need not personally be aware of the existence of the humiliation or degradation or other violation”.¹⁰¹ This interpretation is pivotal as it establishes that outrages upon personal dignity can be committed against unconscious individuals or the deceased. It ensures the protection of dignity regardless of the victim’s awareness, thereby bridging the protection gap found in IHRL, which we have found to be skewed towards the survivors. An additional element, concurrently introduced in the *Elements of Crimes*, is that of the victim’s cultural background, which is recognized as pivotal in assessing whether an act constitutes an outrage upon personal dignity.¹⁰² Notably, this recognition appears in conjunction with the above-mentioned extension of the term “person” to include the deceased, thus creating a direct link between outrages upon the dead and cultural sensibilities. This connection is not incidental, as in many societies and communities, certain treatments of the dead¹⁰³ – including photographing of human remains or, even more so, making such images publicly viewable¹⁰⁴ – are considered unethical, insensitive and deeply harmful.¹⁰⁵

While ICL arguably provides valuable insights, it should be noted that criminal responsibility entails a high threshold. For this reason, the mere publication or sharing of images of the deceased is unlikely to constitute an international crime by itself. The relevant case law focuses on the enemy party disseminating video and photographic materials depicting victims from the opposing side and with the specific intent to humiliate the dead.¹⁰⁶ The ICC has considered the posting and sharing of visual materials as adding to the perpetrator’s intent to further degrade the victims, as seen in the *Al Hassan* and *Al Werfalli* cases.¹⁰⁷ Recent domestic

100 ICC, *Situation in Libya in the Case of the Prosecutor v. Mahmoud Mustafa Busayf*, ICC-01/11-01/17, Second Warrant of Arrest (Pre-Trial Chamber I), 4 July 2018, para. 31.

101 ICC, *Elements of Crimes*, UN Doc. PCNICC/2000/1/Add.2, 2 November 2000, fn. 49, 57.

102 *Ibid.*

103 See e.g. Ahmed Al-Dawoody, “Management of the Dead from the Islamic Law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics”, *International Review of the Red Cross*, Vol. 99, No. 2, 2017.

104 Chip Colwell, “Is It Ever OK to Publish Photographs of Human Remains?”, *Sapiens*, 11 March 2020, available at: www.sapiens.org/culture/photographing-human-remains/; John Harries et al., “Exposure: The Ethics of Making, Sharing, and Displaying Photographs of Human Remains”, *Human Remains and Violence: An Interdisciplinary Journal*, Vol. 4, No. 1, 2018.

105 “Posting [a] picture of a deceased is *haram* because it can mortify the deceased and may hurt the feelings of his family members. Especially when the condition of the deceased is inappropriate like when his *awrah* is exposed or when his organs are detached from his body because Islam forbids its *ummah* to expose the *awrah* of others and this may disgrace him.” Mardia Marzi, “Irsyad Al-Fatwa Series 519: The Ruling of Posting Pictures of a Deceased”, Mufti of Federal Territory’s Office, 11 June 2020, available at: www.muftiwp.gov.my/en/artikel/irsyad-fatwa/irsyad-fatwa-umum-cat/4538-irsyad-al-fatwa-series-519-the-ruling-of-posting-pictures-of-a-deceased; C. Colwell, above note 104.

106 S. Ashbridge, above note 4.

107 Sarah Zarmisky, “Is International Criminal Law Ready to Accommodate Online Harm? Challenges and Opportunities”, *Journal of International Criminal Justice*, Vol. 22, No. 1, 2024, pp. 176–177.

jurisprudence under universal jurisdiction laws in Germany, Sweden, Finland and the Netherlands has addressed the issue of photographing war dead as constituting a war crime under Articles 8(2)(b)(xxi) and 8(2)(c)(ii) of the Rome Statute. In these cases, courts have found defendants guilty of humiliating and degrading treatment for taking or disseminating images of deceased individuals in conflict settings. While a more comprehensive analysis is provided by Mischa Gureghian Hall in this issue of the *Review*,¹⁰⁸ it is relevant to highlight, for present purposes, the growing number of cases in which defendants have been convicted of war crimes for posing with corpses and/or sharing such images online,¹⁰⁹ even where they could not be directly linked to the underlying acts of mutilation or mistreatment of the corpses. Notably, in most cases, the essence of the humiliating and degrading treatment has been found in the very act of exposing the deceased to the public gaze. Importantly, this harm does not seem to be construed as a wrong against the family or next of kin, but rather as a violation of the inherent honour and dignity of the deceased as persisting beyond death. This approach underscores a heightened standard of inherent dignity attributed to victims and to the visual representation of their bodies.

However, there is a higher threshold when it comes to the *mens rea* element,¹¹⁰ as perpetrators are generally found guilty when posing with mutilated bodies or when mocking them by, for example, “broadly smiling and displaying a victory sign” or “putting one foot on the victim”.¹¹¹ This *mens rea* standard seems to be higher than the knowledge standard established by the International Criminal Tribunal for the former Yugoslavia (ICTY) in relation to the crime of outrages upon personal dignity.¹¹² Beyond the mere taking and sharing of the picture, the humiliation is proven by factors such as the explicit mocking of the victim, thus suggesting a *mens rea* standard of intent, which is, of meaning to cause that consequence, in the wording of Article 30 of the Rome Statute.¹¹³

The OSINT conundrum

As illustrated by the cases presented in the previous section, images of the dead are often both evidence of and constitute the material act of the crime. This duality

108 Mischa Gureghian Hall, “The War Crime of Outrages against the Personal Dignity of the Dead: Legal Basis, Evolution, and Elements”, *International Review of the Red Cross*, Vol. 107, No. 929, 2025. For a concise overview of the cases, see Eurojust Genocide Network, *Prosecuting War Crimes of Outrage upon Personal Dignity Based on Evidence from Open Sources – Legal Framework and Recent Developments in the Member States of the European Union*, The Hague, February 2018.

109 It is worth noting that German courts have tended to focus more on the act of posing with the deceased as constitutive of the *actus reus*, whereas courts in Finland, Sweden and the Netherlands have conceptualized the criminal conduct as arising from the act of posting the images, or from the combination of both posing and posting. See M. Gureghian Hall, above note 108.

110 T. Rodenhäuser, above note 51, p. 563.

111 Eurojust Genocide Network, above note 108, pp. 5–10.

112 ICTY, *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case Nos IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, paras 164–166. In this judgment the Appeals Chamber confirmed the analysis previously made by the Trial Chamber, according to which the crime of outrages upon personal dignity does not require a specific intent to humiliate.

113 Rome Statute, above note 99, Art. 30.

raises a question relating to OSINT investigations, which rely on publicly available data such as geospatial information, satellite imagery, social media posts, think tank studies, and information available on traditional mass media and, generally, on the internet¹¹⁴ to conduct investigations on grave violations of IHRL or IHL. A dedicated section is warranted here because OSINT is generally employed in the context of accountability processes that are often relevant to, but not limited to, ICL. This brief examination of OSINT is also aimed at underscoring that a deep and critical reflection on both the content and manner of visual representation is needed to make sense of emerging practices.

On the one hand, OSINT investigations have proven invaluable for gathering key evidence and for bypassing traditional information gatekeepers.¹¹⁵ On the other hand, they pose crucial challenges in terms of privacy,¹¹⁶ reliability¹¹⁷ and admissibility,¹¹⁸ making the use of such evidence fraught with challenges. As noticed by Zarmsky, “[m]uch of the literature that focuses on the intersection between new technologies and human rights has concentrated on how technology can be used to enhance accountability” and has overlooked how “technology enables novel forms of perpetration of existing international crimes or entirely new crimes”.¹¹⁹ It is noteworthy that the posting of pictures with the intent of circulating evidence by a party or outlet other than that of the enemy¹²⁰ is disincentivized as there exist other more suitable and effective methods to reach the same aim.¹²¹ Similarly, the *Berkeley Protocol on Digital Open Source Investigations* sets out some ethical considerations to be followed when conducting OSINT investigations. In particular, it suggests that

adherence to the principle of dignity may also affect what is shared publicly about an investigation, including in writing and in any visual materials – for example, not showing the full extent of suffering or violence if it is not necessary to do so.¹²²

114 Office of the United Nations High Commissioner for Human Rights and Human Rights Center at the University of California, Berkeley, School of Law, *Berkeley Protocol on Digital Open Source Investigations*, New York and Geneva, 2022 (Berkeley Protocol), pp. 6–8.

115 The ubiquity of twenty-first-century digital technologies allows surveillance and monitoring by non-State actors such as human rights observers, journalists, and citizens’ networks monitoring war crimes. Matthijs Maas, *AI, Governance Displacement, and the (De)Fragmentation of International Law*, Conference Paper ISA2021 – Theoretical Perspectives on International Law, March 2021, p. 20.

116 Berkeley Protocol, above note 114, pp. 27–28.

117 *Ibid.*, p. 8.

118 *Ibid.*, pp. 25–27.

119 S. Zarmsky, above note 107, p. 170.

120 A third-country media outlet, non-governmental organization or government may justify publication as an effort to denounce the crime and foster accountability. See e.g. William Casey Biggerstaff, “Ukraine Symposium – Photos of the Dead”, *Articles of War*, 29 August 2022, available at: <https://lieber.westpoint.edu/photos-of-dead/>.

121 While it has been argued that publication of images of PoWs may help to highlight their conditions of detention and to identify responsible parties in order to prevent abuse, GC III offers more effective mechanisms to reach the same aims: see ICRC Commentary on GC III, above note 43, para. 1625. Similarly, the ICC’s Office of the Prosecutor accepts information and evidence submissions without requiring the sender to be a victim or witness: see Rome Statute, above note 99, Art. 15.

122 Berkeley Protocol, above note 114, p. 14.

Technological advancements, including artificial intelligence and deepfakes, pose significant threats to the reliability of digital evidence. The erosion of epistemological foundations in journalism and human rights investigations could render justice processes more difficult and resource-intensive. As the volume of online information grows, so too does the challenge of verifying the authenticity of images and videos, which are increasingly susceptible to manipulation, potentially rendering OSINT investigations inoperable. Indeed, one of the greatest challenges for using OSINT materials to build a case and prosecute is posed by the verification of relevant material within an increasing volume of online information, especially photographs and videos captured on smartphones and other mobile devices, some of which may be compromised or misattributed.¹²³

Conclusion: On the evolving notions of inherent dignity and frameworks for protection

This article has explored how contemporary transformations in the relationship between war, death and photography may influence the legal rules protecting the dead in armed conflict. By examining this issue through the lenses of IHL, IHRL as it applies during armed conflict and ICL, and by employing a systemic integrative approach,¹²⁴ the analysis has aimed to assess whether and how the normative landscape surrounding the protection of the inherent dignity of the deceased in armed conflict is shifting. The inquiry has revealed that, although the protection of the dead takes on distinct nuances across the three legal regimes, there is a discernible trend towards increased sensitivity regarding the use and dissemination of images of the dead and, eventually, a broader normative emphasis on their inherent dignity. It appears that recent digital advancements in photography and image sharing have catalyzed this evolution, presenting both challenges and opportunities for legal development. Ultimately, this evolution reflects broader questions about how societies regulate the visibility of the vulnerable “other” and how legal systems respond to shifting cultural practices of representation, memory and respect in times of war.

The approach suggested in this article has aimed at integrating the strength of three different normative frameworks, which differ in their legal, social and historical objectives and premises, in order to respond to the challenges posed by digital media. It has been found that IHL offers foundational protections, particularly during IACs, including a prohibition against exposing PoWs and other protected persons to public curiosity. Rather than undermining existing legal obligations, the evolution of visual media appears to have reinforced them. This is particularly evident in the updated 2020 ICRC Commentary on GC III, which explicitly extends the application of the principle of dignity to the online sphere, including the internet

¹²³ *Ibid.*, Foreword.

¹²⁴ Vienna Convention on the Law of Treaties, 1115 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 31(3)(c).

and social media platforms. However, while the circulation of images may be justified by an overriding public interest, the latter concept remains insufficiently defined within the framework of IHL. Moreover, IHL's emphasis on preserving anonymity, for instance through the blurring of images and faces, does not adequately address broader concerns regarding the context of publication, the modes of representation or the potential emotional and psychological impact of imagery.

This gap brings us to IHRL. An analysis of ECtHR jurisprudence has demonstrated the requirement, for States party to the ECHR, of conducting a contextual assessment of image publication. This includes consideration of whether representations risk exacerbating trauma or humiliation, as well as attention to the specific medium of dissemination, particularly given the vast reach and permanence associated with social media platforms. The ECtHR case law further emphasizes the necessity of obtaining consent prior to publication; in cases where consent is not feasible, publishers must be able to justify the use of such images by providing information about the circumstances under which they were obtained, thereby enabling an assessment of whether the deceased's and their family members' legitimate expectations of privacy and dignity have been respected. This framework assumes particular significance for actors operating in third States, especially media outlets that are not directly bound by IHL but are nonetheless subject to domestic legal standards, informed by IHRL obligations and influenced by public expectations. Nevertheless, despite emerging jurisprudence and doctrinal developments recognizing certain residual rights of the deceased, the prevailing focus remains on the rights of survivors as primary beneficiaries, thus revealing a structural limitation in fully protecting posthumous dignity under human rights law.

In contrast, ICL has long recognized the inherent dignity of the deceased. The prohibition of outrages upon personal dignity under ICL encompasses acts that may occur irrespective of the victim's awareness, thus reflecting a robust commitment to posthumous respect. Developments in digital media have further influenced this field, with courts increasingly relying on images of the deceased both as evidentiary material and, in a growing number of cases, as the *corpus delicti* itself. Nevertheless, ICL's scope is confined to instances involving deliberate humiliation by identifiable perpetrators, thereby excluding the broader array of public, private and institutional actors involved in the digital circulation of such images.

Finally, the practice of open-source intelligence introduces an important dimension. While OSINT has proven instrumental in documenting violations and supporting accountability mechanisms, it simultaneously raises complex ethical and legal concerns. Moreover, it has been invoked as a justification for the dissemination of images depicting deceased individuals. The brief discussion of OSINT in this paper highlights the need for a critical and principled approach to the practice. Specifically, it suggests that emerging standards in this field should prioritize verification and reporting mechanisms that avoid public dissemination when such dissemination would contravene privacy and dignity protections. In this way, the question of what is shown and how it is shown becomes central to shaping both the evidentiary and normative dimensions of this evolving practice.

In closing, this paper has aimed at drawing the attention of international legal scholars to the power of images in shaping societal hierarchies and reinforcing the power dynamics¹²⁵ underlying both IACs and NIACs. Visual media does not merely nor objectively document conflict; rather, it actively participates in the construction of meaning and legitimacy, often prompting normative shifts. This happens either through gradual legal evolution or by exposing tensions within existing legal frameworks when they no longer align with contemporary realities. In an era where the boundaries between information, representation and manipulation are increasingly blurred, it becomes essential to critically engage with the processes through which images are produced, circulated and consumed. Doing so is essential not only for understanding their ethical and political implications but also for shaping the legal obligations that must accompany their use, particularly in contexts marked by violence, vulnerability and contested narratives.

125 James W. Carey, *Communication as Culture*, 2nd ed., Routledge, New York, 2008.