

### International Criminal Tribunal for the former Yugoslavia (ICTY), the forensic pathologist and ethics

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*Forensic pathologists involved in the ICTY missions could be subjected to ethical tensions. In order to study the nature of such tensions, review of the literature and analysis of forensic material available from the trial transcripts relative to Srebrenica massacre were carried out. Forensic evidence used in ICTY trials is weakened by many factors, including especially the difficulties in the interpretation of the autopsy findings and the possibility of a biased selection of exhumations by the Office of the Prosecutor. Although discrepancies exist between forensic evidence and facts established by ICTY judgments about Srebrenica events, genocide charge was not challenged by ICTY, conflicting with the idea that reliably established facts are the foundation of legal analysis. The degree of ethical conflicts in forensic pathologist's community depends on their level of knowledge respectively about the fundamental principles of the law subverted by ICTY and the political implications of international justice. Ethical guidelines are needed to ease such ethical tensions.*

**Keywords:** mass grave, forensic pathology, ICTY, ethics.

#### Introduction

War crimes in the former Yugoslavia since 1991 have been subjected to several international forensic investigations of mass graves within the framework of inquiries led by the ICTY. Forensic pathologists involved in the ICTY missions could be subjected to ethical tensions due to the difficulties of the missions, the emergent conflicts between forensic scientists of the teams

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(especially between forensic pathologists and forensic anthropologists), the original nature of the ICTY proceedings and lastly the fact that ICTY is a questionable criminal court (Lorin de la Grandmaison et al., 2006:208-212).

## Material and method

In order to better determine the nature of such ethical tensions, we carried out a review of the literature. PubMed research was carried out using the following key words: mass grave, former Yugoslavia, forensic pathology, ethics. We also studied forensic material available from trial transcripts relative to Srebrenica massacre. Trial transcripts were available from the ICTY official web site<sup>1</sup>. Only closed trials were taken into account, including trials of Erdemović, Blagojević and Jokić, Krstić, Popović et al. and Milošević.

## Results

### *Review of the literature*

Most of the papers published on the subject focused on natural and methodological limits of the investigations (respectively due to the degraded state of the bodies, the lack of means on the spot and the lack of standardisation between the different teams involved) (Schäfer, 2000:110-6; Sprogø-Jakobsen et al., 2001:1392-6; Skinner et al., 2003:81-92; Skinner, Sterenberg, 2005:221-232). Some authors have stressed the deontological duties of the medico-legal expert:

- He must stay impartial, independent and objective (Rainio et al., 2001:220-232; Vanezis, 1997:277-283; Cordner, McKelvie, 2002:867-884)
- Utmost confidentiality must be maintained by the members of the team regarding the medico-legal findings (Chandrasiri, 1997:98-102)
- He must respect his scope of competence (Schäfer, 2000:110-6)
- He must be aware of the limits of the medico-legal investigations (Sprogø-Jakobsen et al., 2001:1392-6; Rainio, Lalu, Penttillä, 2001:171-85)

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<sup>1</sup> <http://www.icty.org/>

According to the results of a questionnaire sent to 65 forensic pathologists involved in ICTY missions (Lorin de la Grandmaison et al., 2006:208-212), two types of ethics could be drawn:

- A conviction ethics, which takes into account only the action's achievement without worrying about the consequences of the action.
- A responsibility ethics, for which we are accountable for the foreseeable consequences of our actions.

These two types of ethics were first defined by the German sociologist Max Weber.

The conviction ethics was shared by most of those questioned. Moreover, two authors clearly expressed a conviction ethics. Indeed, they agree with the need for international war tribunals such as the ICTY in order to challenge the impunity of war criminals and to achieve justice for the victims and their families (Vanezis, 1997:277-283; Chandrasiri, 1997:98-102).

The opposition between the two types of ethics was mainly based on the opinion of the forensic pathologists upon the justice led by the ICTY:

- A conviction ethics for those who considered that the ICTY respected the elementary rules of the law and were reinforced in the idea of justice after their experience, wishing to work again for the ICTY
- A responsibility ethics for those who questioned the impartiality of the ICTY.

### *Analysis of trial transcripts*

The analysis of trial transcripts underlined the difficulties of mass grave investigations encountered by the forensic experts, including bad work conditions due to the lack of human and material means and the degradation of bodies.

A lack of objectivity and low level of professionalism of some forensic experts were mentioned in court during Popović's trial<sup>2</sup> including:

- Too much subjectivity in the performance of exhumation and *post mortem* examinations.
- Superficial diagnoses without detail descriptions.

<sup>2</sup> <http://www.icty.org/x/cases/popovic/trans/en/080626IT.htm>  
<http://www.icty.org/x/cases/popovic/trans/en/080627ED.htm>

- Complaints from professional colleagues respectively against one American forensic pathologist who changed autopsy reports (especially the conclusion about manner of death) and one American forensic anthropologist who removed bodies too fast, discarding clothing even if identity documents were inside it.

The analysis of forensic data from trial transcripts also showed discrepancies between forensic findings and facts established by ICTY judgements, relative respectively to death figures and the manner of death of the victims.

Concerning the death figures, there was a huge difference concerning the Pilica site between the Erdemović judgement for which 1,200 were killed<sup>3</sup> and the total number of bodies found in the mass graves, 327 cases<sup>4</sup>. Concerning the complete mass grave investigation linked to the Srebrenica massacre, more than 7,000 individuals were killed in July 1995 according to ICTY judgments<sup>5</sup>. But total estimated number of individuals found in the mass graves was 2,553 (2317 male individuals, one female individual and 235 whose gender remained undetermined).<sup>6</sup>

The major cause of death found was gunshot wounds<sup>7</sup>. Blindfolds and/or ligatures strongly suggesting execution were found in 448 bodies (17% of all cases). Execution as manner of death was questionable in a significant number of cases:

- 67 individuals died of shrapnel or blast injuries
- 11 individuals died of gunshot wounds and blast injuries

Such cases could be linked to the legitimate combat casualties sustained by the 28<sup>th</sup> Division column of the Bosnian Moslem army which conducted a breakout toward Muslim-held territory in Tuzla after the fall of the enclave.

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<sup>3</sup> <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts980305e.pdf>

<sup>4</sup> <http://www.slobodan-milosevic.org/documents/P642-1a.pdf>

<sup>5</sup> <http://www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf>  
[http://www.icty.org/x/cases/blagojevic\\_jokic/acjug/en/blajok-jud070509.pdf](http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf)

<sup>6</sup> <http://www.slobodan-milosevic.org/documents/P642-1a.pdf>

<sup>7</sup> <http://www.slobodan-milosevic.org/documents/P642-1a.pdf>

No cause of death was determined in 1,441 cases<sup>8</sup>. It was not possible to establish the cause of death because of the degradation of the bodies which were often very incomplete. Manner of death was consequently undermined for all these cases.

## Discussion

The degree of ethical tensions will be not the same, minor for a forensic pathologist mainly interested by the technical aspect of his mission and strongly convinced that his mission will bring clues and evidence of criminal acts useful in convicting war criminals. Conversely, ethical tensions will be strong for a pathologist worried about the need to respect the fundamental principles of the law and human rights and aware at the same time that the ICTY has subverted such principles of law.

Conviction ethics is mainly based on the defence of the two main objectives of the international criminal justice (the absolute requirement of justice, by ensuring that those who are guilty will be convicted and the civil peace) and also not questioning the relevance of the ICTY. Conversely, the responsibility ethics is mainly based on the challenging of the ICTY regarding:

- The non respect of the law by this institution (Lorin de la Grandmaison et al., 2006:208-212; Lorin de la Grandmaison, 2003:473-9):

There is no separation of judicial and legislative powers according to the Rules of procedure and Evidence, the presumption of innocence is not respected (the accused is held guilty until innocence is proven, confessions are presumed to be free and voluntary unless the contrary is established by the prisoner), secret indictments are allowed, secret witnesses not subject to cross-examination are used regularly and moreover hearsay evidence is acceptable and lastly there is no independent appeal body.

- The knowledge of non-investigated mass graves that can challenge the supposed impartiality of the ICTY. Some forensic pathologists were aware of mass grave sites wittingly not investigated by the ICTY, especially mass graves of Serbian victims (Lorin de la Grandmaison et al., 2006:208-212).

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<sup>8</sup> <http://www.slobodan-milosevic.org/documents/P642-1a.pdf>

The responsibility ethics is also based on the challenging of the international criminal justice. International criminal justice requires a single vision of the good, valid for all people in the world, but two arguments are against this dogmatism (Delsol, 2004:51-70):

- The uncertainty of the definition of good (which is the modern basis for tolerance, as found in John Locke in his letter concerning toleration. Moral distinction between good and evil is based on freedom and several conceptions of the good can co-exist).
- The respect for the dignity of peoples (to change the laws of a people from outside, this will lead to the slavery of this people, according to Montesquieu's thought).

Judicial interference is caused by a state of moral indignation, easily manipulated for political purposes (Delsol, 2004:51-70). Designation of crimes deemed intolerable is in fact very subjective. Such justice is currently a justice of powerful states and tends to legitimate interference wars. For example, indictments from the International Criminal Court only involved leaders of African countries<sup>9</sup>. ICTY indictments were also used to politically dismiss Serb leaders in the former Yugoslavia (Lorin de la Grandmaison, 2003:473-9). Moreover, international criminal justice calls for the introduction of a world government (Delsol, 2004:51-70), which will be by nature tyrannical according to philosopher Kant's thought.

Some solutions to ease such ethical tensions are available (Lorin de la Grandmaison et al., 2006:208-212): First of all, medical deontology imposes a moral obligation of professional independence that means the forensic pathologist must not belong to political or interest groups involved in armed conflict. As any physician must refrain from committing any injustice according to Hippocratic oath, the forensic pathologist needs to know if the ICTY respects the fundamental principles of the law. Indeed, the involvement of the forensic pathologist supposes an independent and impartial court of law according to the tenth article of the Universal Declaration of Human Rights. These ethical sources agree more with a responsibility ethics than with a conviction ethics (Lorin de la Grandmaison et al., 2006:208-212). Such ethical tensions need collective thoughts among the international scientific community of forensic

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<sup>9</sup> <http://www.icc-cpi.int/Menus/ICC?lan=en-GB>

pathologists through a discursive ethics, able to suggest adequate ethical guidelines (Lorin de la Grandmaison et al., 2006:208-212).

A court's primary task is to determine the facts and reliably established facts are the foundation of legal analysis. That's why the place of the forensic pathologist has today a major importance in the criminal proceedings as regards demonstration of the truth. We must be aware in the same time that forensic contribution shows some limits in spite of its great development in the last years. First, you have legal limits, as forensic data are strongly dependent on the selection of the exhumation sites, selection carried out by the Prosecutor. Second, you have natural limits, including the state of advanced putrefaction. Methodological limits for the collection of evidence may also interfere during mass grave investigation. Lastly, you find technical limits, with the possibility of wrong or improper interpretation of the forensic findings. Mass grave investigation, even perfectly conducted, cannot give an answer to all raised questions in court.

There is a strong link between judicial truth and historical truth. Indeed, one of the ICTY aim is to impose judicial truth to prevent revisionism (Lorin de la Grandmaison, 2006:12). So ICTY claims to be answerable for historical truth. Such claim has necessarily implications for historical accuracy. As there is no justice without truth according to the philosopher Simone Weil, truth is also a major condition for fair sentences. In order to ease the recognition of truth, it must be remembered that with time, truth always keeps an explanatory power relative to the events. Truth is also best revealed when language is precise. Historical truth is more complex than judicial truth. Judicial truth cannot give a complete picture of the reality of the past. Historical truth includes truth of adequacy (adequacy between the present speech and the reliably established facts of the past) and truth of interpretation, which allows to grasp the meaning of the events (understanding of the past) (Todorov, 2000:188). Because of its unfinished character, historical truth can only be pursued, but cannot be reached for good (temporary truth). Penal trial is not a means for the adequate demonstration of historical truth, according to the philosopher Hanna Arendt. For her, the purpose of a trial was to do justice, nothing more.

The trial chamber's ICTY regarding Srebrenica events stretched the meaning of several components of the genocide definition and enabled a wider application of the term "genocide" (Southwick, 2005:188-227). A broad standard of intent was applied: For the court, selective destruction of "a part of a part of a group" constituted genocide. Group was defined as the Muslims

of Srebrenica. A figurative interpretation of the term “destroy” was used (Southwick, 2005:188-227). ICTY considered that murder of all military-aged men would have a lasting impact upon the entire group. ICTY asserts that the Bosnian Serbs forces eliminated all likelihood that the community of Bosnian Muslims in Srebrenica could ever re-establish itself on that territory.

The qualification of genocide for the Srebrenica events can be challenged at two levels. Regarding truth of adequacy, there are discrepancies between forensic findings and facts established by ICTY judgements, relative respectively to death figures and the manner of death of the victims. The discrepancy relative to death figures can be explained by the fact that there are 43 known Srebrenica related mass graves; only 23 of them had been exhumed by ICTY for the period 1996 to 2001.<sup>10</sup> The others were handed over to the Bosnian Commission for Missing Persons working with the International Commission on Missing Persons (ICMP). ICMP recently claimed it has closed 6,481 cases of Srebrenica victims,<sup>11</sup> but DNA evidence gives no information about the manner and time of death. Such data are only provided by autopsy findings. 3,568 autopsy reports were available for the Srebrenica related trials (Karganović et al., 2011:73-108), but there is an important fact to consider: one report does not equal one body. In 44.4% of the cases, only a body part is involved (Karganović et al., 2011:73-108). Trial transcripts analysis also showed discrepancies concerning the manner of death. According to the review of all these reports by Dr Simić (Karganović et al., 2011:73-108), execution was questionable in a significant number of cases:

- In about 150 cases, burst-out bone injuries suggesting injuries secondary to Praga anti-aircraft weapon were found. The dimensions of bone damage and the pronounced bone fragmentation were more consistent with the impact of a projectile launched from “Praga” or a similar weapon with the impact of an ordinary bullet. During the Bosnian conflict, such anti-aircraft weapon was widely used against ground targets.
- Shrapnel fragments were found in 477 victims.

All these data strongly suggest that all Srebrenica victims were not executed, if we consider legitimate combat casualties suffered by the retreating 28th Division column of the Bosnian Moslem army.

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<sup>10</sup> <http://www.slobodan-milosevic.org/documents/P642-1a.pdf>

<sup>11</sup> <http://www.ic-mp.org/press-releases/dna-results-reveal-6481-srebrenica-victims/>



Regarding truth of interpretation, plausible motives underlying the executions in Srebrenica were not considered by the ICTY judgements, as ICTY showed Srebrenica events as a conflict without prior history. Plausible motives include the motive for taking revenge on those who attacked Serbian villages surrounding Srebrenica during a three-year period and the motive to eliminate a military threat (Karganović et al., 2011:73-108). Such motives challenged the element of specific intent of group's destruction which is characteristic of genocide.

Medico-legal investigations are able to give an objective light on past events in an armed conflict if two conditions are met, including non-selective mass grave investigations and the involvement of forensic experts showing impartiality and a strong critical sense.

Even careful *post mortem* investigations by independent forensic experts are not able to determine with certainty the manner of death of the victims. It was the case for Račak victims in Kosovo, whose autopsies did not clarify the manner of death, between execution and combat, although cause of death was evident for all victims (gunshot wounds) (Rainio, Lalu, Pentillä, 2001:171-85). The forensic experts have to exercise extreme caution and must not hesitate to acknowledge their limitations concerning manner of death, ethnic origin of the victims or the assertion of their civilian status (Lorin de la Grandmaison, 2001:301-4).

## Conclusions

In conclusion, Srebrenica killings are best characterized as a crime against humanity (Southwick, 2005:188-227) contrary to the ICTY judgments which were used for political purposes, such as demonization methods (Lorin de la Grandmaison, 2003:473-9). Serbs were compared to Nazis, which make easier the NATO campaign in 1999. This shows clearly that forensic pathologists involved in international justice missions are at risk of being manipulated. Ethical guidelines for the forensic pathologist on that matter are strongly needed. The scope of such ethical guidelines useful for the forensic pathologists involved in missions of international criminal tribunal could include (Lorin de la Grandmaison et al., 2006:208-212):

- The place, role and professional independence of the forensic pathologist.

- The acceptable standards of justice (guaranteeing in particular the respect of human rights) needed to be completed by an international criminal tribunal.
- The alternatives to international justice when such conditions are not filled through a truth and reconciliation commission in which two forensic missions could be considered:
- A humanitarian mission for the identification of the victims.
- A mission for historical purposes independent of any judicial process, where the process of forensic investigation can help create an accurate record of past crimes which is able to challenge false interpretation of facts related to the armed conflicts. These forensic investigations can give an objective perspective on past facts if such investigations are not selective and if historians and forensic pathologists are driven by a duty or at least a concern of truth.

Such alternatives, in accord with medical deontology, seem a better way forward than currently challenged international justice without any cultural and spatial connection with the territories where war crimes were committed (Lorin de la Grandmaison et al., 2006:208-212).

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## **Međunarodni krivični sud za bivšu Jugoslaviju (ICTY), forenzički patolog i etika**

Forenzički patolozi uključeni u rad misije Međunarodnog krivičnog suda za bivšu Jugoslaviju (MKSJ) mogu biti izloženi etičkim problemima. Da bi bila istražena priroda ovih problema, napravljen je pregled literature i analiziran dostupan forenzički materijal iz sudskih transkripata koji su u vezi sa masakrom u Srebrenici. Forenzički dokazi korišćeni u suđenjima MKSJ su sporni zbog mnogih faktora, uključujući naročito poteškoće u interpretaciji autopsijskih nalaza i mogućnosti pristrasne selekcije ekshumacija od strane kancelarije tužioca. Iako postoje odstupanja između forenzičkih dokaza i činjenica utvrđenih od strane MKSJ presuda u vezi sa događajima u Srebrenici, optužba za genocid nije bila osporena od strane MKSJ, što je u suprotnosti sa idejom da su samo pouzdano utvrđene činjenice osnova za pravnu analizu. Stepenn etičkih konflikata u forenzičko patološkoj zajednici zavisi od nivoa znanja patologa o osnovnim principima zakona podrivenog od strane MKSJ i političkih implikacija međunarodne pravde. Potrebne su etičke smernice kako bi se rešili ovakvi etički problemi.

**Ključne reči:** masovne grobnice, forenzički patolog, ICTY, etika.