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CHAPTER 2

The posthumous dignity of dead persons

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2.1 Introduction: generations and posthumous dignity

Observing humanity from a long-term perspective, we can easily see that the chain of succeeding generations forms a single *historical community*. And since these generations have passed and will pass their heritage on to each other, we can add that they also form a single *moral community*: if all the living together constitute “humanity,” then the living, the dead, and the unborn together constitute “humanity at large.” But there are notable differences among these three groups.

In 2020, demographers Carl Haub and Toshiko Kaneda calculated the number of people that have ever lived on earth. They guesstimated that the total number of individuals who have been born since the dawn of humanity is 108 billion. Of these, nearly 8 billion are alive and about 100 billion dead (Toshiko and Haub 2020). Others have recently calculated the number of future people on earth. If we look at the next 50 000 years only, and assume a birth rate over that period that equals the rate in this century, the unborn would count around 6.75 trillion people (Krznaric 2020, pp. 82–83, 264).

On top of these vast demographic differences between the dead, the living, and the unborn, there are three striking asymmetries between them. The dead and the unborn do not exist in the same sense as the living as the former are no more alive and the latter not yet alive. Moral principles cover not only the living, that is, people who can reciprocate or can harm and benefit each other, but also the dead and the unborn (Parfit 1984, p. 357; White 1984, pp. 60–62, 86–89; Meyer 2021, § 1). The latter, however, are vulnerable in that they are unable to

represent and defend themselves. Therefore, we need to speak about the living in terms of rights and duties and about the dead and the unborn in terms of respect and protection. This first asymmetry is already reflected in the fact that while there is a *Universal Declaration of Human Rights* for the living, no such thing exists for the dead or the unborn.

UNESCO drafted a declaration of duties of the living to the unborn in 1997 (UNESCO 1997), and this author, inspired by it, drew up a declaration of duties of the living to the dead in 2004 (De Baets 2004).¹ These declarations of duties to the unborn and the dead, respectively, show a second asymmetry because they do not mirror each other; there is even hardly any overlap between them. Why? The dead have existed and were once living individuals with own personalities; therefore, they are, in principle, individually identifiable. The unborn lack this trait. The declaration about past persons is cast in individual terms, whereas the declaration about future persons is written in collective and abstract terms (Prior 1978, p. 171). And there is even a third asymmetry. In contrast to the future that is unknown but open ended and for which we can make plans, the past is irreversible and unalterable (see also Parfit 1984, pp. 149–186).² While we can harm or benefit future people, albeit indirectly, our capacity to harm or benefit the dead is, strictly speaking, nonexistent. Moral questions regarding the dead may therefore look less urgent.

In the following, I will study the community of the 100 billion dead and build a theory on how to approach them best. My thesis is the posthumous dignity thesis: the dead should be viewed as *past* human beings who have posthumous dignity.³ My argument provides evidence for posthumous dignity and identifies its constituent elements. It shows that the posthumous dignity of the dead is the reason why the living have duties of respect and protection toward the dead. It operationalizes these two duties into more specific ones. I also discuss some disputes to which posthumous dignity gives rise, the breaches it can suffer, and the ways to repair them.

I must add from the outset that in defending the thesis, my approach is scientific. Unlike many others, I do not assume that the dead have agency,⁴ and I avoid agential concepts (such as afterlife, immortality, spirits, or souls). The burden of proof for the agency thesis is on those who claim it, not on those who, as I do, find it unconvincing. Nevertheless, I do think that the dead are influential in two ways. First, they *influence* the living not only substantially (as remains) but also genetically (as offspring), materially (as legacy), and biographically (as memories and life stories). Second, the fact that many *believe* that the dead have agency is in itself a major form by which the dead are influential. I hold that the posthumous dignity thesis, even with its flaws and unresolved puzzles, is more consistent than other theories about the dead.⁵

2.2 The dead and posthumous dignity

The term “the dead” is not self-explanatory. The dead are not well described as merely dead bodies. A dead body is not an ordinary object, neither from a medical nor from a legal perspective. One of the guiding medical principles is: “Purchasing . . . cells, tissues or organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned.”⁶ And legally, relatives of the dead do not *own* the latter’s body – which is considered a *res nullius* (a thing of nobody) or a *nullius in bonis* (among nobody’s property) – but they have a right to custody over it between death and burial.⁷ It follows that “*who* are the dead” is a better question than “*what* are the dead.”

The proper perspective is to compare and contrast the dead not to objects but to human beings. Human beings are not only bodies but also persons, not only biology but also psychology. The bodily and the personal are dual aspects of the dead also. However, in contrast to what many philosophers following John Locke have done, I will not make hard distinctions between the concept of human beings and the concept of persons because in the dominion of the dead, such distinctions are merely important in a heuristic and epistemological sense, not in an ontological sense.⁸ Therefore, I will use “persons” as a synonym for “human beings” here. Hence, when we compare human beings – or persons – to the dead, the crucial difference is that human beings have interests, needs, rights, and duties and make claims and choices, while the dead are incapable of having or making these, either now or in the future. The crucial similarity is that without exception all the dead *have been* human beings (and persons). The dead are no longer human beings (or persons) but are still *reminiscent* of them, marking them with powerful symbolism (Feinberg 1985, pp. 53–57, 70–71, 94–95, 116–117). It follows that there is only one possible definition for the dead: *the dead are past human beings or past persons*.

My definition of the dead has one important consequence: since the dead are not human beings, they have neither full nor residual human rights (and even no rights at all).⁹ That is the reason why no *Universal Declaration of Human Rights of the Dead* exists: it is impossible by definition. Equally important, if the dead do not have human rights, they are not covered by the core concept uniting these rights, namely, human dignity.¹⁰

We need another moral language to talk about the dead. This language is one of duties on the part of living based on the “fact” that the dead have posthumous dignity. The fact that the living have these duties toward the dead does not mean that the dead are entitled to corresponding rights. This position does not imply, however, that the rights that individuals exercise while alive do not have legal consequences after they die nor that there are no claims related to the dead; quite the contrary.

With its dual claim that the dead do not have rights and the living have duties toward the dead, the posthumous dignity thesis is situated halfway between the legal maxim of *actio personalis moritur cum persona* (“personal action dies with the person”) in common law and the dignitarian approach in civil law. The thesis rejects two extreme and mutually exclusive positions: one that sees the dead as mere bodies without any influence and one that allocates full agency to the dead with own lives separate from the living. My thesis is neither a strategy to delay the inevitable conclusion that death equals destruction nor a door to full-scale metaphysical realities. Rather, it occupies a middle ground, which is compatible with both science and minimalist but quasi-universally held conceptions of dignity and respect.

2.3 Evidence for posthumous dignity

It is impossible to prove conclusively the existence of posthumous dignity as a dimension of the dead. The required evidence is not empirical in the usual, experiential sense because it is out of the question to ask the dead whether they experience such a thing as posthumous dignity. Rather, it is *phenomenological*: one can observe posthumous dignity only indirectly through the prism of its consequence (respect) or its opposite (indignity). Evaluating attitudes of respect and indignity toward the dead yields the following set of facts.

In anthropology, we see that quasi-universally the living *do* respect the dead and believe that the latter have dignity. For many, respect for the dead is a core value of life. In archaeology, traces of funerary rites are seen as proof of the presence of human activity. In biology, we notice that although grief is a feature of several animals, only human beings develop a sustained and deeply ritual relationship with their dead. In the legal domain, all countries have elaborated burial and cemetery regulations. In international humanitarian law, the universally ratified Geneva Conventions prescribe that human remains of the war dead should be respected. Infringements of posthumous dignity serve as powerful proof *a contrario* for its existence. If the reasonable person is the standard, then we can safely say that the disrespectful treatment of dead bodies and the desecration of burial sites meet with quasi-universal indignation, that is, are generally recognized as outrages. The International Criminal Court has stipulated that, when occurring in war, such “outrages upon the dignity of dead persons” are war crimes.¹¹

The evidence thus shows that the dead are quasi-universally approached and treated with respect – with the important caveat that the evidence is far more compelling for recent than for remote times. I shall discuss this aspect later, but for now suffice it to say that this caveat cannot avoid the further conclusion from

this brief phenomenological analysis that the best way to understand the quasi-universal respect for the dead is to *postulate* the posthumous dignity of the dead.¹²

2.4 Duties flowing from posthumous dignity

From our quest for evidence, we concluded that the dead have posthumous dignity, and therefore deserve respect and protection. Since the dead *deserve* respect and protection, we can say that respect and protection are duties.¹³ But who exactly are those who hold the duties and those who benefit from them? Here, we should sharply distinguish respect from protection. While all the living without exception hold the duty to respect the dead, this is not the case with the duty to protect: given practical limits (see, e.g. Barker 2020), only specific groups hold the latter duty.¹⁴ Indeed, in discussing the protection of posthumous dignity, we should differentiate between thick and thin relations. The dead with whom we have thick relations – the few we admire and love – can summon our protection; the others can command our respect. In thick relations, duties of protection are individual; in thin relations, they are collective – as embodied in archives, museums, public commemorations, and the like. This essential distinction is the reason why I avoid speaking about a “duty of care for the dead” as many authors do: “care” conflates “respect” and “protection.”

Specific groups act or are entitled to act as representatives of the dead and to perform duties of protection. To begin with, there are the dead themselves when they were alive: some designed a strategy for their afterlife preferences and posthumous legacy (including their posthumous digital legacy) (see, e.g. Zhao 2016). Their family members, friends, and wider solidarity networks usually take over that role when they die. This is the inner circle of concerned individuals. In the next circle, we find various community caretakers. Depending on the tasks at hand, it includes executors of wills, estate administrators, religious counselors, forensic scientists, and the medical, legal, or historical professions.¹⁵ In a third circle, we reach the classical trias of state duties: a state duty to respect (the state should show respect for the dead itself); a state duty to protect (the state should prevent third parties from infringing the duties to the dead); and a state duty to fulfill (the state should facilitate the discharge of duties by its citizens by means of legislative, political, cultural, and other measures). At the official level, a panoply of guardians is available: governments and parliaments promulgating laws and regulations for cemeteries or archives, in the first place, but also the judiciary and enquiry commissions. At the international level, courts guided by custom and treaty are in charge. Guardianship to protect the dead is never straightforward: the wishes of the dead are often misinterpreted, intentionally or not.¹⁶

Now that the duty-bearers are identified, who is benefiting from these duties? The dead are not the beneficiaries of the duties of respect and protection in any real sense as they are unaware of any such duties performed on their behalf: they are beneficiaries *in the perception* of the living. To the extent that the duties to the dead are fulfilled, they comfort the latter's surviving near and dear and of society at large; to the extent that they are breached, the relatives suffer, others are outraged, and the overall trust in a decent posthumous treatment is diminished. So much so that we can say that society in its entirety is the main beneficiary of the duties to the dead.

The general duties of respect and protection can be broken down in more specific duties. A "universal declaration of duties of the living to the dead" would look as follows:

UNIVERSAL DECLARATION OF THE DUTIES OF THE LIVING TO THE DEAD

Considering that the dead have posthumous dignity, they deserve respect and protection as specified in the following duties to be discharged in a culture-sensitive manner:

Identity-related duties to the dead

Art. 1 IDENTITY: The duty to search for and identify the dead.

Body-related duties to the dead

Art. 2 BODY: The duty to protect the physical integrity of the dead.

Art. 3 FUNERAL: The duty to honor the dead with last rites.

Art. 4 DISPOSAL: The duty to bury or cremate the dead decently and not to disturb their resting places.

Personality-related duties to the dead

Art. 5 IMAGE: The duty to show the dead only after balancing their posthumous privacy and reputation against the public interest.

Art. 6 SPEECH: The duty to comment on the dead only after balancing their posthumous privacy and reputation against the public interest.

Legacy-related duties to the dead

Art. 7 WILL: The duty to respect the will of the dead regarding their reasonable body-related wishes and their property.

Art. 8 HERITAGE: The duty to safeguard the heritage of the dead.

Rights needed by the living when performing duties to the dead

Art. 9 HISTORY: The right to know the truth about past human rights violations.

Art. 10 MEMORY: The right to mourn and commemorate.

The duties to the dead in the Declaration are multifaceted as they cover biological, cultural, religious, economic, and psychological aspects, among others. They are structured according to a chronological logic though there are many overlaps.

The first group contains a single *identity-related duty*. Article 1 encompasses the search, localization, rescue, and identification of the dead – and in their wake, the legal recognition of death. Identifying the dead and the causes and circumstances of their deaths is demanded as an elementary form of truth by surviving relatives. There is a generalized, quasi-universal aversion against anonymous death. Proper identification prevents the dead from becoming missing persons.

Body-related duties (Articles 2–4) evoke quasi-timeless posthumous dignity (even skeletons from prehistory are treated with respect)¹⁷ in contrast to personality- and legacy-related duties (Articles 5–8) that gradually fade away. The violation of the dead body and the resting place is usually punished more severely than the violation of personality aspects. Although universal,¹⁸ body-related duties should take into account cultural and religious traditions with their variations in funeral and disposal practices. Herodotus already observed that the death rituals of one people were abhorred by another. The usual pattern has three distinct moments: death, the last rite, and disposal below, on, or above the earth. But there are many deviations from this pattern: a funeral can be held without a body or a burial without a rite. One can think of the “tomb of the unknown soldier.” The concept of a resting place should be taken to encompass burial grounds, funeral architecture, and grave goods, including objects that function as doubles of the dead. When ashes are ritually dispersed, no final resting place exists. Accepted practices such as organ and tissue donation; using bodies for scientific, educational, or therapeutic purposes; exhumation and autopsy for forensic purposes; emergency burials; and cemetery clearance require a fair balance of all interests involved, including the consent of relatives.

Body-related duties have a strong privacy dimension. As an empirically retrievable expression of posthumous dignity, posthumous privacy is a characteristic of the dead, *not* a right, and the evidence for it is considerable. Physicians have professional obligations of confidentiality after the deaths of their patients.¹⁹ Families have the right to take the dead body of their relative in custody; unwanted public intrusion into funerals and other expressions of mourning is seen as an outrage. Funerals have unique characteristics: they are semi-public meetings of great intimacy and privacy, yet have the power, in the presence of the dead body as their focal point, to strengthen the bonds among families and wider social networks for the future. In the case of political personalities, they can even transform into rallying points for political resistance.

Personality-related duties (Articles 5–6) also satisfy deeply felt needs to honor the dead.²⁰ Funerals (Article 3) often reflect the personality of the deceased. Articles 5–6 propose duties regarding posthumous privacy and reputation.²¹ The saying “you cannot defame the dead” is correct only in the sense that the dead themselves do not feel the defamation anymore. Evidence for posthumous privacy and reputation is considerable here also. Criminal or civil codes in many

countries, data protection and archival legislation, and medical codes of ethics have provisions for the responsible handling of information about the dead, including embargo terms. In showing images or footage of the dead, privacy and reputation concerns may be overridden by the public interest if the images are shown in historical works, artistic endeavors, and reports about war or human rights violations.²² “Commenting on” the dead refers to many genres, from tape recordings of funerals over obituaries, epitaphs, funerary orations, and genealogies to biographies. The balancing problem revolves around the problem of how to respect posthumous privacy and reputation without blocking access to sensitive archives or paralyzing critical research and writing (Schauer 1992, pp. 179, 185–186). If posthumous dignity is sacralized in overbroad legal provisions about “the memory of the dead” and “defamation of the dead,” the expression of ideas about the dead can be seriously hampered, if not censored (De Baets 2021). The exercise of free expression about the past should not become too burdensome: the default presumption should be in favor of disclosure of information about the dead.²³ The passage of time should be taken into account: the longer after death the disclosure occurs, the stronger this default presumption. Even so, there may be circumstances in which authors prefer to exercise a right to silence regarding some sensitive posthumous aspects of their subjects.

Legacy-related duties (Articles 7–8) bifurcate into (personal) will and (collective) heritage. At the individual level, wills regarding funeral and burial belong to the privacy aspects and, if unambiguously expressed and reasonable, count heavily in any balancing with other interests.²⁴ Wills also regulate the estate (the tangible, including pecuniary, and intangible property of the dead). While many individuals do not wish to be forgotten, some, by stipulating that their personal papers be destroyed and digital records erased, do not wish to be remembered. At the collective level, the preservation and transmission of tangible and intangible cultural heritage is regulated in UNESCO conventions and international humanitarian law.²⁵ Legacy-related duties may raise complicated issues of posthumous mecenate, publicity, copyright, and intellectual property.²⁶

The *rights to memory and history* (Articles 9–10), finally, help the living to properly fulfil their duties. These two rights are strong manifestations of the human rights to thought, opinion, expression, assembly, and association. They enable survivors to be informed about past breaches of posthumous dignity and to mourn and commemorate their dead decently so as to give painful past events a proper context, interpretation, and meaning.²⁷ It should be noted, however, that the right to memory is different from a duty to remember. A duty of remembrance imposed by oneself is acceptable, but when it is imposed by the state or by others, it should be rejected for several reasons. It confuses respect and protection. It forces us to commemorate the dead for all eternity, granting them an immortality that human beings do not possess. It is vulnerable to abuse if those who impose the duty make biased selections of whom to remember and whom

to forget. Above all, human rights clearly stipulate that the right to hold opinions, including memories, without interference and express them also includes the right not to hold such opinions and memories and not to express them.²⁸ Sacralizing the dead is a dangerous game.

2.5 The nature of posthumous dignity

Posthumous dignity has some salient characteristics. I tentatively suggest that it is:

- A dimension, not a right,
- Non-discriminatory,
- Fading over time,
- Relative, not absolute,
- Attributed, not intrinsic.

Posthumous dignity is *not a right*. The dead do not have rights and therefore no right to either posthumous dignity or posthumous respect. Rather, posthumous dignity is *a dimension* of the dead, consisting of the aspects of identity, body, personality, and legacy and concretely expressed as posthumous privacy and posthumous reputation.

A second feature of posthumous dignity is its non-discriminatory character, meaning that it is applicable to all the dead without distinction. We can identify concentric layers of relations: those loved in small circles (the near and dear), those loved in large circles (the wise ancestors, the heroes of humanity, the benefactors), those to whom we remain indifferent (the overwhelming majority), and the few considered morally repugnant (tyrants and mass murderers in particular) – with the understanding that those to whom we are indifferent or inimical are somebody else’s near and dear. Such a *moral typology* is important to identify to which dead we have duties of respect and protection but does not exclude posthumous dignity for anyone. Being an ancestor or leaving a heritage to posterity is not a condition for granting posthumous dignity; being a dead tyrant or instigator of mass murder is not a condition for not granting it (Parfit 2011: Volume 1, pp. 184, 240, 244, 374).²⁹ Moral merit is no criterion. The non-discriminatory character of posthumous dignity is the only real sense in which it is universal. This does not mean, however, that we cannot intervene in the administration of the *protection* to dead tyrants and mass murderers: they deserve posthumous dignity in private, but in the interests of society, it is legitimate to prevent any public or institutionalized commemoration. A democratic state has a right to prevent graves of mass murderers from becoming places of pilgrimage.

The third feature is that posthumous dignity *endures but fades over time*. Although much evidence for posthumous dignity is found in the past, it is far

from historically universal: for centuries, many have assumed that posthumous dignity was solely applicable to the own cultural group. Archaeologists have often treated the human remains of indigenous peoples with disrespect. In other words, the ascription of posthumous dignity varied according to time, place, and perspective. Philippe Ariès, the leading historian of Western attitudes toward death, wrote: "The lavish expression of grief about the loss of a loved one and the need to commemorate that life . . . came to the fore in Western culture only in the nineteenth century . . . The individual tombstone . . . was a modern invention."³⁰ The problem is how we deal with our incomplete knowledge of the remote dead. We can construct an *epistemological typology* consisting of those who left traces from which to extract knowledge (the recently dead, the powerful, the famous, and the rich) and those about whom we are ignorant (the millions of anonymous dead in history). Although in principle, posthumous dignity has no time bar, this fading effect erodes any duties of protection in practice.

The fourth feature has already been noted earlier, namely, that posthumous dignity is *relative, not absolute*. Most duties to the dead are regulated by law and tradition, and all have to be balanced against the interests of the living, including public health, public order, and free expression.

The final characteristic is fundamental. Some may argue that the evidence for posthumous dignity is, in fact, evidence for posthumous respect and that it would therefore be better to build the thesis around posthumous respect alone, skipping the allegedly underlying posthumous dignity altogether. But these critics do not offer an explanation for posthumous respect, whereas my thesis does. The deeper problem, then, is why posthumous dignity exists. There are three views: posthumous dignity is an intrinsic property of the dead *recognized* by the living; a potential property of the dead *becoming manifest* each time the living approach them; or a property *attributed* by the living to the dead. The first two positions reintroduce by the backdoor what we waved goodbye near the front door: that, like the living, the dead are assigned agency entitling them to dignity claims. Consistent with my overall position, I take the last view: posthumous dignity is attributed. This is the reason why I hesitate to call posthumous dignity *inalienable*: in principle, it cannot be lost or removed entirely; in practice, it is sometimes breached. Attribution is not completely universal.

The living attribute posthumous dignity to the dead because it is a *social practice*. Society as a whole has an interest in attributing dignity to its dead and cultivating respect for them because doing so provides its citizens with reasonable expectations of being treated decently after their deaths themselves. Attribution thus contributes to norms of civility and to peace. Funerals and wills would make no sense if everyone saw that they were poorly respected. If that were so, the living would lose trust in these practices, and if enough people would lose

that trust, they would eventually disappear. But these practices *have not* disappeared; on the contrary, they have increased over time.³¹

2.6 Semantic debates about posthumous dignity

Meanwhile, it should have become clear that talking about the dead is a semantic minefield packed with metaphors and euphemisms and with the pathetic fallacy (the tendency to ascribe human traits to inanimate phenomena). This minefield is a result of the ambiguous ontological status of the dead. Language plays tricks upon us each time we try to catch the essence of the dead. A few examples will show this. I defined the dead as past human beings and still called the historical community formed by the dead, the living, and the unborn “humanity at large.” Furthermore, my definition of the dead as “past human beings” is negative, whereas the rules of logic prescribe that definitions should state the *essential* attributes of a species and not be negative where they can be affirmative. The definition of the dead is the rare case where the negative form – derived from and contrasted with the living – appropriately expresses the essential characteristic. Some avoid the term “the dead” (presumably for its blunt impact), and replace it with “the deceased,” but the latter term encompasses the recent dead alone, whereas “the dead” emphasizes duration and covers the state of being dead completely.

Furthermore, the International Committee of the Red Cross, the United Nations Human Rights Commission, and the International Criminal Court, among others, do not speak of “past persons” (or “past human beings”) but rather of “dead persons”³² to indicate the dead, but this is less correct. The term “dead persons” suggests that there are two classes of persons – those with the property to live and those with the property to be dead – which is absurd because, by definition, personhood is a property of the living alone.³³ Despite its problematic meaning, I have adopted the term “dead persons” because it has two considerable *practical* advantages. First, as a “subcategory” of persons, “dead persons” fall – at least symbolically – within the legal provisions for persons generally, which increases their protection. Second, legal instruments that use the “dead persons” concept also tend to describe the dignity of the dead not as “posthumous dignity” as would be the proper logic, but as “the personal dignity of the dead,” bringing human rights and humanitarian provisions such as the prohibition of “outrages upon personal dignity” within their purview.

The pressure to follow the international tradition to speak about “dead persons” is visible in this essay’s very title. To make things worse, the title – “The Posthumous Dignity of Dead Persons – is tautological: “posthumous” and “dead” express the same thought. This is done on purpose because shorter titles are not

clearer: “Posthumous dignity” presupposes readers already acquainted with the problems involved; “The dignity of dead persons” does not acknowledge the crucial distinction between human and posthumous dignity.

I avoided the frequently used phrase “respect for the memory of the dead” throughout because “memory of the dead” is not correct: the dead do not have a memory. Rather, “memory of the dead” is a certain set of ideas *about* the life of a dead person lingering on in the minds of the living. In the same vein, I talk about duties *to* the dead, but since the dead are not human beings and do not reciprocate, it would be better to speak about duties *regarding* the dead. And should we label breaches of posthumous dignity “harms,” “wrongs,” “offenses,” “abuses,” or “violations” when we know that, strictly speaking, the dead cannot be harmed, wronged, offended, abused, or violated?³⁴

There are more perplexing semantic puzzles, though. Time and again, I have repeated in my writings and lectures that my thesis is that the dead do not have human rights and that this fact does not exclude that the living have duties toward them. At least half of those who responded to my thesis summarize it as if I defend the thesis that the dead . . . have human rights! (e.g. Cotkin 2008, p. 312). This is due partly to sloppy interpretation, partly to the semantic traps that time and again confuse us. Some of the writings of those authors who argue, either on purpose, unthinkingly, or by mistake, that the dead have human rights are confusing, but – to my surprise, I must admit – most were inspiring. It is impossible to escape the semantic minefield in which the dead are buried.

2.7 Breaches of posthumous dignity

In practice, the dignity of the dead can be attacked, breached, or denied to the point of virtual destruction, thus shocking and offending humanity. An attempt to inventory all breaches of posthumous dignity and of the duties it entails yielded a list of sixty legal and moral wrongs to the dead (De Baets 2009a, pp. 133–137).³⁵ They included such widely varying wrongs as the disruption of funerals, the refusal to return dead bodies to relatives, the unwillingness to execute last wills, the tampering with identities of the dead, the cleansing of archives, the denial of atrocities, and the censorship of biographers, among others. Many are punishable by law, and if not, they are still moral wrongs to the dead. The inventory is incomplete and brings to mind a telling commentary by the International Committee of the Red Cross. Common Article 3 of the Geneva Conventions prohibits “acts which world public opinion finds particularly revolting” such as “violence to life and person” and “outrages upon personal dignity.” In this context, the Committee wrote:

One may ask if the list [of such revolting acts, *adb*] is a complete one. At one stage of the discussions, additions were considered . . . The idea was rightly abandoned . . . [I]t is always dangerous to try to go into too much detail – especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes . . .³⁶

The same is true for outrages upon the dignity of the dead: the variation is endless. I will briefly review here only three types of breaches that are recognized as war crimes or crimes against humanity. First, the crime of “outrages upon personal dignity” is a war crime under the Geneva Conventions and before the International Criminal Court. Its scope includes outrages upon the dignity of the dead, such as the mutilation of dead bodies and the refusal of a decent burial (Dörmann 2003, pp. 314–315, 323; Genocide Network 2018).³⁷ The material element of this crime must have a subjective and an objective component (Dörmann 2003, pp. 314–324). Crimes against the dead, however, do not possess a subjective component because the dead cannot be “personally” aware of the existence of any ill-treatment or humiliation.³⁸ At the same time, the objective component – the fact that the reasonable person must be outraged by the treatment³⁹ – is overwhelming. Second, the enforced disappearances of persons, when committed as part of a widespread or systematic attack against the civilian population, are crimes against humanity.⁴⁰ Insofar as they lead to executions and to concealment or non-identification of dead bodies, they are also breaches of posthumous dignity.⁴¹ Finally, intentional attacks against buildings dedicated to “education, . . . [or] science . . . [or] historic monuments” are also war crimes.⁴² These historical monuments are part of the heritage of the dead.

Who then are the victims of posthumous dignity breaches? Because the dead cannot be harmed by these breaches, the victims are surviving families and friends, indeed humanity as a whole. Outrages upon the dignity of the dead, disappearances leading to death, and the intentional destruction of historical heritage breach duties of respect and protection and the right to memory. However, the fact that some perpetrators *believe* that they can intentionally harm the dead by “dehumanizing” (disfiguring and de-identifying) them is an important fact in itself (De Baets 2009a, pp. 137–139). History has seen many cases of posthumous trial, including posthumous execution and denial of burial.

Two main motives for such breaches can be distinguished. One possibility is that the perpetrators aim at punishing the dead for their acts when they were still alive or at preventing the latter from returning as wandering spirits to take revenge. Another option is that they punish the dead in order to deter or humiliate the living. Deterrence occurs when graves are destroyed to prevent them

from becoming the focus of a pilgrimage; humiliation when genocide deniers, by lying about the atrocities, target genocide survivors. If these indignities are inflicted with impunity, historical injustice is perpetuated. The question arises, therefore, whether these breaches can be redressed.

2.8 Restoration of posthumous dignity

The restoration of posthumous dignity has been a powerful motive behind the establishment of the International Criminal Court as we are reminded in the preamble of its statute: “*Mindful* that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”⁴³ When the judges of the court first met in 2003, United Nations Secretary-General Kofi Annan declared: “For those who have been slaughtered, all we can do is seek to accord them in death the dignity and respect they were so cruelly denied in life.”⁴⁴

I will therefore examine successively whether conceptions of victims, theories of historical injustice, and principles for reparation pay sufficient attention to the restoration of posthumous dignity. The first problem we meet is that most conceptions of victims do not include the dead. The earliest attempt to calculate damages in cases of wrongful death – in the *Lusitania* case of 1923 – avoided the language of victims: the beneficiaries of financial compensation in such cases were the heirs claiming that they had suffered losses. The calculation was executed according to a famous formula still in use today:

Estimate the amounts (i) which the decedent, had he not been killed, would probably have contributed to the claimant; add thereto (ii) the pecuniary value to such claimant of the deceased’s personal services in claimant’s care, education, or supervision; and also add (iii) reasonable compensation for such mental suffering or shock, if any, caused by the violent severing of family ties, as claimant may actually have sustained by reason of such death. The sum of these estimates reduced to its present cash value will generally represent the loss sustained by claimant.⁴⁵

The focus is on the survivors here. Likewise, the *United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) does not talk about the dead. It distinguishes direct victims, who are those suffering harm through crime or abuse of power, and indirect victims, meaning the immediate family or dependents of the direct victims and those persons who suffer harm while trying to help direct victims. But it does not specify whether “those suffering harm through crime” include the dead.⁴⁶

Recently, however, a judge of the International Criminal Court has entertained the view that dead persons *are* victims:

The Single Judge finds it self-evident that a victim does not cease to be a victim because of his or her death . . . It is deemed appropriate, that the successors of a deceased person exercise the rights of deceased persons in proceedings in order to safeguard claims for any future reparations.⁴⁷

We must conclude that the judge's opinion, including his phrase "rights of deceased persons," is not widely shared.

Theories of historical injustice, if they are to include the dead, should define the term "historical injustice" as the sum of all atrocity crimes committed in the past – crimes similar to genocide, crimes against humanity, and war crimes today. Historical injustice can be split into *remote* historical injustice, in which all perpetrators and victims are dead, and *recent* historical injustice, in which at least some perpetrators or victims are still alive.⁴⁸ Remote historical injustice is the most problematic form. Restoration of remote historical injustice has been defended *and* rejected vigorously. Opponents of the idea say that it is too long ago, that the injustice has been superseded by more recent events, that younger generations gradually become less aware of the injustice, that the evidence for it is lost or incomplete, that it revives old pain and old conflicts, that the prosecution of perpetrators and the reparation of victims are forever impossible, that the past cannot be altered, and that it is out of the question to reevaluate all of the past all of the time. Supporters of the idea argue that even atrocity crimes of longer ago still shock the conscience of humanity, that they are imprescriptible, and that the right to know the truth about these atrocities continues to exist after the death of the last perpetrators and last victims. This debate is undecided, and few agree on the right course.

Recent historical injustice can be tackled with the measures described in the *United Nations Reparation Principles*.⁴⁹ These principles distinguish five types of reparation: restitution (the complete reparation of the situation before the crime), compensation (the partial reparation of the situation before the crime), rehabilitation (medical and psychological), prevention (ensuring that the crimes do not happen again), and finally, symbolic reparation or satisfaction. The first four forms come too late for the dead, but they may help victims who survived. Only the last form is partly applicable to the dead.⁵⁰ Reiterating that any satisfaction is achieved solely *in the eyes* of the survivors and does not affect the dead, some measures of symbolic reparation mentioned in the *Reparation Principles* are applicable in situations of recent as well as remote historical injustice. In the following, I quote and comment upon these measures:

Scientific reparation: "Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim." This corresponds to duties 1, 5–6, and 8 of our Declaration. The search for facts is the first stage in the

search for causes and for historical truth: if corroborated, these facts fix the boundaries of any sound historical narrative and explanation of past atrocities. Such searches are protected by the right to the truth,⁵¹ which must be complemented with a state duty to investigate atrocities, including by maintaining accessible archives.⁵² Neither regime change nor amnesty laws nor the passage of time can affect this state duty. Because atrocity crimes are imprescriptible, the right to the truth forms the bridge between the realms of justice and history. In applying the right to the truth to temporally distant cases, two risks persist, however: the risk of anachronism in evaluating crimes of longer ago and the uncertainties in determining indirect victimhood over longer periods. Finally, the disclosure of the truth is conditional on its effect upon the victims – but if the dead are victims at all, the effects upon them are nonexistent and therefore cannot be negative.

Forensic reparation: “The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities.” This corresponds to duties 1–4 and 7 of our Declaration. Like scientific reparation, forensic reparation fosters “the search for clues, which may assist in the historical reconstruction of events.”⁵³

Legal reparation: “An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim.” This corresponds to duties 1 and 6–7 of our Declaration. Legal reparation restores property rights, reviews or annuls previous biased court judgments, and issues posthumous pardons. It dovetails with a strongly felt need among relatives to set the record straight and to clear names and reputations. It is also activated when courts declare that genocide denial is a form of hate speech.

Political reparation: “Public apology, including acknowledgement of the facts and acceptance of responsibility.” Political measures such as apologies touch duties 1 and 6 of our Declaration. Political reparation is usually directed at groups of victims rather than individuals. It provides official acknowledgment of breaches committed by predecessor regimes and endorses other types of reparations made by successor regimes.

Memorial reparation: “Commemorations and tributes to the victims.” This corresponds to duties 3 and 5–6 of our Declaration. Memorial reparation may be the sole reparation measure in cases of mass deaths, including in the remote past.

Educational reparation: “Inclusion of an accurate account of the violations that occurred in . . . law training and in educational material at all levels.”

This corresponds to duties 1, 6, and 8 of our Declaration. It includes the rewriting of falsified history textbooks and the teaching of historical taboos. Educational reparation is a natural extension of scientific reparation. Both aim at preventing future falsification and denial of historical injustices and also encompass such measures as the rescue of manuscripts, the republication of works of dead authors previously censored, and the novel publication of biographies of those formerly fallen in disgrace.

All these forms of symbolic reparation have *immediate* effects on the restoration of the posthumous dignity of dead persons.

2.9 Conclusion: the impact of posthumous dignity

However, symbolic reparation of the posthumous dignity of the dead has ramifications beyond its immediate effects. *Substantially*, it brings comfort to the surviving relatives and to wider communities. *Morally*, it helps discontinue historical injustice, thus decreasing the risk of its repetition. *Socially*, it raises the awareness of historical injustice, adding to its preventive role. *Politically*, it strengthens the rights to memory and history, as robust forms of the right to freedom of expression, and directly supports democracy.

Posthumous dignity is a thesis providing a consistent perspective on the dead. Compliance with the duties it entails assists individual survivors in their years of grief and societies in their decades of building the rule of law, human rights, and democracy. Its restoration reminds the community of past atrocities and helps prevent their re-occurrence. Attributing posthumous dignity to the dead profoundly enhances the human dignity of the living. In doing so, the Golden Rule for the Dead is our guide: *do unto the dead as you would have others do unto you after you die*.

Notes

1. Also reproduced in De Baets (2009a, p. 123). An updated version is included in this chapter.
2. The comparison between the dead and fetuses is also ill-suited because the former's situation is definitive, the latter's open ended.
3. After a gestation process starting in 2000, I have introduced the posthumous dignity thesis in the 2004 essay, the 2009 book, and several articles. Others have defended comparable concepts. *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2017), §§ 42, 90, 154, speaks about "respect for the dignity of the dead." Its 1991 predecessor did not mention this concept. In their preamble, the *Guiding Principles for the Dignified Management of the Dead in Humanitarian Emergencies and to Prevent Them Becoming Missing Persons* (Geneva: ICRC Missing Persons Project, 2021) state: "Respect

due to a human being does not cease with death." In the literature, various authors use the posthumous dignity concept, including, for example, Sian Cook, "Posthumous Dignity and the Importance in Returning Remains of the Deceased," and Roberto Parra, Elisabeth Anstett, Pierre Perich, and Jane Buikstra, "Unidentified Deceased Persons: Social Life, Social Death and Humanitarian Action," both in Roberto Parra, Sara Zapico, and Douglas Ubelaker, eds., *Forensic Science and Humanitarian Action: Interacting with the Dead and the Living* (Hoboken, NJ: Wiley, 2020), 67–99.

4. I do not go as far as Parra et al., "Unidentified Deceased Persons," 79–84, who speak of the (symbolic) agency of corpses. Using an expanded notion of "agency," they include what I call "influence" in it. For a discussion about dead-related agency issues, see Rosenblatt (2010) pp. 929–936.
5. This chapter is about being dead, not about dying or mourning. Dying is an experience (except, perhaps, in cases of sudden death), mourning is an experience, but being dead is not an experience.
6. World Health Organization, *Guiding Principles on Human Cell, Tissue and Organ Transplantation* (2010), Principle 5.
7. United Nations (UN) Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Doc. E/CN.4/2005/102/Add.1) (2005) (hereafter *Impunity Principles*), Principle 34. The worldwide repatriation trend since the 1990s should also be noted here: in the case of remains of indigenous persons, custody belongs to the indigenous people who can prove cultural affiliation to the deceased, and the latter's remains should return to them. See also *UN Declaration on the Rights of Indigenous Peoples* (2007), Article 12. Since 1989, the World Archaeological Congress and some national archaeological societies have approved codes of ethics to deal with human remains.
8. I do not make the Lockeian distinction between human beings and persons here, e.g., by arguing that persons are human beings with certain characteristics (conscious, rational, free, moral, etc.). The implication of that distinction (namely, that certain classes of human beings are not, not yet, no longer, or not fully persons, such as young children, the mentally ill, or the irreversibly comatose), while important for the living, disappears after death because young children, the mentally ill, and the irreversibly comatose, when deceased, do not differ in essence from other dead persons.
9. From my review of around a hundred philosophical essays about the dead for this chapter, I estimate that the thesis that the dead have rights is defended by about 10% of the authors: it is a minority position. The large majority departs from the premise that the living owe duties to the dead. As recently as 2018, the *Declaration for the Dignified Treatment of All Missing and Deceased Persons and Their Families as a Consequence of Migrant Journeys (The Mytilini Declaration)* has a part entitled "The rights of the missing and of the deceased and their bereaved families," but it identifies only the families as right-holders.
10. For an analysis of the human dignity concept, see De Baets (2007).
11. "List of Customary Rules of International Humanitarian Law," *International Review of the Red Cross*, 87, no. 857 (March 2005), Rules 90 and 113.
12. Additional reasons for broadly shared posthumous respect may be found in the quasi-universal feeling of perplexity about the borders of humanity, in fear of death, and in a widely shared urge for transcendental continuity of life. Following Martin Heidegger, Roger Scruton writes: "Our existence has no ultimate foundation: it is a

- brute fact for which we can find no reason, since all our reasons are generated within life" (Scruton 1994, p. 315).
13. I prefer "duties" over "obligations" (which most often have a relational character) and "responsibilities" (duties is shorter and simpler).
 14. It has been argued, unconvincingly I find, that dead victims of atrocity crimes form an exceptional category, deserving not only respect but also protection from *all* of us. Meyer, "Intergenerational Justice," § 5.4, calls this "surviving duties."
 15. Legal standing with representation by guardians has been granted to corporations (everywhere), future generations (climate change cases in several countries), deities (India), nature (Bolivia, Ecuador, Uganda, India, Bangladesh), a river, a mountain, and a parc (New Zealand), rivers (Canada, Colombia), a lake (Spain), trees (Belgium), and an orangutan (Argentina).
 16. Another problem is which legal norms should be followed when disputes arise about exhuming human remains, removing war cemeteries, or transferring war memorials: those in vigor at the time of the victim's death, the cemetery's establishment, the memorial's creation, or those at the time of the disputes. According to the principle of intertemporal law, the law as evolved at the time of the dispute should be applicable. See Petrig (2009) and De Baets (2022, pp. 1600–1601).
 17. Posthumous dignity never expires completely as we can observe when archaeologists discover ancient remains, to which names ("Lucy", "Ötzi") are given.
 18. Brown (1991) includes death rituals in his list of human universals.
 19. "I will respect the secrets that are confided in me, even after the patient has died." World Medical Association, Declaration of Geneva (Geneva 1948, last revised 2017), sixth vow. This declaration is often called the "physician's oath."
 20. See Zhao (2011, 2014).
 21. Reputation and honor are closely related: reputation is the esteem given to a person by others; honor is a person's self-esteem. It follows that posthumous honor is impossible because the dead do not have self-esteem, whereas posthumous reputation exists because it is attributed by the living to the dead.
 22. For legal cases, see United States Supreme Court, *National Archives and Records Administration v. Favish, et al.*, 124 S.Ct. 1570 (2004); European Court of Human Rights, *Case of Hachette Filipacchi Associés v. France* (Application no. 71111/01), Judgment (2007).
 23. The 2016 General Data Protection Regulation of the European Union (EU Regulation 2016/679) is not applicable to personal data of "deceased persons," implying that the margins to use such data are broad: see its Considerations 27, 158, 160.1.
 24. Conventions such as those drafted by the Hague Conference on Private International Law (1961) and Unidroit (1973) regulate the status of testamentary dispositions and last wills.
 25. For a definition of cultural property, see *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954), Article 1.
 26. Regarding posthumous intellectual property, see Barkan and Bush (2002, pp. 201–223); regarding posthumous copyright, see *Berne Convention for the Protection of Literary and Artistic Works* (1886, 1979), Articles 6bis–7bis. Regarding posthumous publicity, see Gross et al. (1988) and Madoff (2010).
 27. For best practices for commemorations and collective funerals, see International Committee of the Red Cross (ICRC), *Operational Best Practices Regarding the Management of Human Remains and Information on the Dead by Non-Specialists* (Geneva: ICRC, 2004),

- 18–19, and ICRC, *Mourning Process and Commemoration* (Geneva: ICRC, 2002), 27–28 (an overview of death conceptions in major religions).
28. See International Covenant on Civil and Political Rights (ICCPR) (1966), Articles 18–22 (Article 18.2 in particular); UN Human Rights Committee, *General Comment 34* (Freedom of Opinion and Expression) (2011) (UN Doc. CCPR/C/GC/34), § 10. See also De Baets (2009a), 147–157, for an extensive discussion. For a discussion of the duty to grieve as a duty to oneself, not to the dead, see Cholbi (2021), pp. 149–165.
29. This view is the opposite of Smilansky (2018), a crazy plea to punish dead dictators.
30. As paraphrased in Hutton (1993, p. 104).
31. For the clearest formulation of the argument, see Partridge (1981). See also Winter (2010).
32. The term “dead person[s]” is used in the *Geneva Conventions* (1949) and their Additional Protocols (1977) and in the *Elements of Crimes* of the International Criminal Court (ICC). The term “the dead” is used in the *Hague Convention X* of 1907, the *Geneva Conventions* of 1906, 1929, and 1949; the *Additional Protocols* of 1977; and “List of Customary Rules”, Rules 112–116. Other uses in, for example, UN Commission on Human Rights, “Human Rights and Forensic Science” (resolutions 1998/36; 2000/32; 2003/33; 2005/26).
33. A human being/person who is alive exists; a human being/person who dies goes out of existence; a human being/person who is dead does not exist (although the latter’s remains may continue to exist for some time). As Immanuel Kant argued, the property of existence (or of being alive) is not a personal property as any other (such as being rational); it is a condition for these properties. See also Soll (1998, pp. 33–36, 182 note 26), Luper (2019, § 1.5) and Eser (2002, volume 1, 923, note 156).
34. Note that in his four-volume work *The Moral Limits of the Criminal Law*, Joel Feinberg discussed “the mistreatment of dead bodies” not under *Harm to Others*, *Harm to Self*, or *Harmless Wrongdoing*, but under *Offense to Others*, 72–77.
35. See De Baets (2009a, 133–137).
36. Jean Pictet, and others, *Commentary on Geneva Convention I* (Geneva: ICRC, 1952), 54.
37. See also the report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Mass Graves (UN Doc. A/75/384) (2020). For examples of trials involving charges of mutilation of dead bodies, cannibalism, and refusal of honorable burial, see UN War Crimes Commission, ed., *Law Reports of Trials of War Criminals*, volume 13 (London: UN War Crimes Commission, 1949), 151–152. See also European Court of Human Rights, *Case of Akpınar and Altun v. Turkey* (Application no. 56760/00): Judgment (2007), which was a case of corpse mutilation, at § 82: “[T]he Court has never applied Article 3 of the Convention [prohibition of torture, *adb*] in the context of disrespect for a dead body. The present Chamber concurs with this approach, finding that the human quality is extinguished on death, and therefore, the prohibition on ill-treatment is no longer applicable to corpses . . . despite the cruelty of the acts concerned.” See also the partly dissenting opinion of Judge Fura-Sandström.
38. Recognized in ICC, *Elements of Crimes* (2002), Articles 8 (2) (b) (xxi), and 8 (2) (c) (iv), Element 1 (notes 49 and 57 respectively).
39. Recognized in ICC, *Elements of Crimes* (2002), Art. 8 (2) (b) (xxi), and 8 (2) (c) (iv), Element 2.
40. See also *Declaration on the Protection of All Persons from Enforced Disappearance* (1992), Article 17; *International Convention for the Protection of All Persons from Enforced Disappearance* (2006), preamble, Articles 8, 24.

41. ICC, *Rome Statute* (1998), Articles 7.1(i), 7.2(i).
42. ICC, *Rome Statute* (1998), Articles 8.2(b)(ix), 8.2(e)(iv).
43. ICC, *Rome Statute* (1998), preamble.
44. “International Criminal Court Judges Embody ‘Our Collective Conscience’ Says Secretary-General to Inaugural Meeting in The Hague” (press release SG/SM/8628–L/3027) (2003).
45. *Reports of International Arbitral Awards: Opinion in the Lusitania Cases (November 1, 1923)*, volume 7, 32–44 (quote on 35). For its present use, see *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* (2001), art. 36, § 18.
46. UN, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985), Principles 1–2 (and 12b). See also UN, *Declaration on . . . Enforced Disappearance* (1992), Article 19.
47. ICC Judge Hans-Peter Kaul in *Case of the Prosecutor v. Jean-Pierre Bemba Gombo: Fourth Decision on Victims’ Participation (Pre-Trial Chamber III)* (ICC-01/05-01708) (2008), §§ 40, 46.
48. See De Baets (2009b, 2011).
49. *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN Doc. A/RES/60/147) (2006), Principles 18–23, especially 22. See also *Impunity Principles*, Principles 31–38; UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (UN Doc. CCPR/C/21/Rev.1/Add. 13) (26 May 2004), § 16. For background, see Grosman (2018) and International Commission of Jurists (2018: 207–213). ICC Statute, Article 75, only distinguishes restitution, compensation, and rehabilitation. Some other forms of reparation, however, can be found under Article 93.1(a) (identification and whereabouts of persons or the location of items) and (g) (examination of places or sites, including the exhumation and examination of gravesites).
50. Article 37 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) provides that “2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.”
51. *Impunity Principles*, Principles 1–5, 14, 24.
52. See also Boel et al. (2021).
53. Human Rights Council, *Report on Best Practices in the Matter of Missing Persons* (UN Doc. A/HRC/AC/62) (2010), § 88.

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