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PhD Thesis Submitted By:

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**The Exhumation of Mass Graves by International  
Criminal Tribunals:  
Nuremberg, the former Yugoslavia and Rwanda**

October 2011

**Supervisor:**

Prof. Ray Murphy

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## Introduction

Criminal enquiries into war crimes, genocide, and crimes against humanity, have increasingly come to be characterised by the application of forensic science to the investigative process. A recurrent scene in the investigations of such crimes is the forensic exhumation of mass graves with the aim of recovering bodies and extracting physical evidence. Several international criminal tribunals, established in the past number of decades to hold perpetrators accountable, have undertaken forensic programmes in order to gather evidence in support of prosecutions. These programmes are complex undertakings involving multiple personnel from a variety of professional disciplines, and they entail a number of legal, practical and even political considerations. Such factors notwithstanding, as noted by Justice Richard Goldstone, the first chief Prosecutor of both the International Criminal Tribunal for the Former Yugoslavia<sup>1</sup> and the International Criminal Tribunal for Rwanda,<sup>2</sup> exhumations can be regarded as “an important example of what can be achieved by an international criminal court”.<sup>3</sup>

International criminal courts are established in order to seek an end to impunity for the most serious of atrocity crimes.<sup>4</sup> Impunity, and its opposite, punishment and accountability for wrong-doing, are concepts at the core of criminal justice. Since the emergence of an organised system of international justice, encompassing international human rights law, international humanitarian law and international criminal law, those concerned with its application have sought to hold individuals responsible for serious transgressions to account. Judge Gabrielle Kirk McDonald, former President of the International Criminal Tribunal for the former Yugoslavia, in

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<sup>1</sup> Established pursuant to United Nations Security Council Resolution 827, UN Doc.S/RES/827 (1993), 25 May 1993.

<sup>2</sup> Established pursuant to United Nations Security Council Resolution 955, UN Doc. S/RES/955 (1994), 8 November 1994.

<sup>3</sup> Richard Goldstone, ‘Assessing the Work of the United Nations War Crimes Tribunal’ Address of the Honorable Justice Richard Goldstone, Former Chief Prosecutor for the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda, and Justice of the Constitutional Court of South Africa, Stanford Law School, October 12, 1996, (1997) 33(1) *Stanford Journal of International Law*, 1, 7.

<sup>4</sup> The term ‘atrocity crimes’ is one suggested by David Scheffer as a collective reference to the crimes of genocide, war crimes and crimes against humanity. David Scheffer, ‘Genocide and Atrocity Crimes’ (2006) 1(3) *Genocide Studies and Prevention*, 229.

a speech at the Council on Foreign Relations in New York in May 1999, encapsulated the philosophy underpinning the work of international courts:

This century has been the bloodiest in human history. And, increasingly, civilians have become targets, rather than suffering the consequences of this warfare. In this century we have also witnessed a proliferation of international treaties designed to protect basic human rights even during the conduct of war, yet these rights have for the most part been ignored. Thus, a cycle of impunity with devastating results has evolved which, I submit, can only be ended by the application of the rule of law, by holding individuals accountable for their illegal acts. This is what the Tribunal is doing. The precedent that it is now establishing has significantly altered the way the international community responds to such conflicts. The Tribunal's experience indicates that it is beginning to meet its potential.<sup>5</sup>

Likewise, the International Criminal Tribunal for Rwanda locates laws' confrontation of impunity at the cornerstone of its being.<sup>6</sup> A similar ideology can be identified in the work of the International Military Tribunal at Nuremberg, as revealed in the opening speech of Justice Robert Jackson, the Chief Prosecutor representing the United States of America at the Tribunal. Although the word impunity is not explicitly used, the sentiment is unmistakable:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of

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<sup>5</sup> Judge Gabrielle Kirk McDonald, 'The International Criminal Tribunal for the former Yugoslavia: Making a Difference or Making Excuses?' ICTY Press Release, The Hague, 13 May 1999, JL/PIU/402-E, available at <http://www.icty.org/sid/7766>.

<sup>6</sup> This facet of the Tribunal's work becomes immediately obvious when one views the website of the Rwandan Tribunal. Alongside the title of the Court, sits as a tagline the words *Challenging Impunity*. Website of the International Criminal Tribunal for Rwanda, available at <http://www.unictr.org/Home/tabid/36/Default.aspx>. Although this thesis will not focus on the work of the International Criminal Court, it is worth noting that this court also places the fight against impunity as central to its *raison d'être*. Details on the court provided on its website identifies that it is "the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community", indicating that the worldview of this institution does not stray far from a traditional conception of international criminal justice. 'About the Court' Website of the International Criminal Court, available at, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last accessed 27 October 2011).

the law is one of the most significant tributes that Power has ever paid to reason.<sup>7</sup>

In order to hold perpetrators individually responsible, international criminal courts must be presented with sound and convincing evidence of their culpability. Thus, investigations will be mounted to produce a corpus of evidence that can persuade the trier of fact, beyond a reasonable doubt, of the guilt of the accused. Trials held before international criminal Tribunals are lengthy and complex, and frequently relate to an event or series of events which have taken place over a prolonged period of time, involve incidences that have occurred at many locations, and may involve multiple perpetrators or co-accused. This stands in contrast to the dynamics of the typical domestic trial, which often will only be concerned with prosecuting isolated events.<sup>8</sup>

The nature of the crimes committed add a further complexity, as tribunals are not prosecuting so-called 'ordinary crimes'; rather, such tribunals indict individuals for offences that are prohibited under international law and are regarded as being particularly heinous in nature. Thus, it has been remarked upon that:

It is time-consuming to prove, or to respond to, a charge that offences have been committed as part of a widespread or systematic campaign, as is required for establishing crimes against humanity. Similarly, proof that a conflict is international requires considerable evidence that goes beyond proof of the specific crimes with which the accused is charged. Finally, proving or defending an allegation of genocide is more complex than the core crime of murder. All of this is made even more difficult when there are multiple accused.<sup>9</sup>

Consequently, to satisfy the burden of proof required for trials of this nature, it is necessary for the prosecution to call extensive evidence.<sup>10</sup> The prosecution will draw upon a number of evidential resources to prove its cases. Forensic evidence which

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<sup>7</sup> Robert Jackson, opening speech, Wednesday 21 November 1945, Nuremberg Trial Proceedings Vol. 2, pp.98-99, available at Yale Law School, Lillian Goldman Law Library, The Avalon Project *Documents in Law, History and Diplomacy*, available at <http://avalon.law.yale.edu/imt/11-21-45.asp> (last accessed 27 October 2011).

<sup>8</sup> Richard May and Marieke Wierda, 'Evidence before the ICTY', in Richard May, David Tolbert, John Hocking, Ken Roberts, Bing Bing Jia, Daryl Mundis and Gabriël Oosthuizen (eds.), *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, (The Hague-London-Boston: Kluwer Law International, 2001), pp.249-261, pp.249,250.

<sup>9</sup> Speech of former President Gabrielle Kirk McDonald at the inauguration of new Judges, 16 November 1998, cited in May and Wierda, 'Evidence before the ICTY', *ibid*, p. 250.

<sup>10</sup> May and Wierda, *ibid*.

has been gathered through the exhumation of mass graves containing the bodies of victims who have died in the conflict is one such source of evidence.

### **A. The Exhumation of Mass Graves in an International Criminal Justice Context**

The context in which forensic expertise is utilised to exhume the graves of victims of heinous crimes is subject to a number of variations. For example, investigations may be conducted at the impetus of domestic authorities who recognise the crimes as being those of an international character and investigate, charge those responsible, or provide reparations accordingly. For example, in Guatemala, exhumations have been conducted following the 36 year civil war in which numerous human rights violations, including extra-legal killings, occurred. Exhumations have formed part of a series of transitional justice measures, including legal action taken by survivors of gross human rights violations associated with the civil conflict.<sup>11</sup> The recovery of human remains fulfils an important reparative function for societies in transition after conflict or periods of gross and systematic human rights abuses. Transitional justice reconciliatory mechanisms such as truth and reconciliation commissions have acknowledged the importance of exhumations for the progression of conflict resolution. One such example is the truth commission established in Guatemala, the Commission for Historical Clarification. In the final report of the Commission, one of the primary recommendations made was the establishment of a national reparation programme, including an active policy of exhumations. It considered that the exhumation of remains “is in itself an act of justice and reparation and an important step on the path of reconciliation”,<sup>12</sup> and that the process of exhumation is not only “a judicial procedure, but above all [a] means for individual and collective reparation”.<sup>13</sup>

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<sup>11</sup> James Welsh and Tracy Ulltveit-Moe, ‘Guatemalan government acknowledges human-rights abuses’ (2000) 356 *The Lancet*, 1436.

<sup>12</sup> Commission for Historical Clarification, *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification, Recommendations and Conclusions; Recommendations and Conclusions; Recommendations; III Reparatory Measures, ‘Active Policy of Exhumations’*, February 1999, available at <http://shr.aaas.org/guatemala/ceh/report/english/recs3.html> (last accessed 27 October 2011).

<sup>13</sup> *Ibid.*, at para.29.

Forensic exhumations and examinations may be carried out singularly for humanitarian purposes and prosecutions will not result, regardless of the existence of evidence to indicate criminal culpability. For instance, the work of the Committee on Missing Persons in Cyprus (CMP) may be seen in this light. According to Article 7 of the Terms of Reference, the Committee “shall look only into cases of persons reported missing in the inter-communal fighting as well as in the events of July 1974 and afterwards”.<sup>14</sup> The CMP was established in 1981 following an agreement between the Greek and Turkish Cypriot communities under the auspices of the United Nations in order to establish the whereabouts of the 502 Turkish Cypriots and 1493 Greek Cypriots officially reported as missing as a result of hostilities in 1963-64 and 1974.<sup>15</sup> The Committee utilises forensic expertise in order to exhume, identify and return the remains of missing persons, a primary objective of the project being to facilitate “relatives of missing persons to recover the remains of their loved ones, arrange for a proper burial and close a long period of anguish and uncertainty”.<sup>16</sup> In a wider context, the project aspires to contribute to a process of reconciliation between the affected communities.<sup>17</sup> However, notwithstanding the vital reparative function this endeavour serves, such a programme does not discharge an obligation that arises under international human rights law and international humanitarian law requiring the State to investigate, and when sufficient grounds exist, to prosecute perpetrators who have violated the right to life.<sup>18</sup>

In other circumstances, forensic activity may be the result of robust lobbying and activity from civil society, which can spur on legislative reactions from governing authorities. A germane case in point is Spain, where extensive exhumations of graves related to the Spanish civil war and the period of oppressive rule under General Francisco Franco have been carried out following pressure by civil society organisations such as La Asociación para la Recuperación de la Memoria Histórica, Equipo Nizkor, Foro por la Memoria and Amnesty International. The Socialist

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<sup>14</sup> ‘About the CMP’, Website of the Committee on Missing Persons in Cyprus, available at [http://www.cmp-cyprus.org/nqcontent.cfm?a\\_id=1305&tt=graphic&lang=11](http://www.cmp-cyprus.org/nqcontent.cfm?a_id=1305&tt=graphic&lang=11) (last accessed 27 October 2011).

<sup>15</sup> CMP Factsheet, November 2010, available at [www.cmp-cyprus.org](http://www.cmp-cyprus.org) (last accessed 27 October 2011).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> This was determined in a European Court of Human Rights case, *Cyprus v. Turkey*, application no.25781.94, Judgement of 10 May 2001, at paras. 22, 26-27, 131-136.

government of Jose Luis Rodriguez Zapatero responded by enacting the controversial ‘Historical Memory Law’ (*Ley de Memoria Histórica*) in 2007. In addition, Judge Baltasar Garzón, who served in Spain’s Central Criminal Court, the *Audiencia Nacional*, had made attempts to investigate the Franco-era disappearances and in October 2008 ordered the exhumation of 19 mass graves. Considering the disappearances to constitute continuing crimes, these acts were placed into the context of crimes against humanity. Robust opposition from the State Prosecution Agency followed. Judge Garzón promptly ceased the investigation in November 2008, and passed responsibility to the regional courts. The question of whether it is desirable to construct a public narrative on ‘historical events’, and whether it is appropriate to exhume mass graves as part of this progression from ‘individual’ to ‘collective’ memories of the Civil War, and the period of Franco rule, has been the subject of much debate in Spanish society. Proponents have faced fierce opposition from those who object to the opening of ‘old wounds’.<sup>19</sup>

Forensic exhumations performed under the auspices of international criminal tribunals can be regarded as a further category of forensic investigation. These projects are carried out according to a specific purpose associated with the prosecutorial targets of the tribunals - the foremost objective of the exhumations is the assemblage of evidence that relates directly to prosecution charges. Thus, humanitarian concerns associated with human identification, the repatriation of remains, and questions of truth, outside of the forensic context, can be low on the list of objectives of tribunals pressed for time and resources. In this way, the mandate and the intended outcomes of these enquiries will differ from other manifestations of forensic investigations, such as those described above in, for example, Guatemala, Cyprus and Spain.

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<sup>19</sup> See further, for example, Carlos Jerez-Farrán and Samuel Amago (eds.), *Unearthing Franco’s Legacy: Mass Graves and the Recovery of Historical Memory in Spain*, (Notre Dame, IN: University of Notre Dame Press, 2010).

## **B. The Purpose of Forensic Evidence for International Criminal Trials**

Successful prosecution in international criminal trials rests in large part on the ability to obtain evidence in support of the charges levied against defendants. Indeed, two core elements have been identified as necessary for international tribunals and international justice to flourish: the ability to arrest the perpetrators and the ability to acquire evidence against them. Indictments and trials will not materialise without *prima facie* evidence that there is a case to answer.<sup>20</sup> Therefore, considerable effort, time and resources will be allocated to the investigative stage of international criminal prosecutions. Considering the importance of investigations for the trials, this aspect of international criminal law has received a surprising lack of attention in law literature, although there is a growing body of material on operational aspects stemming from the science disciplines. John R. Cencich has considered why material on the investigatory aspect of genocide, war crimes and crimes against humanity in the context of joint criminal enterprise cases at the Yugoslav Tribunal is “conspicuously absent”.<sup>21</sup> According to Cencich, one explanation may be that much of what has been written on joint criminal enterprise comes from the legal decisions of the International Criminal Tribunal for the former Yugoslavia, “which cannot appropriately provide the out-of-court perspective of what goes into conducting the actual investigation”.<sup>22</sup> Although the trial transcripts, decisions and judgements do give some impression, in many ways, it is a limited view, and in academic terms, remains overlooked. The investigation is largely what goes on behind the scenes; however, this obscurity does not make such inquisitions any less an essential component of international criminal law.

The forensic exhumation is but one element of the international criminal investigation but it is a very valuable one. Enquiries into violations of international criminal law rely on the forensic sciences “for critical evidence that establishes the

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<sup>20</sup> Mark B. Harmon and Fergal Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings’ (2004) 2 *Journal of International Criminal Justice* 403, 403.

<sup>21</sup> John R. Cencich, ‘International Criminal Investigations of Genocide and Crimes Against Humanity: A War Crimes Investigator’s Perspective’ (2009) 19(2) *International Criminal Justice Review*, 175-191, 176.

<sup>22</sup> *Ibid.*

nature and pattern of crimes committed” as well as for providing methods for human identification.<sup>23</sup> Forensic analysis pertaining to death investigations will tend to concentrate on specific crimes falling within the broader categories under the jurisdiction of the tribunals. For example, in the context of war crimes, the forensic examination will pertain to “acts of wilful killing, directing attacks against a civilian population or protected persons, killing of surrendered combatants, physical mutilations and medical experiments, intentional starvation, and extrajudicial executions”.<sup>24</sup>

The decisions, firstly, to instigate a forensic programme and subsequently on how many graves should be exhumed can be influenced by a number of factors including whether and how the exhumations will contribute to the aims of the investigation, prosecutorial strategy, and the availability of funding. Exhumations and what they entail in terms of logistics, personnel, equipment and running costs can be prohibitively expensive. An experienced international investigator, Raymond McGrath, considers money to be the “*sine qua non* of investigation”.<sup>25</sup> Salaries are a major expense, coupled with the costs of travel expenses, accommodation, transport, and equipment.<sup>26</sup> Tribunals have adapted a number of ways of circumventing the issue of financial restrictions. In addition to securing funds from the ordinary budget of the tribunals, it was also possible to procure forensic assistance from other sources. Forensic teams and the equipment necessary to mount successful exhumations by the United Nations Tribunals were, in a number of cases, donated by State governments or non-governmental organisations. One American organisation, in particular, was prominent in the forensic programme of both the Yugoslav and the Rwandan Tribunal. The Boston-based non-governmental organisation, Physicians for Human Rights, undertook a number of investigations in the former Yugoslavia and completed all the forensic exhumations on behalf of the Rwandan Tribunal.

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<sup>23</sup> Erin H. Kimmerle, ‘Current Trends in Forensic Investigations of Human Rights Abuse: Human Identification of Mass Graves’, in M.I. Okoye and C.H. Wecht (eds.), *Forensic Investigation and Management of Mass Disasters* (Tucson, AZ: Lawyers and Judges Publishing Company, Inc, 2007), pp.221-240, p.221.

<sup>24</sup> Helena Ranta and Kari T. Takamaa, ‘Crimes against Humanity and Other War Crimes’, in Tim Thompson and Sue Black (eds.), *Forensic Human Identification: An Introduction* (Boca Raton-London-New York: CRC Press, 2007), pp.445-456, p.448.

<sup>25</sup> Raymond McGrath, ‘Problems of Investigations into War Crimes and Crimes Against Humanity During and After Ethnic Conflict’, in M. Cherif Bassiouni (ed.), *Post –Conflict Justice* (Ardsey, New York: Transnational Publishers Inc., 2002), pp.893-909, p.895.

<sup>26</sup> *Ibid.*

Criminal investigations mounted by international tribunals are not without difficulties and there are a number of obstacles that may need to be overcome to ensure their success. A significant problem that may be faced by organisations attempting to carry out forensic investigations is political opposition. Mass graves often conceal crimes which the perpetrators will go to lengths to prevent being unearthed. Indeed, as Kirsten Juhl and Odd Einar Olsen identify, “mass grave investigations will be deeply embedded in politics, and the purpose of using such investigations as a means to establish truth, justice and societal safety is in itself a political issue.”<sup>27</sup> In a wider context political opposition can be found when the ‘truth-seeking’ underlying the process of forensic investigations goes against the grain of a hegemonic discourse propagated by those in power. There may therefore be significant resistance or indeed hostility toward the investigations and forensic investigators.

Forensic evidence is not the sole form of evidence presented by the Prosecutor in support of the charges listed in an indictment. Physical evidence forms part of a variegation of evidence which is intended to inform the bench, which will ultimately decide whether there is sufficient evidence to convict, or acquit, the accused. This multifarious utilisation of evidence is portrayed in the *Krstić* judgement from the Yugoslav Tribunal. In reference to the crimes committed against the inhabitants of Srebrenica, Bosnia in the summer of 1995, the judgement reveals how:

The Trial Chamber draws upon a mosaic of evidence that combines to paint a picture of what happened during those few days in July 1995[...] The accounts given by the survivors of the execution sites are corroborated by forensic evidence (such as shell casings and explosive and tissue residues) at some of the execution sites, expert analysis of the contents of mass graves and aerial reconnaissance photographs taken in 1995. The Trial Chamber has also considered the testimony of UN military personnel who were in Srebrenica, records of VRS radio communications that were intercepted by the Army of Bosnia Herzegovina ("ABiH") in July and August 1995, records seized from the ABiH, records seized from the VRS, the analysis of military experts called by both the Prosecution and the Defence and the testimony of General Krstić himself, as well as other witnesses who testified for the Defence. In addition, the Trial Chamber

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<sup>27</sup> Kirsten Juhl and Odd Einar Olsen, ‘Societal safety, archaeology and the investigation of contemporary mass graves’ (2006) 8(4) *Journal of Genocide Research*, 411, 414.

called two witnesses of its own accord, both of whom formerly held senior positions in the ABiH and were closely monitoring the unfolding events in Srebrenica in July 1995.<sup>28</sup>

The evidence uncovered by forensic experts is particularly valuable for providing a method of “effectively putting a particular event in context”, especially where the large volume of reports or eyewitnesses may be overwhelming and difficult for a single trial to handle.<sup>29</sup> In addition, forensic evidence serves to corroborate other forms of evidence, particularly evidence that might otherwise be considered weak or unreliable. Graham Blewitt, former Deputy Prosecutor of the International Criminal Tribunal for the former Yugoslavia, has accordingly expressed that: “Forensic evidence often provides unequivocal corroboration to what would otherwise be suspect or dubious evidence”.<sup>30</sup>

In addition to providing material evidence that points towards the guilt of perpetrators, a further advantage associated with forensic evidence is the contribution it makes to the so-called ‘historical record’. The trial of Dražen Erdemović<sup>31</sup> provides an apt example. Erdemović, the first person to enter a guilty plea at the International Criminal Tribunal for Yugoslavia, was a member of a Bosnian-Serb army firing squad that massacred Bosnian Muslim civilians from Srebrenica. Plagued by guilt, Erdemović confessed to an international journalist about the crime and drew an extremely accurate map indicating the location of the mass grave.<sup>32</sup> Erdemović subsequently was put on trial at The Hague and Physicians for Human Rights were deployed to exhume the mass grave.<sup>33</sup> Discussing the case and the significance of the mass grave exhumation, Prosecutor Richard Goldstone frames the account in terms of historical justice:

[...] the importance of this to historical justice was that the Serbs [...] denied his version. They said there was no mass grave there at all; they never shot or killed any of these Muslim men; this was propaganda and they said if you find that grave, if it’s there, it will contain the dead bodies of earlier

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<sup>28</sup> *Prosecutor v. Radislav Krstić*, Case No.IT-98-33-T, Trial Judgement of 2 August 2001, para. 4.

<sup>29</sup> Kristina. D. Rutledge, “Spoiling Everything” - But for whom? Rules of Evidence and International Criminal Proceedings’ (2003) 16 *Regent University Law Review*, 151, 177,178.

<sup>30</sup> Graham T Blewitt, ‘The Role of Forensic Investigations in Genocide Prosecutions before an International Criminal Tribunal’ (1997) 39(4) *Medicine, Science & the Law*, 284, 284.

<sup>31</sup> *Prosecutor v. Drazen Erdemovic*, Case No.IT-96-22.

<sup>32</sup> Richard J. Goldstone, ‘Remarks on Historical Justice and Reconciliation’, Conference of the International Bar Association, Prague, (September 27 2005) I/2005 *IHJR Occasional papers* 5.

<sup>33</sup> *Ibid* 6.

wars. In any event we were able to find this mass grave from the information contained on Erdemović's maps and with the help of satellite photographs furnished to us by the United States. The mass grave was exhumed by Physicians for Human Rights[...]They proved forensically that the bodies that they pulled out had been killed in about July 1995. All the bodies were of men and boys who had been shot with their hands tied behind their back. Now that put an end to the false denial. That incident is no longer denied by the Serbs or by the Bosnian Serbs.<sup>34</sup>

The use of the forensic sciences in national justice systems has a history spanning some centuries.<sup>35</sup> The union has largely been a successful one.<sup>36</sup> With the development of international criminal law it has increasingly come to be recognised that the expertise of forensic practitioners can likewise make a positive contribution to the growing system of international criminal justice.<sup>37</sup> As the *ad hoc* tribunals are reaching their completion phase, it is timely to conduct a critical examination of the forensic programmes that were undertaken by these institutions. This work represents a vital contribution that has been made by forensic disciplines to the advancement of criminal justice in the international arena. The lessons learnt from the application of forensic techniques to the investigation of atrocity crimes forms part of an important legacy of these institutions.

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<sup>34</sup> *Ibid* 5, 6.

<sup>35</sup> Forensic science does not refer to one single science discipline but rather is an umbrella term that refers to a broad number of science disciplines that have an application in a legal context. The term is often shortened to 'forensics'. For a general back-ground on forensic science see further, Zakaria Erzinçlioglu, *Forensics: crime scene investigations from murder to global terrorism* (London: Carlton Books, 2006). For a description of early domestic cases in which medical and scientific expertise, including forensic anthropology, was employed in a forensic context see, further, Clyde Collins Snow, 'Forensic Anthropology' (1982) 11 *Annual Review of Anthropology*, 97 and Christopher Joyce and Eric Stover, *Witnesses from the Grave* (London: Grafton, 1993) (reprint).

<sup>36</sup> There are nonetheless a myriad of examples of the misinterpretation, misuse or contamination of forensic evidence which has ultimately led to miscarriages of justice. Forensic evidence is not infallible and cannot provide 100% accuracy but rather generates a statistical probability connecting an accused to a crime. The reliability of using forensic methods falls short when, for example, there is insufficient scientific rigour in the applied methodology, there is the presence of examiner bias and forensic procedures are unduly influenced by prosecutorial orientation. APA (Ton) Broeders, 'Forensic Evidence and International Courts and Tribunals: Why bother, given the present state of play in forensics', published in the proceedings of the *International Society for the Reform of Criminal Law (ISRCL) Conference*, The Hague, 2003, Session 403 (Copy on file with author).

<sup>37</sup> For example, the Commission on Human Rights Resolutions 2003/33 and 2005/26 on *Human Rights and Forensic Science*, recognise in their preambular paragraphs that "forensic investigations can play an important role in combating impunity by providing the evidentiary basis on which prosecutions can successfully be brought against persons responsible for grave violations of human rights and international humanitarian law."

## C. Aims, Core Questions and Structure of the Thesis

This thesis is a study on the practice of mass grave exhumation in the context of international criminal law, and more specifically as employed by international criminal tribunals. The primary institutions of focus are the International Military Tribunal held in Nuremberg,<sup>38</sup> the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.<sup>39</sup> The study locates the genesis of the phenomenon of mass grave exhumation for international criminal justice purposes at a historical point in time, contending that the emergence of this experience parallels with the development of international criminal law during and after the Second World War, and with the growing movement against impunity for the most serious of international crimes. It will be argued that this process represents a shift in how the remains of the deceased in armed conflict are viewed.

Chapter I will thus outline the legal framework relevant to the treatment of the dead in war. Important provisions have been codified in international humanitarian law that address the requisite treatment of individuals who die as a direct consequence of armed conflict. As will be documented in this chapter, rules and customs pertaining to the treatment of war dead evolved over a period of time, progressing from basic requirements *a propos* the disposal of the remains and the tallying of the numbers who had died, to a more comprehensive list of obligations that also took into account the needs of surviving families and communities who were grieving for their losses under the arduous circumstances of war. With the advent of a comprehensive legal system of international human rights and international criminal law, which was consolidated through a range of enforcement mechanisms, including courts that can enforce criminal sanctions, the dead offered the possibility to provide evidence of the terrible crimes that had been committed during conflicts. Thus, the deceased came to

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<sup>38</sup> Trial of the major war criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946.

<sup>39</sup> The International Military Tribunal, like its successors, was conceived out of the atrocity of war and was established by four Allied Powers at the end of the Second World War. The latter two Tribunals, often referred to as the *ad hoc* Tribunals due to their provisional and situation specific nature, were established in 1993 and 1994 respectively under Chapter VII powers of the Charter of the United Nations.

represent not only human remains to which obligations were owed, but also became a source of physical evidence to be utilised in criminal prosecutions. Chapter I will outline the treaty and customary international humanitarian law provisions relevant to the treatment of the dead. Further, the references to exhumation in the Geneva Conventions of 1949 and the Additional Protocols of 1977 will be detailed, and the rationale behind these provisions will be explained. The final issue addressed in the chapter will be a brief examination of the guidelines that direct the process of mass grave exhumation, highlighting the current lack of a binding legal framework.

The core aim of Chapter II is to detail the *modus operandi* of mass grave exhumations from an international criminal justice perspective. The definition of mass grave will be examined. As the chapter will highlight, the definition is subject to a number of variations. Different disciplines have framed their own designations that reflect the inherent bias of each speciality. The various components of the term mass grave will, therefore, be examined from the viewpoint of several scientific disciplines. The definition that has come to be used in international criminal law will then be outlined. Mass grave exhumations are multi-disciplinary endeavours which entail a number of operational challenges. Chapter II will thus provide a thorough overview of the process, detailing the methods used to locate the graves and the respective roles of the experts that are engaged in the procedure. The rationale for engaging in forensic investigations will be discussed, from the prosecutorial point of view, and the chapter will highlight important tasks that must be carried out to ensure the forensic integrity of the evidence extracted from the crime scenes. The final section of the chapter examines some important procedural aspects pertaining to the presentation of forensic evidence in the international criminal trial. The definition of expert witness, as developed through the case law of the *ad hoc* tribunals will be explored, and the rules relating to the admission of forensic evidence will be detailed.

The use of forensic expertise during the 1990s in connection with the prosecution of perpetrators of atrocity crimes on all sides of the Balkan conflict has been examined elsewhere.<sup>40</sup> Reference to previous incarnations of the utilisation of forensic science

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<sup>40</sup> For example, Melanie Josefine Klinkner, 'Towards Improved Understanding and Interaction between Forensic Science and International Criminal Law in the Context of Transitional Justice', PhD thesis, Bournemouth University (2009). This thesis focuses on two main case studies – the

practitioners in an international legal context has tended to be brief, and the purpose has been mainly to provide contextual information of what has ‘gone before’. However, it is important to pay more than just cursory attention to the ‘predecessors’ of the forensic programmes of the United Nations *ad hoc* International Criminal Tribunals. Therefore, chapter III will examine the presentation of forensic evidence at the International Military Tribunal held in Nuremberg in 1945 and 1946. The second half of the chapter will explore the crime of enforced disappearance and explain how the practice of forensic exhumation, in an international criminal justice context, re-emerged after a four decade long interval between the close of the Second World War and the growing movement against impunity that emerged in the Southern American cone in the 1980s. Thus, Chapter III places the work of the *ad hoc* Tribunals, vis-à-vis forensic investigations, into a historical context. By outlining the state of practice prior to the establishment of these institutions, it will be illustrated how forensic investigations have developed and evolved. This will demonstrate that the work of the contemporary international tribunals has not occurred in a forensic or legal vacuum.

The forensic programmes managed by the *ad hoc* Tribunals can be regarded as significant due to the contribution made to the knowledge and practice of forensic investigation of complex international crimes. Writing in 2001 in relation to the work that took place in the former Yugoslavia, Eric Stover and Molly Ryan emphasise that the investigations “have drawn on a wide range of scientists from around the globe, increasing our knowledge of how to manage large-scale exhumations ten-fold”.<sup>41</sup> Ten years on, this thesis aims to explore further the dynamics of the forensic programme at the International Criminal Tribunal for the former Yugoslavia, in order to advance an additional contribution to the field of knowledge. Whilst this study is in no way exhaustive, and does not purport to cover all issues relating to the exhumation of mass graves in the Balkans by the Tribunal, some of the more important considerations will be identified and discussed. As will

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International Criminal Tribunal for the former Yugoslavia and the Extraordinary Chambers in the Courts of Cambodia (Copy on file with author). Caroline Alyce Tyers, ‘Hidden Atrocities: The Forensic Investigation and Prosecution of Genocide’, PhD thesis, University of Tennessee: TRACE – Tennessee Research and Creative Exchange, Doctoral Dissertations (2009). This PhD thesis focuses on three cases prosecuted at the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Radislav Krstić*, *Prosecutor v. Blagojević and Jokić* and *Prosecutor v. Popović et al.*

<sup>41</sup> Eric Stover and Molly Ryan, ‘Breaking Bread with Dead’ (2001) 35(1) *Historical Archaeology* 7, 18.

be highlighted in Chapter I, a set of legal obligations *a propos* the war dead exist in international humanitarian law. Whilst these are obligations incumbent on States, it will be argued that international tribunals can play a role in upholding international humanitarian law obligations towards the deceased. To that end, the final section in Chapter IV will outline details on the cooperative relationship that was established between the Yugoslav Tribunal and State and non-State bodies in the Balkans working on the humanitarian aspects of body recovery, identification and repatriation.

It has been remarked upon in the past that the International Criminal Tribunal for Rwanda “suffers from poor visibility in the shadow” of the Yugoslav Tribunal.<sup>42</sup> Although numerous scholars have studied the Rwandan genocide, and the work of the Rwandan Tribunal, it is probably fair to say that there has been a tendency in the scholarly community to focus more intently on the work of the International Criminal Tribunal for the former Yugoslavia. Moreover, this point holds true on the subject of the practice of mass grave exhumations by the Rwandan Tribunal. To date, the experience relating to the use of forensic expertise at the International Criminal Tribunal for Rwanda has remained overlooked. Chapter V aims to bridge some of this gap. A further core question that arises in the study of mass grave exhumations is whether the practice of forensic exhumation of the graves of victims killed during armed conflict, for the purposes of criminal justice, can be viewed as problematic or undesirable in some circumstances. This issue will be explored in Section C of Chapter V which examines the question of why forensic evidence was not relied upon more extensively at the International Criminal Tribunal for Rwanda. Possible explanations to account for the dearth of exhumations conducted that are explored include the possibility that there was resistance to exhumations on the part of the Rwandan government, financial and logistical obstacles and decisions related to a prosecutorial strategy.

There were a number of factors that informed the choice of case studies analysed in this thesis. Primary focus is given to the work of the *ad hoc* Tribunals as their forensic investigatory phases are complete. These institutions have also completed many trials and the Tribunals themselves are in their completion phases, thus there is

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<sup>42</sup> Rutledge, ‘Spoiling Everything’, (n 29), 159.

a considerable body of case law to draw upon and numerous judgements in which forensic evidence is cited in support of findings of guilt against the accused. There are also a number of judgements in which it is made evident that the forensic evidence does not support the claims made by the prosecution and thus demonstrates the limits of this form of evidence. The case law of the *ad hoc* Tribunals is readily available and accessible. In addition, particularly in the case of the International Criminal Tribunal for the former Yugoslavia, there is a substantial body of literature, for the most part emanating from science disciplines, that details numerous operational aspects of the forensic investigations conducted for this institution. In contradistinction, to date no trials have been completed by the International Criminal Court and thus there are no judgements from which the value of the forensic evidence for prosecutorial purposes can be evaluated. Further, the secondary literature is scant to the point of non-existent. Therefore, the very practical consideration of access to information was a cogent deciding factor in the determination to exclude the International Criminal Court from this study.

An additional consideration that was made as regards the choice of case study was the fact that the *ad hoc* Tribunals sit well together as a focus of study as there are a number of procedural similarities between the two Tribunals. In no small part, this is due to the fact that both courts were established under Chapter VII powers of the United Nations Charter. Conversely, the International Criminal Court is a treaty based institution. William Schabas identified a further procedural difference between the International Military Tribunals at Nuremberg and Tokyo, the *ad hoc* Tribunals and the International Criminal Court which relates to the triggering mechanism of the respective Tribunals: “Unlike Nuremberg, Tokyo, and the *ad hoc* Tribunals, the ICC is a permanent body that cannot automatically exercise its jurisdiction; it must be ‘triggered.’ In this sense, the earlier institutions were already ‘triggered’ by the political bodies that created them”.<sup>43</sup> However, in light of the fact that forensic expertise is utilised by the International Criminal Court, a subsequent study would certainly be warranted, particularly when judgements are eventually rendered for the cases currently in the trial phase.

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<sup>43</sup> William A. Schabas, ‘Victor’s Justice: Selecting “Situations” at the International Criminal Court’ (2010) 43 *The John Marshall Law Review*, 535, 538.

The approach taken in this thesis will be to outline how forensic investigations operate from a prosecutorial point of view. It should be noted that Defence counsel may also instigate explorations of a forensic nature in order to challenge the evidence presented by the prosecution, however, this will not be examined in the thesis. There are two rationales behind this methodology. First, the burden of proof is on the prosecution and the Defence has only “to lead such evidence as would, if believed and uncontradicted, induce a reasonable doubt about the prosecution case”.<sup>44</sup> Therefore, the forensic activity associated with the Office of the Prosecutor of criminal tribunals will be more extensive than any forensic pursuits conducted by a Defence team.<sup>45</sup> A second, more pragmatic reason, relates to the space constraints associated with a project of this length, thus, it was decided to afford prioritisation to exploring prosecutorial investigations. A future review analysing the modus operandi of Defence investigations would be a valuable contribution to the field of knowledge.

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<sup>44</sup> *Prosecutor v. Zajnir Delalić, Dravko Mucić, Hazim Delić and Esad Lanžo*, Case No. IT-95-21-T, Trial Judgement of 16 November 1998, para.603, cited in May and Wierda, ‘Evidence before the ICTY’, (n 8), p251.

<sup>45</sup> There are ‘equality of arms’ issues pertaining to the ability of Defence teams to secure the resources necessary to undertake adequate investigations in order to mount an effective Defence. This topic is outside the scope of this thesis, but on ‘Equal distribution of powers to collect evidence’ see, further, Alexander Zahar and Göran Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2008), pp.364-366.

# Chapter I: “We Are the Dead”<sup>1</sup>: Legal Obligations Relating to Finding, Burying and Exhuming the Deceased Following Armed Conflict

## Introduction

International humanitarian law developed as a branch of international law with a specific purpose to limit “the use of violence in armed conflicts”.<sup>2</sup> This body of law does not contain an outright prohibition on killing; realistically there would be few States who would be willing to sign up to international treaties that curtailed the ability of its armed forces to target and kill enemy fighters on the field of battle. The law does, however, regulate who can be targeted, and the level of violence that may be used by combatants as they try to obtain a military advantage over adversaries. Hence, violence is limited by:

- a) Sparing those who do not or no longer directly participate in hostilities;
- b) Limiting the violence to the amount necessary to achieve the aim of the conflict, which can be – independently of the causes fought for – only to weaken the military potential of the enemy.<sup>3</sup>

Even with a body of law moderating the actions of belligerents, deaths associated with armed conflict is a bleak but inevitable reality. International humanitarian law is not silent of the subject of the dead. A number of provisions have been enshrined pertaining to the treatment of the deceased following armed confrontations. These rules have evolved over the course of centuries and many are now recognised as having the status of customary international humanitarian law. This chapter will outline the relevant treaty and customary law rules, and will discuss the rationale behind the development of such obligations.

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<sup>1</sup> John McCrae, ‘*In Flanders Fields*’ (1915), first published in *Punch* magazine on 8<sup>th</sup> December 1915, available at <http://www.greatwar.co.uk/poems/john-mccrae-in-flanders-fields.htm> (last accessed 27 October 2011).

<sup>2</sup> Marco Sassòli and Antoine A. Bouvier in co-operation with Susan Carr, Lindsey Cameron and Thomas de Saint Maurice, *How Does Law Protect in War: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* 2<sup>nd</sup> edn., 2 vols. (Geneva: International Committee of the Red Cross, 2006), vol. I, p.81.

<sup>3</sup> *Ibid.*

The dead body occupies a central place in the narrative of forensic investigations of mass graves. The importance of retrieving the human remains of combatants and civilians who have died as a result of armed conflict will therefore be discussed, from not only a legal, but also a psycho-social and moral viewpoint. The emergence of the practice of applying forensic expertise to the investigation of crimes in an international forensic context will be examined against the background of the development of these rules.

Specific mention of the word exhumation in international humanitarian law texts is exiguous. As this chapter will illuminate, the reference to exhumations is predominately connected to humanitarian purposes. In response to military practice, it is permissible under the First Geneva Convention of 1949<sup>4</sup> to exhume temporary graves in order to excavate the remains of deceased soldiers for the purpose of repatriation to their country of origin or to move the bodies to permanent military cemeteries. The 1977 First Additional Protocol<sup>5</sup> contains further reference to exhumation, and here the scope of application is broadened. However, there are strict limits to the range of permissible circumstances under which excavations can be carried out. Although exhumations can be conducted for investigatory purposes, such as those connected to enquiries into war crimes, the permission to carry out the activity is granted to the State on whose territory the grave is located. This represents something of a gap in this body of law in terms of the regulation of situations where an international criminal tribunal will seek to exhume the graves of victims of armed conflict. Thus the chapter will conclude with a short section highlighting some international standards that have developed a propos the forensic exhumation of mass graves.

## **A. Locating the Dead: Forensic Investigations of Atrocity Crimes**

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<sup>4</sup> Article 17 of the First Geneva Convention.

<sup>5</sup> Article 34 of the First Additional Protocol to the Geneva Conventions.

“Bones are often our last and best witnesses; they never lie, and they never forget”.<sup>6</sup> These words, voiced by the renowned forensic anthropologist Clyde Snow, reflect a conviction commonly held amongst practitioners working on investigations of atrocity crimes that entail the forensic exhumation of mass graves. As Eric Klinenberg maintains, this view offers “a concise and pragmatic formulation of the notion that the body is the site and surface of essential but otherwise obscured social truths”<sup>7</sup> and has become a self-evident principle of “human rights workers and truth commissions throughout the world”.<sup>8</sup> The difficulty in getting to the ‘authentic’ truth amongst the competing, multiple, partial and conflicting narratives that abound from the adversaries in conflicts can in some way be overcome by applying scientific scrutiny to the most physical evidence of organised violence – the dead body. As Klinenberg articulates:

But there is one way, familiar to anyone who follows cases of political violence, in which adjudicators can establish definitive and reliable evidence: get to the dead bodies, the corpses whose materiality cannot be denied, subject them to medical autopsy, and scientifically determine the nature and causes of their deaths. Find and center the bodies, the logic goes, and the truth will soon emerge.<sup>9</sup>

This observation points to a rationale behind engaging in medico-legal investigations; through a scientific reading of the body, observable facts that reveal with a satisfactory degree of accuracy a chain of events that has played out culminating in the death of individuals can be scrutinized and recorded. The dead body becomes more than remains to which a duty of care is owed, but can be a source of valuable forensic information. How does the emergence of forensically examining bodies of victims of the dead following conflict fit into the development of rules pertaining to the treatment of the dead as codified in international humanitarian law?

Writing in relation to the stages of development in international law regarding enemy dead in conflicts involving western societies, Luc Capdevila and Danièle Voldman

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<sup>6</sup> Eric Klinenberg, ‘Bodies that Don’t Matter: Death and Dereliction in Chicago’ (2001) 7 *Body and Society*, 121-135, at 121, citing Stover ‘Bones....Never Lie, and They Never Forget’ (1997) 27(12) *Smithsonian*, 40.

<sup>7</sup> Klinenberg, ‘Bodies that Don’t Matter’, *ibid.*, 121

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

reflect on how there were three distinguishable junctures which were “marked by the widening geographical and growing demographic implications of warfare”.<sup>10</sup> Initial rules were particularly concerned with identification of the deceased in order to maintain accurate records, to establish figures on the number killed and to ensure control over the gathering of personal effects left on the field of battle. The second phase developed regulations pertaining to the actual bodies.<sup>11</sup> The third and final stage took account of the dead “as individuals to whom one had obligations”.<sup>12</sup> As will be discussed in the section below on the provisions of international humanitarian law pertaining to the deceased, the rationale underpinning these rules reflect very much a humanitarian component. The reasons for treating the deceased in a certain manner now extends far beyond pragmatic reasons of analysing statistical data on the numbers killed but rather seeks to bequeath a level of dignity to the dead and attempts to alleviate some of the detrimental consequences that will inevitably result for the survivors. Early codification of rules pertaining to war dead concerned the reciprocal conduct towards enemy dead. As time has advanced and the nature of warfare has changed, the categories of protected persons<sup>13</sup> has extended to protect not just soldiers but also non-combatants, as the boundaries between enemy and allies and combatant and civilian have been blurred. Thus, rules have evolved that address the appropriate action to be taken vis-à-vis all categories of deceased. The conception that the rules of international humanitarian law that have been drafted to protect all categories of dead reflect a basic level of compassion or civility was conveyed in a 2002 judgement from the High Court of Israel. The *Jenin (Mortal Remains)* case reflected that: “The location, identification, and burial of bodies are

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<sup>10</sup> Luc Capdevila and Danièle Voldman, *War Dead: Western Societies and the Casualties of War* (Edinburgh: Edinburgh University Press, 2006), p.77.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Protected persons are those who in wartime “benefit from protection under treaty and customary international humanitarian law. These persons are specifically the sick, wounded, shipwrecked, prisoners and civilians not taking direct part in the hostilities”. ICRC ‘Other persons protected under international humanitarian law’ available at <http://www.icrc.org/eng/war-and-law/protected-persons/other-protected-persons/index.jsp> (last accessed 27 October 2011). In addition a number of other persons are protected under the law including medical and religious personnel, civil defence staff and humanitarian workers, *ibid.*

important humanitarian acts. They are a direct consequence of the principle of respect for the dead – respect for all dead”.<sup>14</sup>

Practice regarding the dead has not remained static but rather has been fluid as norms and laws have responded to the realities of the constantly shifting ways of engaging in armed conflict. As Capdevila and Voldman articulate, “[n]ew ways of waging war changed attitudes towards the dead and the way they were dealt with”.<sup>15</sup> In different conflicts, belligerents were “horrified by the scale of losses”.<sup>16</sup> With the increase in the number of fatalities in armed conflict came a greater level of care toward the dead. It was, they note, “as if at the dawn of mass killing, the individual became more precious. The greater the number of combatants who perished the more the survivors were concerned to give each one a marked grave, in an identifiable place accessible to the bereaved”.<sup>17</sup>

The First World War and the emergence of industrialised warfare represented a fundamental break in military history. Total warfare was reflected in the changes in weaponry and also in the numbers and dynamics of troops involved. Transformations were also witnessed in how the wounded were cared for and how the dead were treated;<sup>18</sup> this has been identified as marking a “decisive turning point”.<sup>19</sup> Prior to the Great War, conflicts in the previous decades, during the second half of the nineteenth century, took place in a reasonably defined geographical place, they were of short duration, relatively speaking, and engaged with intense diplomatic activity. Even though they were crudely respected, codes of honour in relation to the enemy existed. Thus, these conflicts resembled wars of an earlier era. The 1914-1918 war saw the mobilisation of large proportions of the male population and the utilisation of civilian populations, notably including women and non-combatants, who came to play an important role in the whole strategy of war, consequently

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<sup>14</sup> *MK Mohammed Barake v. The Minister of Defense et al*, HCJ 3114/02, *MK Ahmed Tibi v. The Prime Minister et al*, HCJ 3115/02, *Adalah et al v. The Commander of the IDF Forces in the West Bank*, HCJ 3116/02, Judgement, April 14, 2002, at para. 9

<sup>15</sup> Capdevila and Voldman, *War Dead*, (n 10), p.8.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Susan-Mary Grant observes that although the practice of burying or burning the dead on the field of battle became no longer tolerated during the First World War, shifting instead to burials, preferably individualised in military cemeteries: “[y]et the American Civil War witnessed this development in attitudes towards the dead half a century before the First World War prompted a similar shift in Europe”, Susan-Mary Grant, ‘Patriot Graves: American National Identity and the Civil War Dead’ (2004) 5(3) *American Nineteenth Century History*, 74, 77.

<sup>19</sup> Capdevila and Voldman, *War Dead*, (n 10), p.10.

heralding “a new era” of which this war was the “turning point”.<sup>20</sup> The characteristics of total war corresponded to the expansion of the field of battle to the broader society and thus:

[...] greatly increased the ways in which people were killed by weapons of war. Whereas, until then, the majority of those killed were military personnel and fighting soldiers, war from then on affected the whole fabric of the countries involved in the conflict, making the distinction between civilian and military more and more difficult. Nations at war had, thereafter, to learn to honour different categories of war dead.<sup>21</sup>

It became unacceptable to abandon the dead on battlefields, or to unceremoniously dispose of the remains of war casualties. The growing sentimentality towards the dead in war is reflected in one of the most famous poems of the First World War period - *In Flanders Fields*. The poem evokes for the reader the image of row upon row of crosses, used to mark the individual graves of Commonwealth soldiers. The abruptness, and the tragedy, of the manner in which countless came to lose their lives in the War is captured in the poem’s second verse:

We are the Dead. Short days ago  
We lived, felt dawn, saw sunset glow,  
Loved and were loved, and now we lie  
In Flanders fields.<sup>22</sup>

The advent of international forensic investigations and the post-mortem examination of cadaverous remains for the purposes of evidence gathering can be seen as another stage of evolution in international law concerning how the dead body is treated. As the body comes to be the object of scientific scrutiny, it represents utilitarian value as the dead form a source of evidence for criminal prosecutions. This observation is reflective of how shifting attitudes towards the dead body in armed conflict has evolved as the nature of warfare has progressed and as international law has responded by moderating the action of belligerents and seeks to punish

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> John McCrae, ‘*In Flanders Fields*’ (n 1). The dead, metaphorically speaking, make claims on the living, and in the third, and final verse, call on their comrades to “Take up our quarrel with the foe” and beseech them not to “break faith with us who die”.

infringements of the laws and customs of war. As will be outlined in this thesis, a number of international criminal tribunals have had as a feature the application of forensic science and medical expertise to the criminal investigations of international crimes falling under their jurisdiction. The International Criminal Tribunal for the former Yugoslavia is particularly noteworthy in terms of the scale of forensic investigations undertaken during the course of its work. The activities of the *ad hoc* Tribunals established in the 1990s, in respect of international forensic investigations, are not though the first examples of the use of forensic techniques in an international criminal justice context. Medico-legal investigations of war crimes can be traced back to at least the Second World War.<sup>23</sup> I would argue that the Second World War period marked a further progression in how the dead are viewed and treated after armed conflict in relation to the post-mortem examination of cadavers for the express purpose of producing evidence for international criminal trials.<sup>24</sup>

Although the war crime trials carried out after the Second World War were not the first attempt to prosecute those suspected of perpetrating war crimes during armed conflict,<sup>25</sup> the International Criminal Tribunal at Nuremberg marked a watershed in international criminal justice,<sup>26</sup> and was considerably more successful than previous

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<sup>23</sup> I have been unable to find any earlier concrete examples of the application of forensic and medical scientific knowledge to the investigation of crimes in an international context. Although the history of forensic science predates the Second World War, the application of scientific and medical methods in a forensic context was limited to the domestic sphere and was utilised for the prosecution of crimes recognised under domestic jurisdiction, as opposed to crimes of an international character such as war crimes.

<sup>24</sup> Chapter III will further delineate the emergence and development of international forensic investigations from the Second World War period to the 1980s.

<sup>25</sup> For example, the Leipzig War Crimes Trial was established after the end of the First World War, which saw the victorious allied powers attempt to hold German belligerents to account for aggression and other war crimes. The trial has been described by Gary Jonathan Bass as “a crashing failure”. Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton-Oxford: Princeton University Press, 2000), p.58. Another example is the ill-fated Constantinople War Crimes Trials, held in 1919, in an attempt to hold to account leaders from the wartime Ottoman government suspected of being liable for war crimes, the 1915 Armenian genocide, and those considered responsible for the deportation and murder of Armenians from Yozgat and Trebizond. In the worlds of Bass; “Constantinople is the Nuremberg that failed”, *ibid*, p.106.

<sup>26</sup> This notion that the Nuremberg trials marked a watershed moment in international criminal justice has been reflected upon by numerous scholarly and legal authorities. For example, the website of the International Bar Association’s Human Rights Institute states that “the Nuremberg trials were a watershed in international criminal law, recognising individual responsibility for crimes against peace, war crimes, and crimes against humanity”, ‘ICC International justice – First generation tribunals’, available at [http://www.ibanet.org/Human\\_Rights\\_Institute/ICC\\_Outreach\\_Monitoring/JBA\\_ICC\\_Intl\\_justice\\_first\\_gen\\_tribunals.aspx](http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/JBA_ICC_Intl_justice_first_gen_tribunals.aspx) (last accessed 27 October 2011); Amnesty International likewise remarks how the Nuremberg Tribunal “was a watershed moment for international justice, setting a number of key precedents that underpin today’s international justice system”, Amnesty International USA ‘The Legacy of Nuremberg’, available at <http://www.amnestyusa.org/our-work/issues/international->

incarnations. In addition, the subsequent proceeding held in Nuremberg by the United States,<sup>27</sup> and other trials accomplished unilaterally by allied powers,<sup>28</sup> can be considered as part of this defining moment in international criminal law.

The International Military Trial at Nuremberg is not synonymous with the use of evidence of a medico-legal nature; however, this form of evidence was presented in the course of proceedings. Although the evidence was for the most part of no forensic benefit, in fact quite the opposite as it served to potentially undermine the legitimacy of the proceedings, supporting for some the victor's justice critique of Nuremberg,<sup>29</sup> it is significant in and of itself that medico-legal expert witnesses were called to give evidence during the trials. Of more success and significance was the use of medical experts to gather forensic evidence in the field by agents employed by the governments of Allied Powers, to be used to build cases for unilateral prosecutions. The work of the Special Medical Sector of the British Army's War Crimes Group is of note and will be discussed further in the following chapter.

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[justice/international-and-internationalized-tribunals/the-legacy-of-nuremberg](#) (last accessed 27 October 2011). Gary Jonathan Bass claims that "Nuremberg remains legalism's greatest moment of glory", Gary Jonathan Bass, *Stay the Hand of Vengeance* (n 25) p.203.

<sup>27</sup> The Trials of War Criminals before the Nuremberg Military Tribunals, held pursuant to Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20 1945. The proceedings were published by the United States in fifteen volumes, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10* (1946–1949), 15 volumes, Washington, D.C.: U.S. Government Printing Office. The 12 subsequent trials were: The Medical Case, The Milch Case, The Justice Case, The Pohl Case, The Flick Case, The I.G. Farben Case, The Hostage Case, The RuSHA Case, The Einsatzgruppen Case, The Krupp Case, The Ministries Case, The High Command Case, 'Subsequent Nuremberg Proceedings', *Holocaust Encyclopedia*, Website of the United States Holocaust Memorial Museum, available at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007074> (last accessed 27 October 2011). For a contemporary legal analysis of these trials see further Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011).

<sup>28</sup> For example, the Dachau Camp trials, convened by United States Military Personnel between November 1945 and August 1948, see further, Joshua Greene, *Justice at Dachau: The Trials of an American Prosecutor* (New York: Broadway Books, 2003). War crime trials were also held in countries that had been held under German occupation during the war. For an account of the various war crime trials of German war criminals see, further, Nathan Stoltzfus and Henry Friedlander (eds.), *Nazi Crimes and the Law* (Cambridge: Cambridge University Press 2008). The International Military Tribunal for the Far East (IMTFE) (the Tokyo Trial) indicted twenty-eight Japanese political and military leaders in April 1946 on thirty-six counts of crimes against peace, sixteen counts of murder, and three counts of war crimes. Judgement was passed down in November 1948, Neil Boister, 'The Tokyo Trial', in William A. Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law*, (Abingdon-New York: Routledge, 2011), pp.17-32, p.17.

<sup>29</sup> William A. Schabas, 'Victor's Justice: Selecting 'Situations' at the International Criminal Court' (2010) 43 *The John Marshall Law Review*, 535, 536.

## **B. Caring for the Dead: The Importance of Customs and Rules Pertaining to the Dead and their Relevance in Times of Armed Conflict**

When a person has died, why do we care about how the dead body is treated? The explanation for the continuing concern for the person who was once living lies in the lingering connection between the living and the dead. As D. Gareth Jones and Maja Whitaker indicate, the dead body has ethical significance and most people have deep moral intuitions which induce us to bestow value on other human beings like ourselves.<sup>30</sup> This is why, they contend, “most people are horrified by pictures of corpses being dumped in mass graves after a holocaust. It touches something very deep in their sense of what is right and wrong; they recognize this as a form of indignity, and would be even more distressed if one of the bodies was that of someone known to them”.<sup>31</sup> Most, if indeed not all, cultures throughout time have developed forms of mortuary rituals, of which a central feature is disposal of the dead in a respectful manner and funeral rites focussed around a reverent final resting place.<sup>32</sup> Behaviour that is regarded as deviating from cultural notions of respect and dignity can prompt strong moral outrage.<sup>33</sup> For Jones and Whitaker there are several related components to this moral intuition. First, our recognition of each other is dependent on recognising distinctive physical characteristics that are not immediately obscured at the time of death. What is done to the dead body therefore “has relevance for our feelings about that person when alive; the cadaver and the

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<sup>30</sup> D. Gareth Jones and Maja I. Whitaker, *Speaking for the Dead: The Human Body in Biology and Medicine*, 2<sup>nd</sup> edn. (Surrey: Ashgate Publishing Limited, 2009), p.21.

<sup>31</sup> *Ibid*, p. 22.

<sup>32</sup> There is a wealth of anthropological studies on death and cultural practices surrounding death. See, for example, Peter Metcalf and Richard Huntington, *Celebrations of Death: The Anthropology of Mortuary Ritual*, 2<sup>nd</sup> edn, (Cambridge: Cambridge University Press, 1991); Antonius C.G.M. Robben, *Death, Mourning and Burial: A Cross-Cultural Reader* (Malden-Oxford-Carlton: Blackwell Publishing, 2004); Douglas James Davies, *Death, ritual and belief: the rhetoric of funerary rites*, 2<sup>nd</sup> edn., (London: Continuum, 2002).

<sup>33</sup> There are numerous examples to drawn upon but I will give just one here. It was reported in the British media in February 2011 that a borough council in Worcestershire in the United Kingdom was considering proposals to re-use energy at its crematorium to heat a nearby swimming pool at a leisure centre run by the council. The proposed measure was part of a commitment to reduce carbon dioxide emissions, as “[t]he heat would otherwise be exhausted into the atmosphere”. Opponents to the plan branded it as “sick” and the council was called upon to apologise for “the insulting and insensitive proposals”. Danielle Dwyer, PA ‘Council defends crematorium plan to heat pool’ *The Independent* Monday 24 January 2011, available online at <http://www.independent.co.uk/news/uk/home-news/council-defends-crematorium-plan-to-heat-pool-2193188.html> (last accessed 27 October 2011).

person cannot be totally separated”.<sup>34</sup> A second component relates to the memories that are formed between the person when alive and those who knew him or her. The cadaver, they contend, represents a collection of built-in memories that can never be entirely divorced from it. For most people, these memories lead to “a sense of respect for a cadaver and its enshrined associations”.<sup>35</sup> The final component centres on the deceased person’s prior relationships. The deceased was someone’s friend or relative who is now grieving the death. Respect shown to the cadaver is therefore to show respect for the survivors’ grief.<sup>36</sup>

Although armed conflicts can present substantial difficulties in fulfilling traditional mortuary rituals, this does not mean to say that such practices are abandoned entirely during periods of war. On the contrary, acts that facilitate the process of mourning and bereavement for the families of the dead continue to be of great importance during periods of enmity. Funerary rites and commemoration ceremonies have been modified and adapted in order to take into account the exigencies of armed conflict.<sup>37</sup> In recognition of the importance of treating the dead body with respect and facilitating the grief and mourning of families and communities left behind, a number of obligations have been codified in international humanitarian law. The requirements include the obligation to search for, collect, identify, handle with dignity and dispose of the dead in a respectful manner.<sup>38</sup> The imperative to implement such legal obligations pertains not just to reasons of a cultural and religious nature, but also to legal and psycho-social concerns. Failure to follow the obligations outlined in international humanitarian law can have serious consequences and, as reflected upon by Tidball-Binz, “[t]he trauma suffered by bereaved families and affected communities as a result of the neglect and mismanagement of their dead, including lack of news of missing relatives, often lasts much longer than the more conspicuous physical effects of catastrophes”.<sup>39</sup>

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<sup>34</sup> Jones and Whitaker *Speaking for the Dead*, (n 30), p.22.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Capdevila and Voldman, *War Dead*, (n 10), pp114-179.

<sup>38</sup> These will be detailed in section C of this chapter.

<sup>39</sup> Morris Tidball-Binz, ‘Managing the dead in catastrophes: guiding principles and practical recommendations for first responders’ (2007) 89(866) *International Review of the Red Cross*, 421, 422

The social, cultural, psychological and legal consequences that befall the families of the missing who in the aftermath of war remain unaccounted for are indeed significant. To provide an example related to one of the case studies under examination in the thesis, the International Criminal Tribunal for the former Yugoslavia has noted the debilitating effects that have resulted from the disappearance of the sizeable number of males executed near the town of Srebrenica in the former Yugoslavia. Following the mass executions and clandestine burial of approximately 7,500 men and boys in the area surrounding Srebrenica, Bosnia in July 1995, the ongoing uncertainty as to the fate of the missing has given rise to a newly recognised psycho-social pathology category known as ‘Srebrenica Syndrome’.

The Trial Chamber heard that the survivors of Srebrenica have unique impediments to their recovery and staff members at Vive Zene speak of the “Srebrenica Syndrome” as a new pathology category. One of the primary factors giving rise to the syndrome is that, with few exceptions, the fate of the survivor’s loved ones is not officially known: the majority of men of Srebrenica are still listed as missing. For Bosnian Muslim women it is essential to have a clear marital status, whether widowed, divorced or married: a woman whose husband is missing does not fit within any of these categories. Moreover, on a psychological level, these women are unable to move forward with the process of recovery without the closure that comes from knowing with certainty what has happened to their family members and properly grieving for them.<sup>40</sup>

Relatives who do not have conclusive proof of death or a body to mourn over remain in a state of limbo which can have a debilitating effect on their quality of life. Without confirmation of death, the missing person remains somewhere between life and death and the survivors often in an indeterminate state caught between the traumatic past and an uncertain future. Apart from the obvious psycho-social effects such a state of affairs must bring there are issues of a more practical nature that arise. For example, the marital status of men or more frequently women remains unclear and they find themselves located in a tenuous position between husband and

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<sup>40</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement of 2 August 2001, at para. 93.

widower or wife and widow.<sup>41</sup> This will have direct consequences on the ability of the individual to re-marry should they wish or to make claims to pension entitlements.<sup>42</sup> Indeed the right of the family to know the truth of what happened to their relatives underpins the *raison d'être* for the provisions pertaining to the dead in modern international humanitarian law<sup>43</sup> and has been the impetus for the development of a regime in international human rights law on preventing enforced disappearances, including the United Nations International Convention for the Protection of All Persons from Enforced Disappearance which entered into force on 23 December 2010.<sup>44</sup>

### **C. International Humanitarian Law and Obligations to the Dead**

The proper treatment of the dead body in war has been a concern for centuries,<sup>45</sup> with reference found in ancient texts as well as in contemporary international legal instruments. Prior to the codification of provisions in modern laws of war, a number of ancient texts addressed this issue. For example, the Mahābhārata, one of the two major Sanskrit epics of ancient India, required burial of enemy fighters with full

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<sup>41</sup> Erin D. Williams and John D. Crews, 'From Dust to Dust: Ethical and Practical Issues Involved in the Location, Exhumation and Identification of Bodies from Mass Graves' (2003) 44(3) *Croatian Medical Journal*, 251, 252.

<sup>42</sup> For an account of the difficulties facing survivors who still search for the remains of their loved ones in Bosnia-Herzegovina see further Wojciech Tochman, *Like Eating a Stone: Surviving the Past in Bosnia*, Translated by Antonia Lloyd-Jones (Portello Books: London, 2008).

<sup>43</sup> Sassòli and Bouvier, *How Does Law Protect in War*, (n 2), p.170. The source of this right is Article 32 of the First Additional Protocol.

<sup>44</sup>International Convention for the Protection of All Persons from Enforced Disappearance, UN.Doc.A/61/488.C.N.737.2008,

[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en) (last accessed 27 October 2011). For further information on the legal framework pertaining to the crime of enforced disappearance, including the *Declaration on the Protection of all Persons from Enforced Disappearances*, the *International Convention for the Protection of All Persons from Enforced Disappearance*, and General Comments on elements of this crime including *General Comment on the definition of enforced disappearance*, *General Comment on Enforced Disappearance as a crime against humanity*, *General Comment on Enforced disappearance as a continuous crime* and *General Comment on the Right to the Truth in Relation to Enforced Disappearances* and on the work of the Working Group on Enforced or Involuntary Disappearances, which comes under the auspices of the United Nations Office of the High Commissioner for Human Rights, refer to the following website, <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx> (last accessed 27 October 2011). See also Chapter III (C) of this thesis.

<sup>45</sup> In more recent years, the question of the legal standing of the body has come to the fore in international human rights law as legal scholars attempt to establish whether the dead have human rights. This gives rise to a number of philosophical and indeed practical questions which are outside the scope of this thesis. For an analysis on the rights of the dead in the context of international forensic investigations see further, Adam Rosenblatt, 'International Forensic Investigations and the Human Rights of the Dead' (2010) 32(4) *Human Rights Quarterly*, 921.

military honours, for “with death our enmity has terminated”.<sup>46</sup> During the latter part of the Middle Ages, the victor was expected to provide a Christian burial and listing of the dead.<sup>47</sup> Classical literary works further illustrate the philosophy of the time regarding chivalry in warfare. Homer and Shakespeare both addressed the issue of the honourable treatment of dead bodies of defeated enemies through their writings.<sup>48</sup>

Preceding the development of modern texts of international humanitarian law, particularised care of the dead became part of army practices but was not specifically codified in international treaty form. One of the earliest modern documents to codify rules moderating the conduct of warfare stems from the American Civil War - General Orders 100 (the Lieber Code)<sup>49</sup> - which outlined the humanitarian treatment of populations and belligerents affected by war. Drafted by Francis Lieber in 1863, the code was an important precursor to the texts of modern international humanitarian law. This code focused on the living, for example, humane treatment of prisoners, sick and wounded, but did not address the question of the dead.<sup>50</sup> However, less prominent codes promulgated during the American Civil War outlined stipulations on how dead soldiers were to be dealt with. In September 1861 General Orders No.75 were issued by the War Department, which specified that:

[T]he Quartermaster General ensure that general and post hospitals be supplied with forms ‘for the preservation of accurate mortuary records,’ along with material for headboards that would mark a soldier’s grave. A supplementary order gave all departmental commanders along with officers commanding military corps and the Quartermaster General of the Army joint responsibility for ensuring that burial regulations were adhered to.<sup>51</sup>

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<sup>46</sup> Leslie C. Green, ‘What One May Do In Combat – Then And Now’, in A.J.M. Delissen and G.J. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead: Essays in Honour of Frits Kalshoven* (Dordrecht: Martinus Nijhoff Publishers, 1991), pp269-295, p.279.

<sup>47</sup> *Ibid.*

<sup>48</sup> Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (Oxford: Oxford University Press, 1998), p.63.

<sup>49</sup> ‘General Orders No. 100: The Lieber Code. Instructions for the Government of Armies of the United States in the Field. Prepared by Francis Lieber, LL.D., 24 April 1863. Originally Issued as General Orders No. 100, Adjutant General’s Office, 1863, Washington 1898: Government Printing Office.

<sup>50</sup> Capdevila and Voldman, (n 10), p.77.

<sup>51</sup> Grant, ‘Patriot Graves’, (n18), 82.

An order issued in April of the following year, General Order No.33, extended General Orders No.75 into the field and “stipulated that Commanding Generals ‘lay off lots of ground in some suitable spot near every battlefield ... and to cause the remains of those killed to be interred’”.<sup>52</sup> Although there were some limitations to the implementation of this order in the field due to the realities of battle, “in making some provision for the burial of the fallen, albeit hastily derived out of sudden necessity, the Union was making a decisive statement about the treatment of its war dead that set the Civil War apart not just from contemporary European conflicts but from its own earlier wars”.<sup>53</sup>

In terms of the movement to codify modern humanitarian law, and rules pertaining to the deceased, a number of texts published in Europe in the 19<sup>th</sup> Century are also of note, as these represent some “first thoughts considering the treatment of enemy dead”<sup>54</sup> prior to the enshrining of principles in treaty form. In *Un souvenir de Solferino*, Henry Dunant discussed how the dead were abandoned on the battlefields in Solferino. In an 1867 report to international conferences of agencies engaged in aid to soldiers and sailors, Dunant called for prisoners who died in captivity to be given ‘individualised graves’. The rationale behind these measures was to enable families to trace the remains in order to facilitate repatriation.<sup>55</sup> At a conference held in Berlin in 1869, a proposal was made by International Committee of the Red Cross delegates that victorious armies should, whenever possible, identify bodies on the battle field and opposing parties should exchange information on the deceased.<sup>56</sup> A number of years later, a manual on the laws of warfare drafted by Gustave Moynier and adopted by the Institute of International Law in Oxford on 9 September 1880 again drew attention to the issue of dead combatants. Article 19 of the text forbade the plundering and mutilation of the dead left on the battlefield, and Article 20 provided both that measures be adopted to identify the dead before burial and that information was to be passed on to their army or government.<sup>57</sup> These texts were used as reference documents at the drafting stage of the proceedings of the conference at the Hague in 1899 and 1907, and at Geneva in 1906, when

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<sup>52</sup> *Ibid.*, 82,83.

<sup>53</sup> *Ibid.*, 83.

<sup>54</sup> Capdevila and Voldman, (n 10), p.78.

<sup>55</sup> Henry Dunant, *Un souvenir de Solferino* (Lausanne: l’Âge d’Homme, 1986 [1<sup>st</sup> edn 1862]), p.134, cited in Capdevila and Voldman, *ibid*, p77

<sup>56</sup> *Ibid*, pp.77, 78.

<sup>57</sup> Capdevila and Voldman, *ibid*, p. 78.

recommendations were made that belligerents should “inform each other of the death of prisoners and of the identity of enemy dead in the area” under the respective control of the parties to the conflict.<sup>58</sup>

In the past century the provisions affording protection to the dead have been consolidated as the experiences of major conflicts such as the Great War, the Second World War and numerous non-international armed conflicts demonstrated the need to codify clear instructions binding on the parties to armed conflict.

### **(1) The Geneva Conventions of 1906 and 1929**

The Geneva Conventions of 1864 were drafted following a diplomatic conference of 16 States held between 8 and 22 August 1864.<sup>59</sup> The Conventions which resulted, while addressing the treatment of the sick and wounded, failed to include provisions to regulate the treatment of war dead. The more detailed Geneva Convention of 1906, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field,<sup>60</sup> which replaced the 1864 Convention did, however, update the previous treaty with provisions concerning the burial of the dead and transmission of information.<sup>61</sup> This early twentieth century document codified the requirement not only to dispose of the dead in a proper manner but also to ensure the deceased were not mutilated or otherwise ill-treated.<sup>62</sup>

The Convention of 1906 was replaced by the Geneva Convention of 1929, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.<sup>63</sup> The experiences of the First World War strongly influenced the drafting of the Geneva Convention of 1929. The alterations adopted in this treaty have been considered to be of less importance than those of 1906.<sup>64</sup> The provisions concerning repatriation of the seriously wounded and seriously sick prisoners were

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<sup>58</sup> *Ibid.*

<sup>59</sup> Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Leiden-Boston: Martinus Nijhoff Publishers, 2004), p.365.

<sup>60</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Signed at Geneva, 6 July 1906 (Geneva Convention 1906).

<sup>61</sup> Schindler and Toman, *The Laws of Armed Conflicts*, (n 59), p385.

<sup>62</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Signed at Geneva, 6 July 1906 (Geneva Convention 1906), Articles 3 and 4.

<sup>63</sup> However, it remained in force until 1970 when Costa Rica, the last State party to it which had not yet adopted one of the later Conventions, acceded to the 1949 Geneva Conventions, Schindler and Toman, *The Laws of Armed Conflicts*, (n 59), p385.

<sup>64</sup> *Ibid.*, p409.

transferred to the 1929 Convention relative to the Treatment of Prisoners of War, which complimented the provisions of the Hague Regulations.<sup>65</sup> The stipulations in the 1929 Convention developed and elaborated on those outlined in the 1906 treaty. Article 3 of the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field obliged the occupants of the field of battle to take measures to search for the wounded and dead after engagement and to protect the bodies from mutilation and maltreatment.<sup>66</sup> Belligerents were required to communicate the names of the dead along with any information which would assist in their identification. They were also required to transmit death certificates and personal effects. A careful examination, preferably a medical examination, was to precede the burial or cremation of the dead, with the objective of confirming death, identifying the remains and facilitating the drafting of a report on the death. Furthermore, the dead were to be honourably interred and the graves respected and marked so that the burial site could be located in the future. To make possible these objectives, parties to the conflict were required to establish a graves registration service at the start of hostilities with the aim of facilitating eventual exhumations and to guarantee the eventual identification of bodies. At the end of hostilities, belligerents were required to exchange the list of graves and dead interred in territory under their control.<sup>67</sup>

A number of measures were to be taken following the death in custody of prisoners, as codified in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War. These included matters pertaining to wills, the certification of death, and honourable burial of the dead in marked graves.<sup>68</sup> Further, information was to be recorded and exchanged on deaths and personal effects were to be transmitted to their country of origin.<sup>69</sup>

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<sup>65</sup> *Ibid*, p421.

<sup>66</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, signed in Geneva, 27 July 1929 (Geneva Convention of 1929), Article 3.

<sup>67</sup> *Ibid*, Article 4.

<sup>68</sup> Convention Relative to the Treatment of Prisoners of War, Signed at Geneva, 27 July 1929, Article 76

<sup>69</sup> *Ibid*, Article 77.

## **(2) The Geneva Conventions of 1949 and the Additional Protocols of 1977**

Each of the four Geneva Conventions contains provisions outlining the obligations which must be afforded to the dead.<sup>70</sup> The Additional Protocols have further codified duties required of belligerents.<sup>71</sup> In order to illustrate how rules governing the treatment of deceased civilians developed in international humanitarian law, the relevant provisions found in the Fourth Geneva Convention and Additional Protocols will be outlined here.

The first article to specifically mention treatment of the deceased in the Fourth Geneva Convention is Article 16. This article is of general application, that is, it falls within the category of “General protection of populations against certain consequences of war” and applies to those protected by the Convention as outlined in Article 4:

[T]hose 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.<sup>72</sup>

Therefore, the protection extends to civilians in international armed conflicts and it does not apply to civilians in non-international conflicts. The second paragraph of Article 16 identifies an obligation towards the dead:

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the

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<sup>70</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 75 UNTS 31, entry into force 21 October 1950 (First Geneva Convention), Articles 4, 12, 15, 16, 17; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 75 UNTS 85, entry into force 21 October 1950 (Second Geneva Convention), Articles 18, 19, 20, 21; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 75 UNTS 135, 21 October 1950 (Third Geneva Convention), Articles 13, 120, 121; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 75 UNTS 287, entry into force 21 October 1950 (Fourth Geneva Convention), Articles 16, 129, 130, 131, 136, 139.

<sup>71</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 UNTS 3, entry into force 7 December 1978 (First Additional Protocol), Articles 32, 33, 34, 61; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609, 7 December 1978 (Second Additional Protocol), Article 8.

<sup>72</sup> Fourth Geneva Convention, (n 70), Article 4.

shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.<sup>73</sup>

As discussed in the Commentaries, the requirement resting on the belligerent Parties to facilitate steps to search for and bring in killed and wounded combatants is a measure for which provision has been made in the First Geneva Convention since 1864. However, the experiences of the two world wars showed that it was necessary to also apply this rule to the case of civilian.<sup>74</sup> The importance of this obligation is both moral and practical: “Apart from moral considerations, the interest of the next-of-kin of the deceased demands that the legal consequences of disappearances without the issue of a death certificate should be avoided as far as possible”.<sup>75</sup>

Further obligations towards the dead are found in Chapter XI, which comes under the more specific heading of “Deaths”. However, these obligations only pertain to the deaths of enemy civilians interned for purposes of administrative detention or following the commission of a criminal offence. The obligations found within the text of these articles are similar in content and spirit to those outlined in the Conventions pertaining to combatants in the First, Second and Third Geneva Conventions. This section addresses the issues of transmission of the wills of internees upon death, certification of death, registration of an official record of death, a certified copy of which must be transmitted to the Protecting Power as well as to a Central Agency for protected persons.<sup>76</sup> Deceased internees must be honourably buried, according to the rites of the religion to which they belonged, if possible, and their graves are to be respected, properly maintained and marked in a manner so that they can always be recognised. Burial in individual graves is required and only in unavoidable circumstances should the dead be interred in mass graves. Bodies can only be cremated for unavoidable reasons of sanitation, or in accordance with the religion of the deceased or else if they have made an expressed prior wish. The ashes are to be transferred to the next of kin at their request. Lists of graves should be forwarded through an Information Bureaux to the protecting power of the decedents.<sup>77</sup> An official enquiry by the Detaining Power must immediately follow

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<sup>73</sup> *Ibid*, Article 16.

<sup>74</sup> Commentary to the Fourth Geneva Convention, p.137 available at <http://www.icrc.org/ihl.nsf/COM/380-600020?OpenDocument> (last accessed 27 October 2011).

<sup>75</sup> *Ibid*, p. 136.

<sup>76</sup> Fourth Geneva Convention, (n 70) Article 129.

<sup>77</sup> *Ibid*, Article 130.

deaths of internees caused, or suspected to have been caused by, a guard, another internee or any other person, in addition to deaths with an unknown cause.<sup>78</sup>

Although the Fourth Geneva Convention sets out quite a number of provisions pertaining to the dead, the protection afforded to civilians is not quite as extensive as those protections pertaining to members of the armed forces. For example, Article 17 of the First Geneva Convention provides for the exhumation of the graves, albeit in very restricted circumstances.<sup>79</sup> A similar provision is absent in the Fourth Geneva Convention. Discrepancies are addressed by the additional measures of protection which were codified in the Additional Protocols of 1977.

Article 34 of Protocol I sets out clear obligations in regard to “remains of deceased”. It introduces provisions not present in the Fourth Geneva Convention and additionally extends the personal field of application of the existing provisions.<sup>80</sup> It codifies protections concerning respect for the human remains of those who have died “for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons who are not nationals of the country in which they have died as a result of hostilities”.<sup>81</sup> Remains must be respected, the gravesites of such persons respected, maintained and marked.<sup>82</sup> High Contracting Parties in whose territory gravesites are located must ensure relatives have access to the graves, permanently protect and maintain the graves and, on request of the next of kin, facilitate the return of the remains and of personal effects to the home country.<sup>83</sup> Paragraph 4 outlines the circumstances under which gravesites may be exhumed.<sup>84</sup> In terms of internal armed conflict, Article 8 of Additional Protocol II provides that “all possible measures” must be taken to search for the dead, as circumstances permit. The dead are to be protected against mutilation and are to be decently disposed of.

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<sup>78</sup> *Ibid*, Article 131.

<sup>79</sup> Article 17, third paragraph of the First Geneva Convention, the relevant text of which reads as follows: “[Parties to the conflict] shall further ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found. For this purpose, they shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country”.

<sup>80</sup> Commentary to First Additional Protocol, accessed online at <http://www.icrc.org/ihl.nsf/COM/470-750041?OpenDocument> (last accessed 27 October 2011).

<sup>81</sup> First Additional Protocol, (n 71), Article 34, first paragraph.

<sup>82</sup> *Ibid*.

<sup>83</sup> First Additional Protocol, (n 71), Paragraph 2.

<sup>84</sup> The permissible grounds for exhuming graves will be discussed section E.

## **D. Customary International Humanitarian Law Rules on the Dead**

A number of provisions pertaining to the deceased are now recognised as constituting customary international humanitarian law. These rules of international humanitarian law reflect both treaty law and practice and as they are recognised as having the status of customary law are binding on all States, regardless of the status of ratification of the treaties in which these rules originate. Hence, they can be considered as constituting the *minimum legal obligations* for the treatment of those killed as a result of armed hostilities – both combatants and civilians.

### **(1) Search for and Collection of the Dead**

“Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction” [Rule 112].<sup>85</sup> Respect for this rule is considered as a *condition sine qua non* of respect for the subsequent rules 113-116, requiring return of remains, decent burial and identification of the dead.<sup>86</sup> As deduced by the International Committee of the Red Cross, in its customary international humanitarian law study, State practice and a review of case law from a number of jurisdictions indicate that these rules are equally applicable to combatants and civilian decedents. Indeed, in contemporary armed conflict the boundaries between soldier and civilian can be blurred. For example, a civilian may directly participate in hostilities and be classified as an unprivileged belligerent who for the purpose of such activities may not enjoy the protection of IHL afforded to civilians. Such actors may indeed be classified as a terrorist, depending on who is framing the terms of reference.<sup>87</sup> In this light, it is important to place the emphasis on the humanitarian aspect of these legal prescriptions rather than attempting to establish what duties are owed to the dead in accordance to the category of decedent.

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<sup>85</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2 vols. (Cambridge: Cambridge University Press, 2005), vol. I, p406.

<sup>86</sup> *Ibid*, p.407.

<sup>87</sup> On the question of civilians and direct participation in hostilities, see further Nils Melzer, *Interpretative Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, (Geneva: International Committee of the Red Cross, 2009).

In terms of the availability of resources necessary to execute these obligations, a wide diversity between parties to the conflict may exist. This obligation is considered to be an obligation of means – each party to the conflict is expected to take all measures possible to locate the dead. A component of this requirement includes permitting the search for and collection of the dead by humanitarian organisations or calling on the assistance of the public. In practice such bodies, which includes organisations such as the International Committee of the Red Cross, or national Red Cross societies, need the permission of the party in control of the area to be searched. However, such permission must not be arbitrarily denied.<sup>88</sup>

A topic closely related to that of the dead in armed conflict is the subject of the missing. During the course of armed conflict a considerable number of individuals or groups of people can fall into the category of “missing” – their whereabouts is unknown and, additionally, it is usually not established whether they are living or deceased. The missing can be members of the armed forces, but increasingly in contemporary armed conflicts, can belong to the civilian population. Regardless of what category the missing or dead fall in to, the humanitarian rationale behind the provisions on the deceased or missing is the same: “It is not primarily to protect the dead and the missing themselves that International Humanitarian Law (IHL) contains specific rules concerning them. The main consideration is ‘the right of families to know the fate of their relatives’”.<sup>89</sup>

## **(2) Treatment of the Dead**

“Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited” [Rule 113].<sup>90</sup> The disdain of the practice of mutilation of dead bodies was first codified in modern humanitarian law in the Hague Convention of 1907 (X).<sup>91</sup> The prohibition has been consolidated through codification in the Geneva Conventions, found in numerous military manuals and reaffirmed in a number of criminal cases.<sup>92</sup> The need for this provision arose due to the perpetual maltreatment of the bodies of the dead

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<sup>88</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (n 85), p.407.

<sup>89</sup> Sassòli and Bouvier, *How Does Law Protect in War?* (n 2), p.170.

<sup>90</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (n 85), p.409.

<sup>91</sup> Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. The Hague, 18 October 1907, Article 16.

<sup>92</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (n 85), p.407.

throughout time. Laws drafted to govern the treatment of the dead body, from religious law, to national law, to rules of international humanitarian law require that the mortal remains are treated in a dignified and respectful manner. Armed conflicts, past and present, have seen many instances where the dead have been mutilated and maltreated, for a variety of reasons, including the practice of using enemy bodies as a weapon,<sup>93</sup> taking parts of the body as a “souvenir”,<sup>94</sup> and using the body to terrorise members of the civilian population.<sup>95</sup> As Meron discusses:

In antiquity, in the Middle Ages, but even in our times in Vietnam, Cambodia, Korea, the Middle-East, the former Yugoslavia and elsewhere, sworn enemies desecrate their enemies’ bodies in violation of international humanitarian law. Often, return of the bodies for an honourable burial is treated as a bargaining chip, as shameful leverage for what is in effect ransom.<sup>96</sup>

A recent expression of the prohibition of the mutilation of the dead is found under the Rome Statute of the International Criminal Court. The Rome Statute recognises the imperative that remains must be handled in a dignified manner and as such recognises that the mutilation of the deceased is prohibited in both international and internal armed conflicts. Under the Statute of the ICC, the prohibition of mutilating dead bodies is covered by the crime of “committing outrages upon personal dignity”. According to the Elements of Crimes, this proscription also applies to dead persons.<sup>97</sup> Thus, this represents a positive law codification<sup>98</sup> reflecting the gravity of this offence.

### **(3) Return of the Remains and Personal Effects of the Dead**

“Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their

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<sup>93</sup> Capdevila and Voldman, *War Dead*, (n 10), pp.84-90.

<sup>94</sup> Simon Harrison, ‘Skull trophies of the Pacific War: transgressive objects of remembrance, (2006) 12 *Journal of the Royal Anthropological Institute (N.S.)*, 817.

<sup>95</sup> Capdevila and Voldman, (n 10), pp.98-107.

<sup>96</sup> Meron, *Bloody Constraint*, (n 48), p75.

<sup>97</sup> Elements of Crimes for the International Criminal Court, Definition of committing outrages upon personal dignity as a war crime, ICC Statute, footnote 49 relating to Article 8(2)(b)(xxi) for international armed conflict and footnote 57 relating to Article 8(2)(c)(ii) for internal armed conflict. Elements of Crimes, available at [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf).

<sup>98</sup> I am grateful to William Schabas for drawing this to my attention.

next of kin. They must return their personal effects to them” [Rule 114].<sup>99</sup> Rule 114 recognises the importance of the repatriation of the remains of the deceased. The customary nature of this rule in international armed conflict is well established.<sup>100</sup> In regards to non-international armed conflicts, although there are no treaty obligations requiring measures to transfer the remains of decedents to their families, it is identified that there is a “growing trend” towards the recognition of this obligation. Additionally, the fact that this rule is in keeping with the obligation of respect for family life implies its dual applicability in international and internal armed conflicts.<sup>101</sup>

#### **(4) Disposal of the Dead**

“The dead must be disposed of in a respectful manner and their graves respected and properly maintained” [Rule 115].<sup>102</sup> In national jurisdictions mortuary procedures are regulated through legal codes. In war-time, although there are many more challenges to be faced in ensuring appropriate interment or other forms of mortuary procedures, these mortuary rituals are no less important. Thus it is identified that Rule 115 “reflects a general principle of law requiring respect for the dead and their graves”.<sup>103</sup> Depending on the circumstances of each individual scenario, those responding to the scene at which the fatality has occurred may or may not be a professional, trained in body handling and forensic methods appropriate to the identification of the deceased. To this end, the International Committee of the Red Cross has published guidelines on operational best practices for the handling of the dead by non-specialist personnel.<sup>104</sup>

#### **(5) Accounting for the Dead**

“With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves” [Rule

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<sup>99</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (n 85), p.411.

<sup>100</sup> *Ibid*, p.411.

<sup>101</sup> *Ibid*, p.412.

<sup>102</sup> *Ibid*, p.414.

<sup>103</sup> *Ibid*, p.416.

<sup>104</sup> International Committee of the Red Cross, *Operational Best Practices Regarding the Management of Human Remains and Information on the Dead by Non-Specialists: for all armed forces; for all humanitarian organizations*, (Geneva: International Committee of the Red Cross, 2004).

116].<sup>105</sup> This rule emphasises the importance of human identification so that each individual death is recorded. It also ensures that the families of the deceased can be directed to the whereabouts of their relative's remains. As identified in the ICRC study, the rule is reinforced by two other rules, the requirement of respect for family life (Rule 105) and the right to know the fate of one's relatives (Rule 117).<sup>106</sup> Again, this is an obligation of means, and parties to the conflict are not obliged to identify all bodies that have been found; in many conflict situations this would be a monumental if not impossible task. Each party must try though to collect information which will aid in the identification of the deceased.<sup>107</sup> However, States are not precluded from obtaining assistance from humanitarian organisations who can, when appropriate, apply sophisticated and more forensically accurate methods of identification, such as DNA analysis, in lieu of, or in addition to, efforts made by High Contracting Parties. The utility of forensic sciences has been recognised by the International Committee of the Red Cross as being "indispensable for the proper recovery, handling and identification of dead people reported missing, as well as for identifying the living".<sup>108</sup>

## **E. The Geneva Conventions and Protocols and Reference to Exhumations**

There are two provisions in the Geneva Conventions and Additional Protocols that make direct mention of the word exhumation. Article 17 of the First Geneva Convention provides that:

[Parties to the conflict] shall...ensure that the dead are honourably interred, if possible according to the rites of the religion to which they belonged, that their graves are respected, grouped if possible according to the nationality of the deceased, properly maintained and marked so that they may always be found. For this purpose, they shall organize at the commencement of

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<sup>105</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, (n 85), p.417.

<sup>106</sup> *Ibid*, p417.

<sup>107</sup> Sassòli and Bouvier, *How Does Law Protect in War*, (n 2), p171. Cf. Art.16 of Convention I and Art. 33(2) of Protocol I.

<sup>108</sup> *Missing persons: a major humanitarian concern*, Interview with Morris Tidball-Binz, ICRC forensic doctor, 28-08-2009, available at <http://www.icrc.org/eng/resources/documents/interview/missing-interview-280908.htm> (last accessed 27 October 2011).

hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country.<sup>109</sup>

In addition, reference to individual burial in the first paragraph of the article is made, partly, with exhumations in mind.<sup>110</sup> As the commentaries to the Convention explain this rule was conceived “as the idea of a common grave conflicts with the sentiment of respect for the dead, in addition to making any subsequent exhumation impossible or very difficult”.<sup>111</sup> This requirement is not made from the perspective of potential future criminal investigations though, and should be considered as part of the humanitarian motive underlying this body of law. If we take into consideration the historical milieu against which these treaties were drafted, it was not uncommon for the bodies of those killed in war to be exhumed from temporary graves in order to be re-buried in official military cemeteries or repatriated at the request of the authorities or indeed the families in the country of origin.<sup>112</sup> Thus, the reasons for exhumations were connected to objectives of memorialisation and not of criminal investigation. The reference to exhumations in Article 17 is mentioned in direct reference to a Graves Registration Service, which should be established at the commencement of hostilities and whose purpose is to “maintain the graves and to enable them to be found”.<sup>113</sup> Likewise, this stipulation is correlated to a humanitarian imperative. The commentaries provide clarification as to the purpose of this Grave Registration Service, which is to assume responsibility for maintaining “an up-to-date list of all graves of enemy combatants, and has to mark clearly any graves which have not yet been marked or which have been marked inadequately; it must also maintain the graves and group them if possible according to the nationality of the deceased, if

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<sup>109</sup> First Geneva Convention (n 70), Article 17.

<sup>110</sup> Article 17, first paragraph, provides that :”Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body.”

<sup>111</sup>Commentary to the First Geneva Convention, p.177, accessed at <http://www.icrc.org/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/51d405d8794afbdbc12563cd00420cc8!OpenDocument> (last accessed 27 October 2011).

<sup>112</sup> See further, Chapter Six, ‘Ritualised mourning in acts of commemoration’ in Capdevila and Voldman, *War Dead*, (n 10), pp.149-179.

<sup>113</sup>Commentary First Geneva Convention, (n 111) p.181.

they are not already so grouped”.<sup>114</sup> The Service also has the duty of keeping account of any change or transfer of these sites, the objective of which is “to allow of subsequent exhumation at any time and to ensure the identification of bodies, whatever the site of the graves, and their ‘possible transportation to the home country’”.<sup>115</sup> The suggestion made in respect of the return of bodies was a new provision that was introduced by the Diplomatic Conference of 1949. The rationale behind it was informed by the custom of some countries to repatriate the remains of their dead combatants at the end of hostilities. As the practice of other countries has been to bury the dead in the theatre of war, where the dead have fallen, the clause was made optional in order to meet both requirements.<sup>116</sup>

Article 34(4) of the First Additional Protocol pertaining to international armed conflicts also makes specific reference to exhumations. In this case, the provision goes further and specifies a number of circumstances under which exhumations can be conducted, in addition to purposes related to memorialisation. Article 34 pertains generally to “remains of deceased”. The provision requires that “the remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities”<sup>117</sup> are to be respected, as are their gravesites, which must further be maintained and marked, as provided for in Article 130 of the Fourth Geneva Convention.<sup>118</sup> Article 34(2) outlines that High Contracting Parties, party to the conflict must, as soon as circumstances allow, conclude agreements for the purposes of: facilitating access to the gravesites by relatives and by representatives from the official graves registration services; the permanent protection and maintenance of these gravesites; the facilitation of the return of the human remains and personal effects of the deceased to the country of origin upon the home countries’ request, or providing the home country raises no objection, at the request of the relatives of the deceased.<sup>119</sup> Article 34(3) outlines

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<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> First Additional Protocol, (n 71), Article 34(1).

<sup>118</sup> *Ibid.*

<sup>119</sup> Article 34(2) reads as follows: “As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in

measures that may be taken in the absence of agreements as provided for in the preceding paragraph.<sup>120</sup> Finally, Article 34(4) lists the specific set of additional circumstances in which exhumation of human remains is permitted:

A High Contracting Party in whose territory the grave sites referred to in this Article are situated shall be permitted to exhume the remains only:

- (a) in accordance with paragraphs 2(c) and 3, or
- (b) where exhumation is a matter of overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country of its intention to exhume the remains together with details of the intended place of reinterment.<sup>121</sup>

The primary purpose of exhumation relates to the repatriation of remains of the deceased, as provided for in the preceding paragraphs and as relates to the practice of belligerents, particularly following the First and Second World Wars. Article 34(4)(b) introduces further explicit conditions under which exhumations may be warranted. As explained in the commentaries to the Additional Protocol, the respect of graves had been proclaimed as a general principle, and likewise the duty to exhume in certain situations was recognised as a general principle, however, as expressed by one of the co-sponsors of the amendment “exhumation should be the subject of closer control”.<sup>122</sup> It was for this reason that a proposal was put forward to sanction exhumations only under the circumstances listed in the subparagraphs in Article 34, the rationale being to “strike a balance between the general principle of respect for graves and the need to exhume”.<sup>123</sup> Importantly, as clarified in the Commentaries, “[t]his paragraph is *addressed to the Contracting Parties in whose*

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detention are situated, shall conclude agreements in order:

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

<sup>120</sup> Article 34(3): “In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves”.

<sup>121</sup> Article 34(4).

<sup>122</sup> Commentary to First Additional Protocol, (n 80), p375, para. 1355.

<sup>123</sup> *Ibid.*

*territory the gravesites covered by this article are situated*, and it provides that exhumations are strictly prohibited outside the situations described.”<sup>124</sup> Over and above the provision for exhumations connected with reburials and repatriation, this article stipulates that exhumations may be conducted in circumstances where there is “overriding public necessity”.<sup>125</sup>

As the commentary reiterates, this paragraph provides that “exhumations are strictly prohibited outside the situations described”.<sup>126</sup> During the drafting phase, the Working Group initially considered against restricting such exhumations because the principle of respect for the deceased and their gravesites that had been previously outlined “provided sufficient general limitation”,<sup>127</sup> and additionally because “the exhumation might be ‘undertaken for many reasons, such as the grouping of remains by nationality, relocation of cemeteries, threats of flood or rising water, reasons of health and sanitation, identification of the deceased or enquiries on war crimes or mutilations’”.<sup>128</sup> Nonetheless, a number of delegates promoted the retention of rules that addressed the circumstances “*where the host State required exhumations for its own purposes*”.<sup>129</sup> Where exhumations were conducted, “compelling reasons” should exist, mindful also of the requirement to protect the graves.<sup>130</sup> Exhumations outside of those provided for in Article 34(2)(b) and (3), which may only be carried out when there is “overriding public necessity”, include situations of “medical and investigative necessity”. This phrase was added “following the comment of a delegate who considered that, in addition to cases of overriding public necessity there might be ‘a matter of military and medical necessity, for example, when it was necessary to determine the cause of death’”.<sup>131</sup> Another delegate expressed the opinion that “public necessity must, by its nature, include both those concepts”.<sup>132</sup> Furthermore, although the expression “overriding public necessity” was clearly defined during the drafting phase, as the Commentaries emphasise “it should nevertheless be noted as the Rapporteur of the Working Group stated that ‘it would

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<sup>124</sup> *Ibid*, p.375, para.1356, my emphasis.

<sup>125</sup> Article 34(4)(b).

<sup>126</sup> Commentary to First Additional Protocol, (n 80), p.375, para. 1356 .

<sup>127</sup> *Ibid*, p.375, para.1358.

<sup>128</sup> *Ibid*, p.378, para. 1358.

<sup>129</sup> *Ibid*, my emphasis.

<sup>130</sup> *Ibid*, p.378, para. 1359.

<sup>131</sup> *Ibid*, p.378, para. 1359.

<sup>132</sup> *Ibid*, p.378, para. 1360.

of course be *for the country in whose territory the graves were situated to decide whether or not exhumation was a matter of overriding public necessity*”.<sup>133</sup>

Accordingly, it may be seen that the references to exhumations as codified in the Geneva Conventions and its Additional Protocols were not drafted with international forensic investigations in mind. The primary purpose of drafting rules regulating the treatment of the human remains during and following armed conflict was to afford dignity to the dead and protect the interests of the families of the deceased. The reference to exhumations in the First Geneva Convention and in the First Additional Protocol pertains first and foremost to the removal of bodies from temporary grave sites in order that they may be moved to more permanent resting places and so is tied to memorialisation purposes. There are exceptions outside of this limited objective, which are specifically outlined in Article 34(4) of the Additional Protocol. As is highlighted above though, the permission to conduct exhumation for reasons of a medical or investigative nature, only when warranted by “overriding public necessity”, rests with the authorities of the State in which the graves are located. In other words, this provision does not explicitly authorise forensic exhumations by organisations of an international character, such as tribunals founded under United Nations powers. The principle international humanitarian law treaties, therefore, do not address the circumstances under which exhumations may be carried out by international organisations such as the United Nations or international criminal tribunals.<sup>134</sup> At the time of their drafting of course, there was little precedent that would see such a pursuit as being necessary. As pointed out in the preceding sections, international humanitarian law has drafted rules outlining the requirement to recover the dead following armed conflict and has provided for a number of examples where bodies can be exhumed from graves. These rules, however, were motivated by a humanitarian intent and the exhumation of mass graves and post-mortem examination of the bodies for criminal justice or forensic purposes receives little attention. How so has international law responded to the advent of international forensic investigations within a criminal justice context?

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<sup>133</sup> *Ibid*, p.378, para. 1361, my emphasis.

<sup>134</sup> This fact notwithstanding, the provisions pertaining to the dead in international humanitarian law should be seen as an important source of rules to inform the dynamics of forensic investigations.

## **F. International Standards on Forensic Investigations of Violations of International Human Rights and Humanitarian Law**

Issues pertaining to the application of medical and forensic sciences in the investigation of violations of international humanitarian law have come to receive increasing attention by both practitioners and academics in the past number of years. In addition, in recognition of the value attached to utilising forensic techniques in the movement to combat impunity, a number of international bodies are currently focusing attention on how the synergy between the respective disciplines can be improved.<sup>135</sup> The Office of the United Nations High Commissioner for Human Rights is particularly important in this regard.

A recent report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights<sup>136</sup> highlighted the significant benefits that have accompanied the application of the forensic sciences in an international legal context. Whilst this synergy has undoubtedly resulted in substantial gains in the fight against impunity, as the report also indicates the marriage of distinctive disciplines in a new area has witnessed some operational complications. One of the main difficulties in this regard extends from the lack of a binding legal framework pertaining to the practice of forensically examining human remains for the purposes of reparative measures, including criminal prosecutorial purposes, followings instances of serious violations of international human rights and international humanitarian law. The following passage articulates perfectly the conundrum:

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<sup>135</sup> The work of the International Committee for the Red Cross is noteworthy, particularly as regard the application of forensic science in a humanitarian context, ICRC, 'ICRC receives award for contributions to humanitarian forensic sciences', 14 September 2011, News Release 11/188, available at <http://www.icrc.org/eng/resources/documents/news-release/2011/forensics-news-2011-09-14.htm> (last accessed 27 October 2011).

<sup>136</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights*, Human Rights Council, Report of 24 August 2010, UN Doc.A/HRC/15/26. The report, was submitted pursuant to Human Rights Council resolutions 9/11 and 10/26, in which the Council requested the High Commissioners Office to "prepare a report, to be presented to the Council...on the use of forensic experts in case of gross violations of human rights with a view to identifying trends and best practices in this regard" and "to request information from States, intergovernmental and non-governmental organizations on best practices in the use of forensic genetics for identifying victims of serious violations of human rights and international humanitarian law with a view to considering the possibility of drafting a manual that may serve as a guide for the application of forensic genetics...", *Ibid*, *summary*.

In a national context the application of forensic science is regulated by legislation and detailed domestic legal frameworks or domestically accepted practices that seek to ensure such conformity. At the international level, however, the rules and acceptable practices are often less clear, sometimes contradictory, or even absent altogether. That situation is rapidly changing due to an ever-increasing reliance on forensic methods and techniques, both domestically and across national borders.<sup>137</sup>

Although this point may appear axiomatic, international forensic investigations of gross human rights violations, war crimes, crimes against humanity and genocide should ensure compliance with the principles and provisions of international human rights and humanitarian law. Writing nearly a decade ago, Cordner and McKelvie warn that forensic scientists themselves can “wittingly, unwittingly or by virtue of poor practice, participate in violations of human rights”.<sup>138</sup> As elucidated in the report cited above, forensic science is “one of the enabling tools to ensure the full implementation of the rule of law, and as such it needs to conform to the rule of law itself”.<sup>139</sup>

A number of guidelines pertaining to the conduct of investigations into alleged atrocities have been advanced by the United Nations. Of note are the *Guidelines for the conduct of United Nations inquiries into allegations of massacres*<sup>140</sup> and annexed to these Guidelines, the model protocol for a legal investigation of extralegal, arbitrary and summary executions, known as the Minnesota Protocol. Another effort to standardise methods for the investigation of extrajudicial killings was made with the 1991 United Nations *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.<sup>141</sup> The manual was intended to supplement the “Principles on the effective prevention and investigation of extra-legal, arbitrary and summary executions”,<sup>142</sup> following the recommendation of the

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<sup>137</sup> *Ibid*, para.3.

<sup>138</sup> Stephen Cordner and Helen McKelvie, ‘Developing standards in international forensic work to identify missing persons’ 2002 84(848) *International Review of the Red Cross*, 867, 880.

<sup>139</sup> *Report on the right to the truth and on forensic genetics and human rights*, (n 136), at para.2.

<sup>140</sup> United Nations, Office of Legal Affairs, *Guidelines for the conduct of United Nations inquiries into allegations of massacres*, New York: Office of Legal Affairs, United Nations, 1995 (reprinted 1997).

<sup>141</sup> United Nations, *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, U.N. Doc. E/ST/CSDHA/12 (1991), available at <http://www1.umn.edu/humanrts/instree/executioninvestigation-91.html> (last accessed 27 October 2011).

<sup>142</sup> As adopted by the Economic and Social Council in its resolution 1989/65 of 24 May 1989.

Committee on Crime Prevention and Control, at a session held in Vienna in February 1990.<sup>143</sup> However, these guidelines are not legally binding and investigators are under no obligation to apply these protocols.<sup>144</sup> Routinely, investigators will often develop their own sets of protocols and standard operating procedures specific to the context in which they work.

In the absence of a binding legal framework to guide the practice of mass grave exhumations, the *ad hoc* Tribunals have been free to develop their own protocols suitable for the challenges, and sometimes idiosyncratic problems, faced in the field.<sup>145</sup> There are very practical reasons why a court will need to develop its own protocols, which can encompass aspects of the United Nations protocols; however, it should be noted that the lack of standardised protocols and operating procedures have resulted in challenges made by the Defence as regard the admissibility of forensic evidence during proceedings before the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. For example, in the *Rutuganda* case before the Rwandan Tribunal, forensic evidence presented subsequent to the exhumation of a mass grave at a site in Kigali was found to be unreliable, and so the findings of the prosecutions expert witnesses could not be admitted in that case. Basing its decision not to admit the forensic evidence partly on the questionable reliability of the scientific methods employed by the prosecutions' forensic anthropologist, and relying for its analysis on the testimony given by a forensic anthropologist employed by the Defence, the trial chamber determined that it was "not satisfied that the scientific method used by Professor

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<sup>143</sup> United Nations, *Manual on Extra-legal Executions*, (n 141), introduction.

<sup>144</sup> See, further, Corder and McKelvie, 'Developing standards', (n 138); Margaret Cox, Ambika Flavel, Ian Hanson, Joanna Laver, and Roland Wessling (eds.), *The Scientific Investigation of Mass Graves: Towards Protocols and Standard Operating Procedures* (Cambridge: Cambridge University Press, 2008).

<sup>145</sup> The forensic team deployed by Physicians for Human Rights under the auspices of the International Criminal Tribunal for Rwanda utilised their own protocols and methodology, Personal interview with Ms. Holo Makwaia, Trial Attorney, Office of the Prosecutor, International Criminal Tribunal for Rwanda, Arusha, Tanzania, 14 April 2010. See, also, Chapter V of this thesis on the use of forensic expertise by the Rwandan Tribunal. In 1996, the first year in which exhumations were conducted by the International Criminal Tribunal for the former Yugoslavia, the organisation Physicians for Human Rights carried out this work and applied their own set of protocols. The Yugoslav Tribunal subsequently developed its own protocols when it developed its own team in 1997, Personal interview with Mr. John Ralston, former Chief of Investigations at the International Criminal Tribunal for the former Yugoslavia, 1 December 2008. The working methods of the Yugoslav Tribunal will be detailed in Chapter IV.

Haglund is such as to allow the Chamber to rely on his findings in the determination of the case”.<sup>146</sup>

Referring to the cross-examination of forensic anthropologist William Haglund in the *Popović* trial at the Yugoslav Tribunal, in which Dr. Haglund’s working methods were again called into question, Melanie Klinkner highlights how this related to the absence of standardised and binding rules to guide forensic work conducted in the international arena. Klinkner points out that the cross-examination demonstrated “the intimate relationship between witness credibility and professional conduct and ethics”.<sup>147</sup> Referring to writings on the domestic legal code, she draws our attention to the fact that “codes of practices that are negotiated between the legal system and scientific disciplines and validated by society provide useful non-case-specific guidelines to adjudicators”.<sup>148</sup> This stands in contrast to the state of play in an international context where “no such negotiated code of practice between international law, scientific disciplines and the international community exists. There is neither a standardised agreement regarding forensic exhumation practices and principles, nor an overarching ethical code for practitioners on international missions”.<sup>149</sup>

The criticism of Dr. Haglund’s scientific methods may, however, have been more of a reflection of the adversarial nature of international trial proceedings than a genuine indication of deficiencies in the protocols used. The Trial Chamber in *Popović* was not persuaded by the objections raised by the Defence and thus it ruled in the judgement that:

Haglund appeared as a Prosecution witness in the case of *Prosecutor v. Rutaganda*, where the Trial Chamber in that case held that “on the basis of the testimony of Dr. Kathleen Reich, a forensic pathologist called by the Defence as an expert witness, [it was] not satisfied that the scientific

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<sup>146</sup> *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No: ICTR-96-3-T, Trial Judgement of 6 December 1999, at para. 256. The trial chamber further made the decision not to admit this forensic evidence as: “Secondly, and above all, the Chamber notes that the Prosecutor failed to show a direct link between the findings of Professor Haglund and Dr. Peerwani and the specific allegations in the Indictment. Consequently, the Chamber holds that the findings of the said expert witnesses should not be admitted in the instant case”, *ibid*, at para. 257.

<sup>147</sup> Melanie Klinkner, ‘Forensic science expertise for international criminal proceedings: an old problem, a new context and a pragmatic resolution’ (2009) 13 *The International Journal of Evidence and Proof*, 102, 122.

<sup>148</sup> *Ibid*.

<sup>149</sup> *Ibid*.

method used by Professor Haglund is such as to allow the Chamber to rely on his findings in the determination of the case” and that “above all, the Chamber notes that the Prosecutor failed to show a direct link between the findings of Professor Haglund and Dr. Peerwani and the specific allegation in the indictment.” It appears that while Dr. Reich criticised Haglund’s method in determining the cause of death, such determination was actually made by another expert in that case, Dr. Peerwani. In the Rutaganda case, Dr. Reich also criticised Haglund’s method in determining time of death, as he did not consider insect information and fabric and clothing analysis and did not take casts of skulls or use stature estimates. Haglund responded that such methods are either not routine practice in Canada or in the United States or could not be used in the context of Rwanda. Haglund also appeared as Prosecution expert in the case of *Prosecutor v. Kayishema* and he was not criticised in this context. [...]The Trial Chamber is of the opinion that nothing raised by the Defence can create a reasonable doubt as to the reliability of Haglund’s work, which the Prosecution has proven before the Trial Chamber.<sup>150</sup>

Overall, whilst the application of forensic science techniques to the investigations of crimes falling under the jurisdiction of the United Nations Tribunals can be seen as a very successful endeavour, the issues raised above do, nonetheless, point towards the persisting need to put in place a suitable framework to guide the practice of international forensic work.

## G. Conclusion

Rules guiding the appropriate conduct towards the dead in the aftermath of war have evolved over centuries as the need to treat the dead with respect and to facilitate the mourning and grief of the families and communities of the deceased has been recognised by States, non-governmental organisations and civil society. The obligations codified in international humanitarian law regarding the war dead are of considerable importance as the consequences of impropriety to the dead can result in

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<sup>150</sup> *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević*, Case No.IT-05-88-T, (Public Redacted) Trial Judgement Volume I, of 10 June 2010, at para.620. References omitted.

detrimental effects on the living. This chapter has outlined and discussed these provisions, highlighting the important humanitarian component that informs these rules.

In more recent years, bodies of the war dead came to have instrumental value as post-mortem examinations of the bodies of victims recovered from clandestine burial sites can provide valuable evidence at war crimes trials. The principles underpinning the rules pertaining to the dead remain, however, those of a humanitarian intent. The practice of forensically examining the graves and the bodies of war dead in the context of international criminal justice is a relatively recent practice in the history of warfare. Existing rules in international humanitarian law addressing the treatment of the dead make little reference to mass grave exhumations for the purposes of criminal enquiries and have no specific provisions to guide the conduct of international forensic investigation. Thus, guidelines have been developed in order to respond to the needs relating to enquiries into atrocity crimes. Such protocols are not legally binding, however, and forensic teams working under the auspices of the *ad hoc* Tribunals were at liberty apply standard operating procedures drafted by the teams themselves or drafted by the courts.

## **Chapter II: The Construction of Forensic Evidence through the Exhumation of Mass Graves**

### **Introduction**

The purpose of this chapter is to provide an overview on how forensic and medical expertise is utilised in the investigation of atrocity crimes. It will detail how such experts engage in this exploratory stage of war crime proceedings and examine how forensic evidence is gathered in the field. The definition of mass grave will be discussed before turning to a review of methods by which clandestine mass graves are located. The operational practices of the investigative team will then be discussed from the excavation of remains from a mass grave site through to the post-mortem examination of the body and consideration will be given to how each particular area of expertise is employed in a forensic context. It should be noted that no two forensic investigations will be entirely the same and the depiction summarised in this chapter is representative of the level of operations at the upper end of the scale, as exemplified by the International Criminal Tribunal for the former Yugoslavia. Investigations conducted under a human rights mandate are often under-funded and limited forensic resources may be made available. The depiction here should be considered instructive of what is desirable practice rather than authoritative on what constitutes all practice.

#### **A. Defining Mass Grave**

Reflective of the divergent ways in which a mass grave can be viewed,<sup>1</sup> there is no one decisive definition of mass grave. Rather there exists a variety of characterisations which are in a sense determined by the discipline framing the terms of reference. A.K. Mant, for example, a British pathologist who served in the Special Medical Unit of the War Crimes Investigation Unit established by the government of

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<sup>1</sup> For example, following a mass disaster authorities may utilise mass graves to intern the dead when local capacity to provide individual burials for a large number of decedents is overwhelmed; in the context of serious violations of international law, perpetrators can use mass graves as a mode by which they conceal evidence; for relatives the mass grave can be a site that holds the answers to their many questions of what happened to their loved ones; for investigators the mass grave is considered a crime scene, etc.

the United Kingdom after World War II, considered a mass grave to be a site where two or more bodies “were buried in physical contact with each other”.<sup>2</sup> Mark Skinner, a forensic archaeologist, has qualified a mass grave as containing at least six individuals.<sup>3</sup> Noting that such definitions focus on the technical and physical characteristics of the grave, Stefan Schmitt<sup>4</sup>, an archaeologist and criminologist, argues for a “holistic definition” which takes into account the anthropological context.<sup>5</sup> It is this context, he argues, that focuses and defines evidence collection and the methods used to excavate the grave: “From this perspective, a mass grave can be defined as one that contains the remains of more than one victim who share some common trait connected with the cause and manner of death.”<sup>6</sup> Melissa Connor, an archaeologist, focuses on the quantitative element of the term due to the challenges presented in excavating a larger size grave and considers a mass grave to be one which constitutes more than six individuals.<sup>7</sup> The Office on Missing Persons and Forensics working in Kosovo as part of the United Nations Mission in Kosovo (UNMIK) distinguishes between mass and multiple graves, the difference between the two being “the respect paid to the dead in the burial process and the subsequent possibility of being able to locate an individual's remains, should exhumation be necessary.”<sup>8</sup> A mass grave, it has determined, is characteristically a large burial site into which the human remains have been randomly dumped. The bodies will lie in the position in which they have fallen and will often be commingled. The grave site

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<sup>2</sup> A.K. Mant, ‘Knowledge acquired from post-war exhumations’, in A. Boddington, A.N. Garland and R.C. Janaway (eds.), *Death Decay and Reconstruction: Approaches to Archaeology and Forensic Science* (London-Manchester: Manchester University Press, 1987), p.72.

<sup>3</sup> Mark Skinner, ‘Planning the archaeological recovery of evidence from recent mass graves’ (1987) 34 *Forensic Science International*, 267, 268.

<sup>4</sup> Director of the international forensic program at the American non-governmental organisation Physicians for Human Rights. <http://physiciansforhumanrights.org/forensic/about/sschmitt.html> (last accessed 27 October 2011).

<sup>5</sup> Stefan Schmitt, ‘Mass Graves and the Collection of Forensic Evidence: Genocide, War Crimes, and Crimes Against Humanity’, in William D. Haglund and Marcella H. Sorg (eds.), *Advances in Forensic Taphonomy: Method, Theory and Archaeological Perspectives* (Boca Raton-London- New York-Washington, D.C.: CRC Press, 2002), p.278.

<sup>6</sup> *Ibid*, p.279.

<sup>7</sup> Connor classifies graves of two to six individuals as “small multiple graves” and states that the figure seven used as a cut-off is totally arbitrary. Melissa A Connor, *Forensic Methods: Excavation for the Archaeologist and Investigator* (Lanham-New York-Toronto-Plymouth: AltaMira Press, 2007), pp.156, 157.

<sup>8</sup> United Nations Interim Mission in Kosovo, OMPF Cycle of Activities, [http://www.unmikonline.org/justice/ompf/ompf\\_activities.htm](http://www.unmikonline.org/justice/ompf/ompf_activities.htm) (last accessed 27 October 2011).

and the identities of the bodies within are unrecorded. From such a grave, it is contended, it is impossible to locate an individual's remains.<sup>9</sup>

The Truth and Reconciliation Commission ("the Commission") established in Sierra Leone following the eleven year civil conflict gave some careful consideration to how it would define mass grave. The various definitions the Commission reviewed contained the following criteria "(a) the number of bodies contained in the mass grave,<sup>10</sup> (b) whether those bodies are identified,<sup>11</sup> (c) the cause of death,<sup>12</sup> (d) the measure of respect accorded to the remains<sup>13</sup> and (e) the "legitimacy" of the site."<sup>14</sup> Deeming those criteria to be too narrow and thus exclusionary, the Commission opted to adopt a broad and encompassing definition of mass grave which was "any grave containing the remains of more than one person that fell victim during the war."<sup>15</sup>

Within an international criminal law framework, the authoritative definition is the one delineated by the United Nations Special Rapporteur on extra-judicial, summary or arbitrary executions who has defined mass graves as locations where three or more victims of extrajudicial, summary or arbitrary executions were buried, not having died in combat or armed confrontations.<sup>16</sup> It is this definition that is used by

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<sup>9</sup> *Ibid.*

<sup>10</sup> The Commission was of the view that "any grave containing more than one body constitutes a "mass" grave. For the purposes of the present exercise any other limitation would be arbitrary and unjustified. To the extent that a single grave contains the body of the victim of a mass killing that also resulted in a mass grave, such grave is also included in this report." *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Appendix 4; Memorials, Mass Graves and Other Sites, Part Two – Report on Mass Graves and Other Sites, 2004, at paragraph 7

<sup>11</sup> "The Commissioners decided that it was not a necessary criterion for the bodies to be unidentified. The report includes graves containing identified bodies, unidentified bodies and graves containing both identified and unidentified bodies", *ibid.*, at para. 9.

<sup>12</sup> If the definition developed by the United Nations Special Rapporteur on extra-judicial, summary or arbitrary executions, as discussed in the next paragraph, is used, mass graves excludes those that contain the bodies of combatants or other fighters. In determining to adopt a wide definition, the Commission decided that "[a]lthough the majority of the graves reported in this chapter contain civilians, the Commission did not wish to exclude the few graves containing the bodies of combatants", *ibid.* at para. 10.

<sup>13</sup> The Commission disregarded definitions such as the one developed by UNMIK, *ibid.*, at para. 11.

<sup>14</sup> "This relates to the reasons behind the creation of the grave. Was it dug in order to dispose of evidence, or was it rather created for health reasons? The Commission has not employed this criterion in order to exclude any graves from this report", *ibid.*, at para. 12

<sup>15</sup> *Ibid.*, at para. 13.

<sup>16</sup> *Situation of Human Rights in the Territory of the Former Yugoslavia*. Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, UN Doc E/CN.4/1993/50, 10 February 1993, Annex I: Summary of the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on his mission to investigate allegations of mass graves from 15 to 20 December 1992, Available at

the International Criminal Tribunal for the former Yugoslavia and, in common with the Yugoslav Commission of Experts'<sup>17</sup> definition, it allows for "other types of features than actual graves, like village wells and natural ravines."<sup>18</sup> This definition, while in some ways more expansive than definitions developed by archaeologists such as Skinner and Connor, as it allows for a lesser minimum number of individuals, is at the same time rather restrictive as it excludes graves of decedents whose deaths have not occurred in violation of international human rights or humanitarian law, for example, legitimate combatants or civilian deaths would not be included in this definition. However, in many cases it cannot be determined if the bodies are victims of extrajudicial, summary or arbitrary executions until they have been exhumed and forensically examined. Indeed, allowing for a determination of whether or not a burial site can be categorised as a mass grave prior to forensic assessment may be ill-advised due to the inherent danger of misclassification. Further, as some authors point out, whilst this definition serves the legal needs of the criminal tribunals, "it confounds what a mass grave is with the dynamics which brought it about".<sup>19</sup>

## **B. Locating Mass Graves for Evidential Purposes**

Mass graves created as a result of violations of international criminal law are often, by their very nature, clandestine. Perpetrators, increasingly savvy to the capacity that developments in scientific technologies bring to international criminal inquiries, may go to some lengths to conceal the evidence of their crimes.<sup>20</sup> Therefore, the first step

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<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/313049964d7549ec802567900054cf88?OpenDocument> (last accessed 27 October 2011)

<sup>17</sup> Commission of Experts established pursuant to Security Council Resolution 780 (1992) to investigate grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia. For a description of the work of the Commission see further Chapter IV of this thesis.

<sup>18</sup> Kirsten Juhl, *The Contribution by (Forensic) Archaeologists to Human Rights Investigations of Mass Graves* (Stavanger: Museum of Archaeology, Stavanger, 2005), p.16. Available at [http://am.uis.no/getfile.php/Arkeologisk%20museum/publikasjoner/ams-nett/Mass\\_Graves2.pdf](http://am.uis.no/getfile.php/Arkeologisk%20museum/publikasjoner/ams-nett/Mass_Graves2.pdf) (last accessed 27 October 2011).

<sup>19</sup> William D. Haglund, Melissa Connor and Douglas D. Scott, 'The Archaeology of Contemporary Mass Graves' (2001) 35(1) *Historical Archaeology*, 57, 57.

<sup>20</sup> Note that not all mass graves containing the bodies of victims of atrocity crimes are created by the perpetrators. In some cases the remains will be recovered and buried by the survivors or their families,

in forensic investigating will often involve locating the burial site.<sup>21</sup> This may not be so straight-forward. As emphasised by Mark B. Harmon and Fergal Gaynor, simply “locating a crime scene can be a formidable task”.<sup>22</sup> Investigating crimes of an international nature in a conflict or post-conflict scenario presents a number of challenges not ordinarily present in domestic jurisdictions where criminal investigations typically take place during times of peace or relative calm. In environments where conflict has raged, field investigations frequently will require extensive security measures such as de-mining of sites where there is a suspected grave, armed escorts and the maintenance of security perimeters to enable investigators, including forensic experts, to safely attend the crime scene.<sup>23</sup> In reality, access to mass graves may only become possible months or even years after the crimes have been committed, in which case the physical evidence may have been tampered with, it may have badly deteriorated or even have disappeared completely. The prompt gathering of evidence is important from a Defence point of view as well as for fulfilling prosecutorial needs. There are fair trial concerns associated with delayed proceedings, and so the right of an accused to an expeditious trial is recognised partly in terms of the right of the accused to prepare an effective defence, as “the passage of time may result in the loss of exculpatory evidence.”<sup>24</sup>

Degradation and contamination of evidence as a result of the interval between the commission and the investigation of a crime are recognised as representing two key prejudicial effects. In the context of genocide and crimes against humanity

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M. Kalacska and L.S. Bell, ‘Remote Sensing as a Tool for the Detection of Clandestine Mass Graves’ (2006) 39(1) *Canadian Journal of Forensic Science*, 1-13, 14.

<sup>21</sup> Of course not all genocide or war crime victims will be disposed of in mass burial sites. Perpetrators may make use of existing natural features such as ravines, wells and rivers. The definition of mass grave utilised in an international criminal law context takes some such deviations into account, as highlighted in the previous section. In other circumstances, such as the Rwandan genocide, the sheer mass of bodies may preclude widespread burial of the victim’s remains at the point of execution. Human remains may therefore be recovered from surface sites in the immediate aftermath of a conflict or genocide. In addition, some level of national medico-legal organisation may continue to function during an armed conflict and bodies may be dealt with through the appropriate channels. The purpose of this discussion is to highlight how investigators set about locating and recovering bodies from clandestine interment sites for the purposes of criminal investigation.

<sup>22</sup> Mark B. Harmon and Fergal Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings’ (2004) 2 *Journal of International Criminal Justice*, 403, 406

<sup>23</sup> *Ibid.*

<sup>24</sup> Hafida Lahiouel, ‘The Right of the Accused to an Expeditious Trial’, in Richard May, David Tolbert, John Hocking, Ken Roberts, Bing Bing Jia, Daryl Mundis and Gabriël Oosthuizen (eds.), *Essays on ICTY Procedure and Evidence: In honour of Gabrielle Kirk McDonald* (The Hague: Kluwer Law International, 2001), pp197-213, p198.

investigations, contamination is seen as presenting a more significant risk. Mass graves can be interfered with not only by perpetrators but also by relatives looking for the bodies of their loved ones. Contamination of physical evidence can represent a major impediment for the admissibility in court of the evidence garnered from the disrupted crime scene.<sup>25</sup> Unauthorised grave disturbance has been documented by international tribunals, for example, investigators from the International Criminal Tribunal for the former Yugoslavia have identified instances where State officials led efforts to conceal and destroy evidence of mass graves. The disinterring of primary mass graves relating to the Srebrenica massacre and reburial of the victims into secondary and tertiary graves was discovered by the Yugoslav Tribunal to have been conducted by the Army of the Republika Srpska whose members were later implicated in the killings.<sup>26</sup> Although such activity makes investigation more difficult and complicated, it does not necessarily preclude the use of evidence from disturbed grave sites in criminal trials. Forensic examination of the graves can establish that bodies have been moved from an original grave site, the primary mass grave, to a subsequent grave site, a secondary mass grave, or even moved subsequently to a third site or tertiary mass grave. Objects such as physical material from the execution sites that have been buried with the human remains and are moved along with the bodies and transported to secondary or tertiary mass graves have been documented upon excavation and are used to link the numerous grave sites.<sup>27</sup> Such activity requires a considerable amount of effort on the part of those responsible and, from the point of view of the Prosecutor, is indicative of guilt.<sup>28</sup>

Human remains will also degrade through a natural process of decomposition, along with other taphonomic processes,<sup>29</sup> resulting in the gradual disintegration of physical

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<sup>25</sup> Paul Seils and Marieke Wierda, 'Evidence', in Dinah L. Shelton (ed. in chief), *Encyclopedia of Genocide and Crimes Against Humanity* (Farmington Hills, MI: Thomson Gale, 2005), pp320-325, pp320, 321.

<sup>26</sup> Harmon and Gaynor, 'Prosecuting Massive Crimes', (n 22), 406, 407. On the clandestine exhumation of primary graves in Bosnia, see, further, Mark F. Skinner, Heather P. York and Melissa A. Connor, 'Postburial Disturbance of Graves in Bosnia-Herzegovina', in Haglund and Sorg eds., (n 5), pp.293-308.

<sup>27</sup> Dean Manning, 'Investigating Genocide – Srebrenica', (2009) 99 *Platypus Magazine* 16, 19.

<sup>28</sup> Graham T Blewitt, 'The Role of Forensic Investigations in Genocide Prosecutions before an International Criminal Tribunal', (1997) 39(4) *Medicine, Science & the Law*, 284, 288. See, also, *Prosecutor v. Momir Nikolić*, Case No.IT-02-60/1-S, Sentencing judgement of 2 December 2003, at paras.123 and 179

<sup>29</sup> The term taphonomy was coined in 1940 by I.A. Efremov, a Russian palaeontologist, and is defined as "the study of transition, in all its details, of organic remains from the biosphere to the lithosphere",

evidence. However, this process will not completely exclude the use of mortal remains for forensic purposes, as although degeneration may limit forensic value, remains in even an advanced state of decomposition can still represent viable evidence. A period of some years between the commission of the crime and the investigation generally will not result in the degradation of the remains to the extent that this form of evidence cannot be obtained and used forensically.<sup>30</sup> Further, in the case of international criminal investigations, the purpose of the recovery of the remains through exhumation is not necessarily correlated to a requirement for individual identifications of the interred victims and in fact such identification might not be required at all. Often the exhumations are conducted to prove sufficiently the immediate circumstances of the victims' death and in the case of genocide to give reliable indications that the victims belonged to a particular group. In other words, group identification rather than individual identification is sought: for instance, national, racial, ethnic, religious affiliation in the context of genocide, and civilian or individuals *hor de combat* as opposed to combatant categorisation in a war crimes or crimes against humanity context. From the perspective of some prosecutions, particularly those relating to genocide charges, establishing group identity may be more pertinent than determining individual identifications.<sup>31</sup>

The methods used for locating a grave site can be sub-divided into two broad categories. The first category consists of direct methods of grave location; the second category is constituted by remote sensing techniques. Direct methods include finding the grave with the use of a witness; detecting soil, topography, and vegetation changes; pedestrian survey; probes; cadaver dogs; and test trenches. Remote sensing techniques are techniques that investigate and define an object without direct contact with it. There are a number of different methods: aerial photography and satellite imagery and geophysical techniques which include - metal detectors, ground-penetrating radar (GPR), electromagnetic (EM) induction meters, electrical

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R. Lee Lyman, 'Foreword' in Haglund and Sorg (eds.), *Advances in Forensic Taphonomy*, (n 5), p.xix. Forensic taphonomy can be defined as "the study of the transition of humans from living organisms to mortal remains, including causes of death, for judicial or legal purposes", *ibid*.

<sup>30</sup> Seils and Wierda, 'Evidence', (n 5), pp.320,321.

<sup>31</sup> Debra Komar, 'Is victim identity in genocide a question of science or law? The scientific perspective, with special reference to Darfur', (2008) 48 *Science and Justice*, 146.

resistivity, and magnetometers.<sup>32</sup> There are advantages and disadvantages associated with each technique and the process or combination of processes used will vary under each different set of circumstances. Often more than one technique will be required and indeed “the use of several complimentary search methods is more effective than the use of a single search method”.<sup>33</sup> A number of factors will influence the suitability of search techniques including the size of the grave and the nature of the burial environment. In addition, other dynamics comprising factors such as the depth of the grave, the type of soil the grave is contained in and whether the area is subject to water-logging can influence the rate of decomposition of the remains and, thus, can influence the effectiveness of methods that utilise decay effects.<sup>34</sup>

## **C. Mass Grave Exhumation and Excavation**

### **(1) Forensic Expertise**

Forensic investigation of complex crimes such as war crimes, crimes against humanity and genocide requires a multi-disciplinary approach. Experts drawn from the fields of science, medicine, law and criminal justice will ideally be deployed. A number of disciplines are regarded as central to the investigation with other more specialised experts becoming engaged in the work as the need arises. Mark Skinner and Jon Sterenberg advocate that, minimally, complete teams are composed of core expertise from “crime scene managers, archaeologists, anthropologists and pathologists”.<sup>35</sup> Additionally, further professionals may be employed including “evidence officers, logisticians, heavy equipment operators, photographers, surveyors, dentists, [and] mortuary managers”.<sup>36</sup> Once a suspected grave site has been located, the forensic investigation of the mass grave takes place in several

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<sup>32</sup> Connor, *Forensic Methods*, (n 7), pp.107-141.

<sup>33</sup> *Ibid*, p.107.

<sup>34</sup> JR Hunter et al, ‘Forensic archaeology, forensic anthropology and Human Rights in Europe’ (Proceedings of the Forensic Science Society Meeting ‘European Connections’ April 2001), (2001) 41(3) *Science & Justice*, 173, 176.

<sup>35</sup> Mark Skinner and Jon Sterenberg, ‘Turf wars: Authority and responsibility for the investigation of mass graves’, (2005) 151 *Forensic Science International*, 221, 222.

<sup>36</sup> *Ibid*, 222.

stages.<sup>37</sup> The process entails site assessment, survey, excavation and post-mortem examination of the remains.<sup>38</sup> To obtain forensically defensible conclusions from the exhumation, the process may take weeks or even months.<sup>39</sup> Notwithstanding the fact that the examination of mass graves entails a particular *modus operandi*, it should not be seen in isolation from the broader investigation and will indeed be focused by factors such as prosecutorial strategy and directed by intelligence gathered from a number of sources.<sup>40</sup>

From an international criminal law perspective, the number of bodies recovered from a mass grave can range from a minimum number of three, if we take the definition developed by the United Nations Special Rapporteur on extra-judicial, summary or arbitrary executions,<sup>41</sup> to in the hundreds or even thousands. The human remains within the mass graves will be found in various states of decomposition and will often be disrupted, disarticulated and co-mingled. They may have been subjected not only to the trauma that resulted in their deaths but also additional damage can be caused by the earth moving machinery used to construct the grave, and during the process of transportation to the grave site in cases where the victims are not killed and buried in situ. Further damage can be caused by any attempts made to eradicate the remains by methods such as incineration, explosives or chemical destruction. The recording and full recovery of all evidence, including human remains, in the best physical condition possible should be the primary goal of the excavation. Although further disruption to the bodies may inevitably occur during the process of exhumation, the more complete the body remains, the more information the forensic pathologist and forensic anthropologist will have available for making an identification, for evaluating the cause and manner of death and for making other related analysis.<sup>42</sup> Bodies recovered from the graves need to be handled with great care, not only to prevent further post-mortem damage and to ensure the remains are

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<sup>37</sup> Note that the place of execution and the deposition site are in many cases not the same location. Victims may be killed in one or numerous places and the bodies then transported to the grave site for disposal.

<sup>38</sup> Skinner and Sterenberg, 'Turf wars', (n 35), 222.

<sup>39</sup> Mark Skinner, 'Planning the archaeological recovery of evidence from recent mass graves' (1987) 34 *Forensic Science International*, 267, 267.

<sup>40</sup> Skinner and Sterenberg, 'Turf wars', (n 35), 231.

<sup>41</sup> Special Rapporteur report, *Situation on Human Rights*, (n 16).

<sup>42</sup> Hugh Tuller and Marija Đurić, 'Keeping the pieces together: Comparison of mass grave exhumation methodology' (2006) 156 *Forensic Science International*, 192,193.

treated with respect, but also due to the danger posed to the forensic investigator from unexploded ordnance. In contemporary conflict situations, there have been instances where victim activated devices have been planted on the bodies of the deceased with the aim of injuring those charged with their recovery.<sup>43</sup>

The role of the forensic archaeologist may be regarded as pivotal for the excavation of the grave site. The discipline of forensic archaeology is defined as “fundamentally applying the mapping and exhumation skills of the archaeologist to death scenes or places where bodies have been disposed”.<sup>44</sup> From the range of the medico-legal experts engaged in forensic exhumations, the forensic archaeologist will frequently be one of the first to encounter a grave site and to commence the exposure of the victims through a meticulous process of excavation. Archaeologists thus will uncover evidence regarded as “critically important to determining the manner of death” as they expose “temporal and spatial relationships that help explain how the bodies came to be in the observed state”.<sup>45</sup> For example, mass graves are commonly dug using heavy machinery which will cause predictable modifications to the soil and will also affect the annual ring formation of branches and roots. Examination of soil and vegetation can help determine the modus operandi of the grave formation by the perpetrators as well as help provide a time frame for the activity. Attempts made to conceal the evidence of the crime can also ironically preserve evidence; soil placed on top of the mass of bodies in the grave can preserve not only bodies but also the location of objects, for instance restraining devices such as ligatures and blindfolds. Careful archaeological methods are required to reveal and preserve, through precise mapping, the relationship of the bodies to such artefacts. Establishing the association between human remains and other material in the graves is extremely important as the contextual information has “as much value as the remains for reconstruction of events surrounding a death”.<sup>46</sup> The contextualisation that the forensic archaeologist can bring to bear in these death investigations has been described as “the line between the exhumation of human

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<sup>43</sup> Connor, *Forensic Methods*, (n 7), p.199.

<sup>44</sup> Mark Skinner, Djordje Alempijevic and Marija Djuric-Srejic, ‘Guidelines for International Forensic Bio-archaeology Monitors of Mass Grave Exhumations’ (2003) 134 *Forensic Science International*, 81, 83.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, 84.

remains and the excavation of human remains”.<sup>47</sup> While the exhumation of human remains is “simply the retrieval of the remains” regardless of whether or not archaeological techniques are used, the excavation of human remains results in not only the recovery of the remains but also the reconstruction of the “human activity at the site and beyond”, thus bring the archaeologist investigator into the realm of “scene reconstruction”.<sup>48</sup>

Utilising radiography as part of the forensic investigation can prove indispensable both for reasons of safety and to maximise the capture of physical evidence. This particular expertise has become customary in the investigatory process as it represents “minimally invasive, objective, permanent, and comparatively cost effective image techniques”.<sup>49</sup> The necessary equipment is relatively mobile and thus can be transported to a field mortuary should the need arise. In cases where medical imaging of ante-mortem injuries is in existence, such images can be compared to those taken post-mortem for identification purposes.<sup>50</sup> Fluoroscopy (real time scanning) provides a means by which an anatomical overview can be provided, as well as presenting an effective and indeed invaluable health and safety mechanism as it highlights forensic artefacts such as explosives and sharp objects prior to the more intimate examination by the forensic pathologist and forensic anthropologist. Furthermore, fluoroscopy accentuates items such as ballistic material and other material of forensic value that may be missed during the physical examination. Plain film, or x-ray “photography”, and dental radiography supply additional tools for the forensic investigator as the skeletal and dental details provided complement the pathological, anthropological and odontological assessment of the remains.<sup>51</sup>

Post-mortem analysis of both fleshed and skeletal remains by forensic pathologists and forensic anthropologists provides additional contextual analysis of the manner of death. Examination of wounds and wounding patterns can be revealing particularly when interpreted in conjunction with information on how the bodies were disposed,

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<sup>47</sup> Connor, *Forensic Methods*, (n 7), p.18.

<sup>48</sup> *Ibid*, p.18.

<sup>49</sup> Emily Hines, Catherine Rock and Mark Viner, ‘Radiography’, in Tim Thompson and Sue Black (eds.), *Forensic Human Identification: An Introduction*, (Boca Raton-London-New York: CRC Press, 2007), pp.221-228, p.221.

<sup>50</sup> *Ibid*, pp.221,222.

<sup>51</sup> *Ibid*, p.222.

such as in clandestine grave sites. Lethal use of force coupled with attempts to conceal and destroy the remains lends robust credence to prosecutorial theories that contend, for example, the victims consisted of unarmed civilians as opposed to legitimate combatants killed in armed confrontation.<sup>52</sup> Forensic pathology is a specialisation in the discipline of pathology that concerns the investigation of deaths where there are medico-legal implications, for example, where it is suspected that the death occurred as a result of homicide. It is the responsibility of the forensic pathologist to perform an autopsy of the human remains.<sup>53</sup> The forensic anthropologist can play a valuable role in the course of the exhumation of the bodies as well as during the period of mortuary examination after the bodies are removed from the mass grave. Forensic anthropology entails the application of methodology in physical anthropology to a medico-legal context. Forensic anthropological analysis generally involves the examination of human skeletal remains although experts may also be trained in soft tissue anatomy. Their expertise is called upon to differentiate human skeletal remains from non-human material, to provide estimation of sex, ancestry, living stature and age at death, to estimate the post-mortem interval, to provide an interpretation of taphonomic factors, to document activity that may have been of a criminal nature, to document ante-mortem trauma, to distinguish ante-mortem injuries from peri-mortem and post-mortem damage to the body and to record any other details that may assist in identification.<sup>54</sup>

Forensic botany and geology experts can assume a helpful role in linking grave sites for evidentiary purposes. This was particularly the case for the investigations conducted in the former Yugoslavia. “Environmental profiling” is the term used to describe the combination of geology and botany for provenancing pollen, spore, soil, and sediment samples from relocated grave sites to the original grave and in some cases to the site of execution. It has been regarded as particularly beneficial “in proving strong circumstantial evidence linking a suspect or suspects to a scene of

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<sup>52</sup> Jose Pablo Baraybar and Marek Gasior, ‘Forensic Anthropology and the Most Probable Cause of Death in Cases of Violations Against International Humanitarian Law: An Example from Bosnia and Herzegovina’ (2006) 51(1) *Journal of Forensic Science*, 103.

<sup>53</sup> The Royal College of Pathologists, ‘Forensic pathology’, available at [www.rcpath.org/index.asp?PageID=444](http://www.rcpath.org/index.asp?PageID=444) (last accessed 27 October 2011).

<sup>54</sup> Douglas H. Ubelaker, ‘Evolution of the relationship of forensic anthropology with physical anthropology and forensic pathology: A North American perspective’ (2006) 4 *Studies in Historical Anthropology*, 199, 199.

crime”.<sup>55</sup> As mass graves are exhumed, samples are obtained from both the grave fill and from rock and soils surrounding them. Sampling occurs at primary and subsequent grave sites and additionally from parts of the body such as the cranium and from clothing or objects associated with the human remains taken from the grave. The samples are then subjected to laboratory analysis. The findings can be used to establish links between the sites. For example, the detection of a striated clast of serpentinite - a type of metamorphic rock - in a secondary grave in North East Bosnia was determined to match the local geology of just one of the primary sites under investigation at that time by the Yugoslav Tribunal, a grave referred to as Lazete I, upslope of which was found a serpentinite dyke.<sup>56</sup> The land use and vegetation of the primary sites were also appraised both on the ground and from aerial photos, and vegetation, pollen and spore found in the secondary graves was subsequently compared for matches.<sup>57</sup> The environmental data from botany and geology profiling is reviewed along with other forensic evidence such as clothing, personal effects, documents and ballistics to provide a “high level of multiple circumstantial evidence” used to link secondary grave sites to primary mass graves and execution sites.<sup>58</sup>

A further field of expertise that has in the past proved most useful during the course of forensic investigations is entomology. Forensic entomology is described as “the application of the study of insects and other arthropods to legal issues, especially in a court of law”.<sup>59</sup> Cadavers, both buried and surface remains, are often associated with insects, particularly beetles, flies and moths. A forensic examination of insect activity on the human remains can provide invaluable indicators of the post-mortem interval as well as provide clues regarding the transportation of a corpse after death, the position of the body at the time of death and the existence of wounds.<sup>60</sup>

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<sup>55</sup> A.G. Brown, ‘The use of forensic botany and geology in war crimes investigations in NE Bosnia’ (2006) 163 *Forensic Science International*, 204, 204.

<sup>56</sup> *Ibid.*, 207.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> E.P. Catts and M.L. Goff, ‘Forensic Entomology in Criminal Investigations’, (1992) 37 *Annual Review of Entomology*, 253-272, 253.

<sup>60</sup> Hunter et al, ‘Human Rights in Europe’, (n 34), 175. See also, Gail S. Anderson and Valerie J. Cervenka, ‘Insects Associated with the Body: Their Uses and Analyses’, in Haglund and Sorg, *Advances in Forensic Taphonomy*, (n 5), pp.173-200.

The odontologist or dentist has traditionally assumed a central role in human identification although the core significance of this discipline to international death investigations is diminishing to an extent as other methods such as DNA are developed. It is unlikely, however, that forensic odontology will be rendered completely ineffectual for some time to come. The viability of employing this area of expertise during international medico-legal investigations will vary depending on the context of the investigation and what its aims are, for example, are positive individual identifications being sought as opposed to group identification? A fundamental exercise in human identification is the comparison of ante-mortem data with the post-mortem information recorded from the bodies. In some jurisdictions, many individuals may not have access to dental care and so dental records will be non-existent for a particular population. In addition, during periods of prolonged armed conflict, individuals may endure severe deterioration of their dental health which will go untreated and undocumented. The deterioration may be such that the post-mortem dental condition does not match the ante-mortem records available. The substantial value placed on forensic odontology for human identification in mass disaster contexts is due to the fact that the teeth are the hardest and most resilient tissues in the human body and so can survive decomposition and severe fire,<sup>61</sup> therefore, presenting a method of identification when other means are not possible or may be unreliable. For this reason, it is unlikely that the use of forensic odontology will disappear completely in post-conflict investigations. In the absence of ante-mortem records, examination of the oral cavity and its contents can hold some value and it can reveal some general information on age, sex and ethnic origin of the decedent.<sup>62</sup> Although more sophisticated techniques such as DNA<sup>63</sup> and stable isotopic<sup>64</sup> analysis are available for use in the criminal justice context, the associated expense can be considerable higher than traditional methods of identification. A further important point to bear in mind is that even though cutting-edge techniques

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<sup>61</sup> Human bones may also survive the effects of fire, and although modification to the morphology and structure will result, burnt skeletal elements can still be forensically viable, see for example, Douglas H. Ubelaker, 'The forensic evaluation of burned skeletal remains: A synthesis' (2009) 183(1-3) *Forensic Science International*, 1.

<sup>62</sup> Richard Shepherd, *Simpson's Forensic Medicine*, (London: Arnold, 2004), pp.50-51.

<sup>63</sup> For an explanation of DNA analysis and the role of the forensic geneticist, see further, William Goodwin and Sibte Hadi, 'DNA', in Thompson and Black, *Forensic Human Identification*, (n 49), pp.5-27.

<sup>64</sup> For an overview of stable isotopic profiling and its forensic applications, see further Wolfram Meier-Augenstein, 'Stable Isotope Fingerprinting – Chemical Element “DNA”?', in Thompson and Black, *ibid.*, pp.29-53.

used for forensic analysis can provide a high accuracy rate, no technique is infallible and the danger is always present of results being unreliable due to sample degradation or contamination, often as a result of human error. Thus, it is desirable to use a combination of forensic techniques to serve as a check against prospective errors and to obtain as much forensically valuable evidence as possible.

## **(2) Management of the Investigation**

To ensure the success of an investigation, operational issues such as the demarcation of functions and responsibilities should be addressed. Maintaining clearly delineated roles for the various actors involved in criminal enquiries of this nature will help ensure team harmony and avoid unnecessary overlapping of activities and duplication of work. Key functions, such as the recovery of the bodies from the mass grave, can be regarded as the purview of the forensic anthropologist, owing to their specialist knowledge of anatomy and osteology, the forensic pathologist, by virtue of their authority in anatomy and soft tissue, or the forensic archaeologist who trains in documenting grave features and recovering grave contents, including human remains.<sup>65</sup> Arguably, either one of these disciplines could be assigned core responsibility for the excavation and exhumation of the grave. Such matters should be negotiated prior to the commencement of an investigation in the field.

Likewise, the question of who takes the lead in directing and managing the inquiries should be tackled. In international criminal investigations carried out by United Nations Tribunals, staff will be drawn from numerous jurisdictions with both common law and civil law backgrounds. The different legal systems engage different methodologies for investigation and presentation of evidence. John R. Cencich recognises how the civil law system takes a dossier approach which entails less cross-examination than is found in the common law system. These distinct approaches did not, Cencich maintains, cause any significant difficulties for the investigation itself. However, apparent in the context of the work he undertook at the International Criminal Tribunal for the former Yugoslavia, the question of who took leadership of the case did take on significance. In civil law systems, the investigating judge will take primary responsibility for directing the investigation. This is in

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<sup>65</sup> Tuller and Đurić, 'Keeping the pieces together', (n 42), 193; Skinner and Sterenberg, 'Turf wars', (n 35), 222, 223.

contrast to the central role the police force assumes in commanding common law criminal enquiries. Unity of command was, according to Cencich, “a particularly contentious point at The Hague”.<sup>66</sup> Investigative teams were led by senior investigations managers at the Yugoslav Tribunal, however, there were also typically one or more legal advisors assigned to each of the teams, the majority of whom had served as Prosecutors in their domestic jurisdictions. Cencich reveals that “the presence of two equally competent and equally paid professionals on an investigations team has led to the source of greatest conflict with the Office of the Prosecutor (OTP) and the ICTY”.<sup>67</sup> However, such tensions aside, in the context of international investigations conducted under the auspices of an international criminal Tribunal, the Prosecutor is the individual who bears ultimate responsibility and control of the investigation. The legal basis for this position is discussed in Chapter IV.

### **(3) Recording of Forensic Evidence**

A crucial task in the process of forensic exhumation and post-mortem examination is the maintenance of a chain of custody of the evidence, which should be documented according to an agreed standard operating procedure. Mass graves are the source of a multitude of objects, bodies and body parts which the investigator can encounter in fast succession. Some will be exposed at the excavation stage, while others will be uncovered in the course of the post-mortem examination. Evidence can be both physical and non-material, such as physical relationships between objects and the bodies, for example the location of bullet casings relative to the location of human remains, or descriptive such as the colour of an item. Non-material evidence may only be recorded but not collected per se. Therefore, the investigative team should operate a standard operating procedure for “cataloguing in a rational, consistent and simple manner” all evidence and link the evidence to a photographic record.<sup>68</sup> Regarded as key to this challenge is the utilisation of a single evidence officer who will take primary responsibility for a number of important tasks including assigning

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<sup>66</sup> John R. Cencich, ‘International Criminal Investigations of Genocide and Crimes Against Humanity: A War Crimes Investigator’s Perspective’ (2009) 19(2) *International Criminal Justice Review*, 175, 177, 178.

<sup>67</sup> *Ibid.*

<sup>68</sup> Skinner, Alempijevic and Djuric-Srejic, ‘Guidelines for Bio-archaeology Monitors’, (n 44), 86.

numbers to objects, overseeing visual recordings, ensuring a linkage between the object and its assigned number upon collection and maintenance of an evidence log.<sup>69</sup> Ideally this role will be undertaken by a scene of crime officer (SOCO), often a member of a police force who will assume responsibility for the continuity of evidence accumulated at both the exhumation and autopsy. The scene of crime officer also ideally bears responsibility for the transfer of data from the evidence and information logs to an evidence database.<sup>70</sup> In the past, there has been functional separation between the scene investigators and the forensic pathologist, which has been regarded as detrimental to a stream-lined investigation. For example, photographs taken in the field need to be linked with ease to the autopsy reports of the exhumed bodies through close communication and an integrated process of documenting and collecting the evidence.<sup>71</sup>

The Prosecutor is responsible “for the retention, storage and security of information and physical material obtained in the course of the Prosecutor’s investigations until formally tendered into evidence”.<sup>72</sup> In accordance with rule 81 of the rules of procedure and evidence of the International Criminal Tribunal for the former Yugoslavia, and of the International Criminal Tribunal for Rwanda, once the evidence has been offered during the proceedings, the Registrar of the Court then assumes responsibility for the physical evidence.<sup>73</sup>

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, 87.

<sup>71</sup> Skinner, Alempijevic and Djuric-Srejic, ‘Guidelines for Bio-archaeology Monitors’, (n 44), 87.

<sup>72</sup> International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.45, 8 December 2010, Rule 41, ‘Retention of Information’ Adopted 11 Feb 1994, revised 12 Nov 1997, amended 1 Dec 2000 and 13 Dec 2000. The analogous rule in the rules of procedure and evidence for the International Criminal Tribunal for Rwanda is almost identical: Rule 41 ‘Preservation of Information’ (A) The Prosecutor shall be responsible for the preservation, storage and security of information and physical evidence obtained in the course of his investigation’.

<sup>73</sup> Yugoslav Tribunal, Rule 81, ‘Records of Proceedings and Evidence’, ‘(C) The Registrar shall retain and preserve all physical evidence offered during the proceedings subject to any Practice Direction or any order which a Chamber may at any time make with respect to the control or disposition of physical evidence offered during proceedings before that Chamber’; Rwandan Tribunal, Rule 81, ‘Records of Proceedings and Preservation of Evidence’, ‘(C) The Registrar shall retain and preserve all physical evidence offered during proceedings’.

## D. Forensic Evidence in the International Criminal Trial

### (1) The Expert Witness

Three basic categories of witnesses have been identified as appearing before the *ad hoc* Tribunals, one of which is the expert witness, who provides the courts with “historical or contextual insight”.<sup>74</sup> The testimony of forensic practitioners who have been involved in the investigation of mass graves, which is given during the trial proceedings, falls under the ambit of expert witness testimony and their reports are classified as expert reports. At their establishment, the *ad hoc* Tribunals did not have a clearly defined characterisation for this class of witness, and similar to other procedural matters at these institutions, guidelines on what was required for individuals to constitute as an expert witness developed over time.

At the Yugoslav Tribunal, the term expert has come to be defined through the jurisprudence as “a person whom [sic] by virtue of some specialised knowledge, skill or training can assist the trier of fact to understand or determine an issue in dispute”.<sup>75</sup> An expert witness is such a person who “to that end testifies”.<sup>76</sup> A Trial Chamber will take into account a number of factors to determine whether a witness meets these criteria: “the witness's former and present positions and professional experience through reference to the witness's CV as well as the witness' scholarly articles, other publications or any other pertinent information about the witness”.<sup>77</sup> In assessing and weighing expert witness testimony the Chamber will consider several points. These are, “the professional competence of the expert, the

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<sup>74</sup> Kristina. D. Rutledge, “Spoiling Everything” - But for whom? Rules of Evidence and International Criminal Proceedings’ (2003) 16 *Regent University Law Review*, 151, 173. The other two categories are “(2) general lay witnesses who were present, but uninvolved, during the conflict (reporters, human rights advocates, etc.); and (3) victim lay witnesses who suffered first-hand through the conflict”, *ibid.*

<sup>75</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, ‘Decision Concerning the Expert Witnesses Ewa Tabeau and Richard Philipps’, 3 July 2002, at para. 2.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Prosecutor v. Momčilo Perišić*, Case No.IT—04-81-T, ‘Decision on Uncontested Srebrenica Expert Reports’, 26 August 2009, at para.7, citing *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, ‘Decision on Expert Status of Reynaud Theunens’, 12 February 2008, at para. 28, with further references; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/I-T, ‘Decision on Defence Expert Witnesses’, 21 August 2007, at para. 6, with further references.

methodologies used, the credibility of the findings made in light of these factors and other evidence, the position or positions held by the expert, the limits of the expertise of each witness, and the relevance and reliability of his or her evidence”.<sup>78</sup>

In the case law of the International Criminal Tribunal for Rwanda, the definition of expert witness is given in the “Decision on a Defence Motion for the appearance of an Accused as an expert Witness” of 9 March 1998 in the *Akayesu* case.<sup>79</sup> Here it is determined that an expert witness is a witness “whose testimony is intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field”.<sup>80</sup> The Trial Chamber in its decision endorsed further criteria, stating that it was “of the opinion that in order to be entitled to appear, an expert witness must not only be a recognised expert in his field, but must also be impartial in the case”.<sup>81</sup> The definition of expert witness coined in *Akayesu* was accepted by the bench in a number of other cases, for example, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*,<sup>82</sup> *Prosecutor v. Aloys Simba*<sup>83</sup> and *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*.<sup>84</sup> Citing decisions from the Yugoslav Tribunal, the Trial Chamber in the *Ntahobali and Nyiramasuhuko* case additionally considered that “it is for the Trial Chamber to decide which evidence it will accept and which it will reject, and what conclusions should be drawn from the evidence”.<sup>85</sup> In addition, the Chamber considered that “a Trial Chamber is not bound to accept an expert’s opinion”.<sup>86</sup> A 27 November 2009 decision in the *Ntawukulilyayo* case reiterates that according to the Tribunal’s jurisprudence, the determination of whether expert witness testimony is

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<sup>78</sup> *Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj*, Case No. IT-04-84-T, Trial Judgement of 3 April 2008, at para. 16.

<sup>79</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, ‘Decision on a Defence Motion for the appearance of an Accused as an expert Witness’, 9 March 1998.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-T, ‘Decision on the Expert Witnesses for the Defence’, 24 January 2003, at para. 2.

<sup>83</sup> *Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-I, ‘Decision on Defence Motion to Disqualify Expert Witness, Alison Des Forges, and to Exclude Her Report’, 14 July 2004, at para. 6.

<sup>84</sup> *Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, *Joint Case No. ICTR-98-42-T*, ‘Decision on Ntahobali and Nyiramasuhuko’s Extremely Urgent Motions to Limit the Extent and Nature of the Report and Testimony of Filip Reyntjens’, 18 September 2007, at para. 18.

<sup>85</sup> *Ibid.*, at para. 18, citing *Prosecutor v. Slobodan Milošević* Case No. IT-02-54- AR73.4, ‘Decision on Admissibility of Prosecution Investigator’s Evidence’, 30 September 2002, at para. 2

<sup>86</sup> *Ibid.*, citing in support *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1, ‘Decision on Prosecution’s Motion for Exclusion of Evidence and Limitation of Testimony’, 3 July 2000, at para. 4.

relevant is founded on two factors; first, the enlightenment offered to the Chamber on particular issues of a technical nature for which specialised knowledge is required and second, whether the expert knowledge may “assist the Chamber in understanding the evidence before it”.<sup>87</sup> The Court is afforded some discretion in deciding if a witness qualifies to give expert testimony.<sup>88</sup> The Chamber must also be satisfied that “the witness possesses specialised knowledge acquired through education, expertise, or training in his proposed field of expertise”.<sup>89</sup>

The experts engaged in the investigations for the *ad hoc* Tribunals were either employed directly or commissioned to work on behalf of these organs.<sup>90</sup> Notwithstanding the fact that these personnel deployed on behalf of the Prosecution, in the preparation of evidence for the proceedings “an expert is expected to make statements and draw conclusions independently and impartially”.<sup>91</sup> The *ad hoc* Tribunals draw on the civil law and common law traditions and procedurally are an amalgam of the two systems; however, these courts are largely adversarial in nature.<sup>92</sup> Thus, the expert witness that testifies in court is subject to both examination by the party on whose behalf they are giving evidence and cross-examination by the opposing party.<sup>93</sup> The testimony of the expert witness will not be accepted

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<sup>87</sup> *Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, ‘Decision on Prosecution Motions Opposing Proposed Defence Expert Witness Charles Ntampaka’, *Rules 89 and 94 bis of the Rules of Procedure and Evidence*, 27 November 2009, at para.6, citing *Bizimungu* Decision of 16 May 2008, at para. 11; *Karemera et. al.*, ‘Decision on Joseph Nzirorera’s Motion to Preclude Testimony by Charles Ntampaka’, 26 September 2007 (“Karemera Decision of 26 September 2007”), at para. 8; Karemera Decision of 25 October 2007, at para. 14; *Nahimana v The Prosecutor*, Case No. ICTR-99-52-T, Judgement (AC), 28 November 2007, at para. 198.

<sup>88</sup> “The determination of whether a witness is qualified to testify as an expert is subject to the Chamber’s discretion”, *Prosecutor v. Dominique Ntawukulilyayo*, *ibid.*, at para.7, citing *Gacumbitsi v. Prosecutor*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, at para. 31.

<sup>89</sup> *Prosecutor v. Dominique Ntawukulilyayo*, *ibid.*, at para.7, citing *Karemera* Decision of 25 October 2007, para. 16; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, ‘Oral Decision on Defence Motions Challenging the Qualification of Expert Witness Dr. Alison Des Forges’, 4 September 2002.

<sup>90</sup> The particular dynamics of the forensic programmes at the *ad hoc* Tribunals will be discussed further in Chapters IV and V.

<sup>91</sup> *Perišić*, (n 77), ‘Decision on Uncontested Srebrenica Expert Reports’, 26 August 2009, at para. 8.

<sup>92</sup> Rutledge, ‘Spoiling Everything’, (n 74).

<sup>93</sup> Rule 85, which is common to the rules of procedure and evidence of both the Yugoslav and Rwandan Tribunals sets out the sequential requirements for the presentation of evidence. “Rule 85. Presentation of Evidence: (Adopted 11 Feb 1994, ICTY), (A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the prosecution; (ii) evidence for the defence; (iii) prosecution evidence in rebuttal; (iv) defence evidence in rejoinder; (v) evidence ordered by the Trial Chamber pursuant to Rule 98; and (Amended 10 July 1998, ICTY), (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment. (Amended 10 July 1998, ICTY). (B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge

unquestionably in all cases. As Rutledge remarks, “[o]ne party’s expert can often be rebutted through the opposing party’s own expert”.<sup>94</sup> Strictly speaking, the role of the expert witness is not to represent the needs of either party to the proceedings or to strengthen the prosecutorial or defence case. The expert witnesses’ real role is to serve the interests of the court. Thus William Schabas remarks, “[w]itnesses are generally brought to the tribunal at the initiative of one of the parties, but once they begin to testify they are no longer considered as witnesses of either of the parties to the trial but only as witnesses of justice”.<sup>95</sup>

## (2) The Admission of Evidence

The rules of procedure and evidence were drafted by the judges of each of the respective Tribunals, as authorised by the statutes.<sup>96</sup> This approach facilitated the encompassment of “the special considerations involved in prosecuting and defending alleged participants in each of these contexts”.<sup>97</sup> The judges, however, had little precedent to guide them in the drafting process.<sup>98</sup> As jurisprudence was developed by the Tribunals, the rules of procedure and evidence have been elaborated and have been subject to multiple amendments as rules have been inserted, deleted and modified. Initially the rules of procedure and evidence for the Rwandan Tribunal were copied from the Yugoslav Tribunal’s rules, but the former have “themselves evolved and now differ in significant respects”.<sup>99</sup>

Section 3 of the rules of procedure and evidence for the International Criminal Tribunals for the former Yugoslavia and Rwanda pertains to the rules of evidence. There are a number of rules of relevance to the admission of expert witness

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may at any stage put any question to the witness. (C) If the accused so desires, the accused may appear as a witness in his or her own Defence”.

<sup>94</sup> Rutledge, ‘Spoiling Everything’, (n 74), 177.

<sup>95</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), p.471. The basis for this observation is a decision in the trial of *Jelisić* at the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Jelisić*, Case No.IT-95-10-T, ‘Decision on Communication Between Parties and Witnesses’, 11 December 1998.

<sup>96</sup> Schabas, *ibid*, p.84. Article 15 of the Statute for the Yugoslav Tribunal and Article 14 of the Rwandan Tribunal statute state that “The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters”.

<sup>97</sup> Rutledge, (n 74), 152, 153.

<sup>98</sup> Schabas, *UN Criminal Tribunals*, (n 95), p.85.

<sup>99</sup> *Ibid*.

testimony. Rule 89 on ‘General Provisions’ pertains to all forms of evidence, including forensic evidence.<sup>100</sup> The wording is almost identical in the rules of procedure and evidence of both the Yugoslav and the Rwandan Tribunals.<sup>101</sup> The Tribunals have adopted a ‘flexible’ approach in connection with the admissibility of evidence. Rule 89(c) of the rules of both the *ad hoc* Tribunals provides that a Chamber “may admit any relevant evidence which it deems to have probative value.” This mirrors an analogous provision in the Charter of the International Military Tribunal which provides that the Tribunal will not be “bound by technical rules of evidence” and will admit “any evidence which it deems to be of probative value”.<sup>102</sup> The approach of the Yugoslav Tribunal in regard the admissibility of evidence is reiterated in the *Blaškić* judgment: “The principle embodied by the case-law of the Trial Chamber on the issue is the one of extensive admissibility of evidence - questions of credibility or authenticity being determined according to the weight given to each of the materials by the Judges at the appropriate time”.<sup>103</sup> The courts have acknowledged the important point that there is a distinction between the admissibility of evidence and the weight to be attached to it. As articulated in an Appeals Chamber decision at the Rwandan Tribunal in the case of *Prosecutor v. Nyiramasuhuko*:<sup>104</sup>

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<sup>100</sup> The Trial Chamber in the *Milan Matic* case at the Yugoslav Tribunal issued guidelines to govern the admission of evidence in January 2006. *The Prosecutor v. Milan Martić*, Case No.IT-95-11-T, Annex A, ‘Guidelines on the Standards Governing the Admission of Evidence’, appendix to ‘Decision Adopting Guidelines on the Standards Governing the Admission of Evidence’, 19 January 2006.

<sup>101</sup> Rule 89 is almost a mirror copy in both rules of procedure and evidence, however, the International Criminal Tribunal for the former Yugoslavia contains a clause that provides for the exclusion of evidence if its value is outweighed by the need for a fair trial. Rule 89(d) states: “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial”. An analogous provision is absent in the International Criminal Tribunal for Rwanda’s law of evidence. In practical terms, this omission may not hold any negative implications. As Alexander Zahar and Göran Sluiter observe “Even without Rule 89(d) the law of evidence is flexible enough to take into account prejudice to the accused when ruling on the admissibility of evidence”, Alexander Zahar and Göran Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2008), p.382, n 167.

<sup>102</sup> Article 19: The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value. *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (“London Agreement”)*, 8 August 1945, available at Yale Law School, The Avalon Project, <http://avalon.law.yale.edu/imt/imtconst.asp> (last accessed 27 October 2011).

<sup>103</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-t, Trial Judgement of 3 March 2000, at para.34.

<sup>104</sup> *Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Élie Ndayambaje*, Case No.ICTR-98-42-T.

[A] distinction must be drawn between, on the one hand, admissibility of evidence, and on the other, the exact probative weight to be attached to it. The former requires some relevance and probative value, whereas the latter is an assessment to be made by the Trial Chamber at the end of the case.<sup>105</sup>

The rationale behind this approach of taken by the Tribunal is illuminated further in the *Blaškić* judgement:

At the outset, it is appropriate to observe that the proceedings were conducted by professional Judges with the necessary ability for first hearing a given piece of evidence and then evaluating it so as to determine its due weight with regard to the circumstances in which it was obtained, its actual contents and its credibility in light of all the evidence tendered. Secondly, the Trial Chamber could thus obtain much material of which it might otherwise have been deprived. Lastly, the proceedings restricted the compulsory resort to a witness serving only to present documents. In summary, this approach allowed the proceedings to be expedited whilst respecting the fairness of the trial and contributing to the ascertainment of the truth.<sup>106</sup>

Regulation of expert witness testimony has developed through a combination of stated rules of evidence in the rules of procedure and evidence of the *ad hoc* Tribunals and decisions issued by the courts. The rule pertaining to testimony of expert witness in the rules of procedure and evidence of the International Criminal Tribunal for the former Yugoslavia was adopted in July 1998.<sup>107</sup> A specific provision on expert witness testimony was not drafted in the original rules, although it is clearly envisioned that this category of witness would be a part of the proceedings, as Rule 90 on the testimony of witnesses states that “a witness, other than an expert,

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<sup>105</sup> *Pauline Nyiramasuhuko v. The Prosecutor*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence, 4 October 2004, para. 6.

<sup>106</sup> *Blaškić*, (n 103).

<sup>107</sup> Rule 94 *bis*: “Testimony of Expert Witnesses’ (Adopted 10 July 1998)

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge. (Amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 13 Sept 2006)

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether: (i) it accepts the expert witness statement and/or report; or (Amended 13 Sept 2006) (ii) it wishes to cross-examine the expert witness; and (iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts. (Amended 12 Dec 2002, amended 13 Sept 2006) (Amended 13 Dec 2001, amended 13 Sept 2006) (C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person. (Amended 13 Sept 2006)”.

who has not yet testified shall not be present when the testimony of another witness is given”.<sup>108</sup> An analogous situation developed with the Rwandan Tribunal. There was no dedicated provision on the testimony of expert witnesses in the original draft of the rules of procedure and evidence of 29 June 1995 and one was adopted in a later amended version of the rules of 8 June 1998.<sup>109</sup>

Rule 94 *bis* of the rules of procedure and evidence sets out a number of requirements pertaining to the testimony of expert witnesses.<sup>110</sup> Trial Chamber III in the *Ntawukulilyayo* case at the Rwandan Tribunal has emphasised that Rule 94 *bis* is “the *lex specialis* with regard to the admission of expert evidence and Rule 89, the *lex generalis*”.<sup>111</sup> In addition, the *ad hoc* Tribunals have developed a regime whereby relevant evidence, including expert witness evidence, can be entered into the record in the form of written statements or reports. An amendment to Rule 89 of the rules of procedure and evidence for the Yugoslav Tribunal<sup>112</sup> provides that: “A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form”.<sup>113</sup> A further modification was made to the rules of procedure and evidence with the adoption of Rule 92 *bis* on the ‘Admission of

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<sup>108</sup> Rule 90(c), Rules of Procedure and Evidence, original version 11 February 1994, available at <http://www.icty.org/sid/136> (last accessed 27 October 2011).

<sup>109</sup> Rule 94 *bis*: “Testimony of Expert Witnesses (A) Notwithstanding the provisions of Rule 66 (A) (ii), Rule 73 bis (B) (iv) (b) and Rule 73 *ter* (B) (iii) (b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party as early as possible and shall be filed with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify. (B) Within fourteen days of filing of the statement of the expert witness, the opposing party shall file a notice to the Trial Chamber indicating whether: (i) It accepts or does not accept the witness’s qualification as an expert; (ii) It accepts the expert witness statement; or (iii) It wishes to cross-examine the expert witness. (C) If the opposing party accepts the statement of the expert witness, the statement may be admitted into evidence by the Trial Chamber without calling the witness to testify in person”. International Criminal Tribunal for Rwanda, Rules of procedure and evidence, available at <http://unictr.org/Portals/0/English/Legal/ROP/100209.pdf> (last accessed 27 October 2011).

<sup>110</sup> Rule 94 *bis* sets out the requirements for the disclosure of expert witness reports and statements. The time limit differs between the two Tribunals. For the Yugoslav Tribunal the opposing party is afforded 30 days to respond to the disclosure, indicating whether it accepts the report and/or statement, whether it wishes to cross-examine the expert witness and whether it challenges the qualifications of the witness as an expert or the relevance of the report or statement in whole or in part (Rule 92 *bis* (b).) At the Rwandan Tribunal counsel are afforded 14 days to respond. Paragraph C of the Rule, common to both Tribunals, states that “If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person”. Note though that the Yugoslav Tribunal Rule 94 *bis* cites both statement and report, whilst the Rules for the Rwandan Tribunal refers only to an expert witness statement.

<sup>111</sup> *Ntawukulilyayo*, (n 87), ‘Decision on Prosecution Motions Opposing Proposed Defence Expert Witness Charles Ntampaka, Rules 89 and 94bis of the Rules of Procedure and Evidence’, 27 November 2009, at para.4.

<sup>112</sup> Amended December 2000.

<sup>113</sup> Rule 89(F)

Written Statements and Transcripts in Lieu of Oral Testimony’ (Yugoslav Tribunal),<sup>114</sup> or as it is entitled in the Rwandan Tribunal’s Rules, ‘Proof of Facts Other Than by Oral Evidence’. The Rule provides that; “A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment”.<sup>115</sup> Under Rule 94, a Trial Chamber can take judicial notice of facts of common knowledge, and is also entitled to take judicial notice of adjudicated facts.<sup>116</sup>

In September 2006 the Yugoslav Tribunal adopted Rule 92 *ter*, on ‘Other Admission of Written Statements and Transcripts’ which provides, *inter alia*, that “A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges;

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<sup>114</sup> Adopted December 2000.

<sup>115</sup> Rule 92 *bis*, (A), adopted 1 December 2000, amended 13 December 2000 and 13 September 2006 by the Yugoslav Tribunal. The wording is slightly different in the Rwandan Tribunal rules of procedure and evidence, but they are substantively the same. The Rule provides a non-exhaustive list of factors both in favour of admitting evidence in written form or from the Tribunal’s transcripts, and factors against. Rule 92 *bis* (A)(i) and (ii) states that:” (i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question: (a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts; (b) relates to relevant historical, political or military background; (c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; (d) concerns the impact of crimes upon victims; (e) relates to issues of the character of the accused; or (f) relates to factors to be taken into account in determining sentence. (ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether: (a) there is an overriding public interest in the evidence in question being presented orally; (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or (c) there are any other factors which make it appropriate for the witness to attend for cross-examination (ICTY Rules of Procedure and Evidence). Comparable factors are listed in the Rwandan Tribunal’s rules.

<sup>116</sup> Rule 94, which is titled ‘Judicial Notice’ provides that: “(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof. (B) At the request of a party or proprio motu, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceeding”. The text is the same for both sets of Rules.

and (iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined".<sup>117</sup>

The International Criminal Tribunal for the former Yugoslavia has established through its jurisprudence a number of requirements to be met before an expert statement or report, including those of forensic experts, is admissible in evidence. They consist of the following: "1) the proposed witness is classified as an expert; 2) the expert statements or reports meet the minimum standard of reliability; 3) the expert statements or reports are relevant and of probative value; and 4) the content of the expert statements or reports falls within the accepted expertise of the witness".<sup>118</sup>

## E. Conclusion

Forensic investigation in the field, where experts are deployed to exhume mass graves for the purposes of evidence gathering, indicates the point where the worlds of the scientist and the lawyer converge. These differing worlds have had to align themselves in order to develop a cooperative working relationship. In the context of activity performed under the auspices of an international criminal tribunal, the mandate of the operation will be directed by the requirements of the court, as per a prosecutorial strategy. Writing about the discipline of forensic anthropology in 1982, Clyde Snow astutely identified this component of the forensic science/legal synergy.

The search for truth in the laboratory and the search for truth in the courtroom are games that are played by different rules. If we scientist play the courtroom game, we must play by the lawyers' rules.<sup>119</sup>

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<sup>117</sup> Rule 92 *ter* (A). Part B of the Rule provides that: Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

<sup>118</sup> *Perišić*, (n 77), 'Decision on Uncontested Srebrenica Expert Reports', 26 August 2009, at para.6 citing Decision on Expert Reports of Ewa Tabeau, 23 April 2009, para.7; *Prosecutor v. Lukić and Lukić*, IT-98-32/1-T, Decision on Second Prosecution Motion for the Admission of Evidence Pursuant to Rule 92*bis* (Two Expert Witnesses), 23 July 2008, para. 15.

<sup>119</sup> Clyde Collins Snow, 'Forensic Anthropology' (1982) 11 *Annual Review of Anthropology*, 97, 101, 102.

As highlighted in this chapter, forensic investigations conducted by or on behalf of international criminal courts pose many challenges that need to be tackled to ensure their successful completion. Enquiries into the complex atrocity crimes that war crimes, crimes against humanity and genocide represent therefore calls for an intricate level of organisation, the utilisation of a multiplicity of disciplines including medical and forensic experts, excellent cooperation between all the stake holders involved, a clear chain of command and the meticulous documentation of physical evidence to ensure its forensic viability in criminal proceedings.

## **Chapter III: Nascent Forensic Investigations of Core International Crimes: From Nuremberg to Buenos Aires**

### **Introduction**

The comprehensive application of forensic science and medical expertise to the investigation of atrocity crimes in an international arena came with the establishment of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda in the mid-1990s. The activities associated with these courts were not, however, the foremost example of the employment of scientific expertise for the purposes of international criminal justice. In the 1940s, medical proficiency was put at the disposal of authorities investigating and prosecuting crimes attributable to the Nazi regime in Germany and German-occupied territory. Of the initiatives instigated at the close of the Second World War, the tribunal of most relevance to the subject matter of this thesis is the International Military Tribunal held in Nuremberg established by the four allied powers of Britain, France, the United States of America and the Union of Soviet Socialist Republics. This Tribunal has a direct bearing due to its international nature: a number of States convened to multilaterally prosecute individuals from a Third State for crimes that were international in character. Although there are a number of substantial differences between the International Military Tribunal and the *ad hoc* international Tribunals of the 1990s, the Nuremberg Tribunal may still be regarded as a predecessor to the Tribunals held at the close of the 20<sup>th</sup> Century.

The presentation of forensic evidence did not form a core part of the prosecutorial strategy of the Prosecuting Powers at the International Military Tribunal. Nonetheless, forensic evidence was admitted through documents entered into evidence. In addition, forensic expert witnesses testified in relation to one of the counts included in the indictment pertaining to the murder of Polish prisoners of war outside of Smolensk in Russia, which was included under the count relating to war crimes. The first section of the current chapter will detail how forensic evidence came to be utilised at Nuremberg and explain the rationale behind its exploitation.

Brief reference will also be made to further medico-legal investigations conducted during this period of time, including by the British Army's War Crimes Group.

Following an interim period of circa four decades, the utility of engaging scientific knowledge in the investigation of international crimes was again recognised, this time against the backdrop of enquiries into cases of enforced disappearances in Argentina and a number of other South American countries. The second part of the chapter will provide an overview of the crime of enforced disappearance and detail how the application of forensic medicine and forensic science expertise re-emerged in an international legal context in the mid-1980s.

## **A. The International Military Tribunal at Nuremberg and the production of forensic evidence**

### **(1) The Nature of Evidence Presented before the Nuremberg Tribunal**

A range of judicial measures, such as war crimes trials, were taken after the close of the Second World War to investigate and hold to account those guilty of war crimes and other atrocious acts connected to the war. Undoubtedly the most prominent of these inquisitions was the Trial of the Major War Criminals before the International Military Tribunal held in Nuremberg, commonly referred to as the Nuremberg Tribunal. The Nuremberg Tribunal saw the four allied powers of Britain, the United States, France and the Soviet Union jointly prosecute twenty two defendants who were considered to have played a major role within the National Socialist Party in Germany or in some other way had supported the Nazi war effort.<sup>1</sup>

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<sup>1</sup> Twenty-four defendants were initially indicted, their selection representative of a cross-section of the different facets of the Third Reich – diplomatic, political, economic and military. Ultimately only twenty-one defendants of the original indictees appeared in court. One defendant Gustav Krupp, a German industrialist, was elderly and in poor health and in a preliminary hearing the decision was made that he would be excluded from the proceedings. Robert Ley, the head of the German Labour Front (*Deutsche Arbeitsfront, DAF*) committed suicide on the trial's eve and Martin Bormann, the Nazi party secretary, was tried and convicted in absentia. United States Holocaust Memorial Museum, Holocaust Encyclopedia, 'International Military Tribunal at Nuremberg', available at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007069> (last accessed 27 October 2011).

Forensic medicine was a well-established discipline at the time of the International Military Tribunal,<sup>2</sup> but the testimony of experts from this and related fields in forensic science were not heavily relied upon for prosecutorial purposes. Their participation may have been in any event superfluous, as the Prosecuting Powers had an abundance of documentary and witness testimony to rely upon. To give some examples of the evidence entered by the prosecution, film footage showing victims in mass graves which had been recorded by Allied forces was entered into evidence and mentioned in the final judgement.<sup>3</sup> The Tribunal was also able to hear witness testimony of prominent participants in Nazi atrocities. For example, Rudolph Hoess, the commandant of the Auschwitz concentration camp from May 1940 until December 1943, gave evidence to the Tribunal on Monday 16 April 1946, during which he provided an estimation of the numbers murdered at the camp and provided details on the modus operandi of the mass killings.<sup>4</sup> The witness had also prepared an affidavit for the prosecution which was read into evidence by Prosecutor Colonel Amen and the veracity of the contents confirmed by Hoess.<sup>5</sup> The testimony and

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<sup>2</sup> An informative article by Sydney Smith published in the *British Medical Journal* in 1951 on the history and development of forensic medicine credits the foremost example of medico-legal expertise to the work of Imhotep, an ancient Egyptian Grand Vizier, Chief Justice and Physician to King Zoser, who lived around the year 3000B.C. As Smith contends, Imhotep “was the first great man combining the sciences of law and medicine; he might, if you wish, be described as the first medico-legal expert”. Sydney Smith, ‘The History and Development of Forensic Medicine’ (1951) (24 March) *British Medical Journal*, 599-600, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2068548/> (last accessed 27 October 2011). The article reveals that at the time of writing forensic medicine had evolved to include “a great deal of specialization” and experts such as the “forensic pathologist, the forensic serologist, and the forensic toxicologist are each well-nigh specialists in their own right”, *ibid*, 606. Science was used as a tool in the investigation of crimes of various categories, *ibid* 606, 607. Further, the article reveals that the potential of inter-disciplinary collaboration had been recognised by that point in time; “To-day [...] the field of forensic science has been widely explored, and on many occasions we must call for the co-operation not only of the surgeon, the obstetrician, the anatomist, the pharmacologist, etc., but also of the botanist, zoologist, entomologist, physicist, chemist, geologist, and others”, *ibid*, 607.

<sup>3</sup> “Grim evidence of mass murders of Jews was [...] presented to the Tribunal in cinematograph films depicting the communal graves of hundreds of victims which were subsequently discovered by the Allies”. International Military Tribunal, Judgement: War Crimes and Crimes Against Humanity (Judge Parker) ‘Persecution of the Jews’, available at Yale Law School, Lillian Goldman Law Library, Avalon Project <http://avalon.law.yale.edu/imt/judwarcr.asp>, (last accessed 27 October 2011).

<sup>4</sup> Testimony of Rudolph Hoess, Commandant of Auschwitz, Monday 15 April 1946, The Nuremberg Trials, Major War Figures trial: Transcript Excerpts, available at the University of Missouri-Kansas city website, <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/hoesstest.html> (last accessed 27 October 2011).

<sup>5</sup> Document 3868-PS/ Exhibit USA-819.

contents of the affidavit were subsequently cited in the judgement in support of the charges pertaining to war crimes and crimes against humanity.<sup>6</sup>

The Nazis' penchant for documenting their criminal deeds further furnished a source of evidence for the Tribunal. For instance, the Units of the Waffen SS and the Einsatzgruppen produced reports on their extermination activities which the prosecution used to support its case.<sup>7</sup> "Death books" (*Totenbuch*) were kept in some concentration camps, notably Mauthausen concentration camp, which meticulously listed details of the murders.<sup>8</sup> These macabre books provided the Tribunal with some particulars on the camps' protocol for the killings. A set of seven books were recovered from the Mauthausen camp and formed part of the profusion of documentary evidence used by the Tribunal.

Each book bears on its cover "Totenbuch" or Death Book-Mauthausen. In these books were recorded the names of some of the inmates who died or were murdered in this camp. The books cover the period from January 1939 to April 1945. They give the name, place of birth, the assigned cause of death and time of death of each individual recorded. In addition each corpse is assigned a serial number, Addition of the serial numbers for the five-year period produces a total figure of 35,318.<sup>9</sup> [sic]

The Nazis had in actual fact made a concerted effort to eradicate the physical evidence of their crimes. The use of crematoria in the death camps to incinerate the corpses of murdered Jews and other prisoners is of course both notorious and well documented. In addition, measures were put into place to re-trace the deadly steps of the Nazi killing apparatus in order to remove any indications that exterminations had taken place. On the orders of the head of the Gestapo, Heinrich Müller, SS Colonel

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<sup>6</sup> As relayed in the judgement: 'With regard to Auschwitz, the Tribunal heard the evidence of Hoess, the Commandant of the camp from 1st May, 1940, to 1st December, 1943. He estimated that in the camp of Auschwitz alone in that time 2,500,000 persons were exterminated, and that a further 500,000 died from disease and starvation', 'Judgement of the International Military Tribunal', (n 3).

<sup>7</sup> The Waffen SS was the armed wing of the Schutzstaffel, or the SS, which was an organ of the Nazi Party. The Einsatzgruppen, which translates in German to 'task forces' were the mobile paramilitary death squads of the SS.

<sup>8</sup> Not all concentration or death camps kept such records, Mauthausen appears to have been one of the exceptions: "No accurate estimate of how many persons died in the concentration camps can be made. Although the Nazis were generally meticulous record keepers, the records they kept about concentration camps appear to have been incomplete", The Avalon Project: Documents in Law, History, and Diplomacy. *Nazi Conspiracy and Aggression Volume 1, Chapter XI, The Concentration Camps*, available at Avalon Project, (n 3).

<sup>9</sup> *Ibid.* An additional single volume book was also found at the camp, which was entitled "Death Book – Prisoners of War", *ibid.*

Paul Blobel headed an operation to destroy traces of the mass murders in Nazi occupied territories in Central and Eastern Europe. A process was instigated whereby the mass graves of Jews, prisoners of war and other victims were exhumed and the bodies destroyed. The predominant method used was immolation on immense pyres. Pieces of agricultural machinery were also modified to make bone grinding machines in order to obliterate the final traces of their victims. The operation was known as *Sonderaktion 1005* and commenced in June 1942 for a period of two years. It was a strictly covert process; German participants from the relevant units of the Reich signed statements of secrecy and the prisoners who were made to perform the physical task of exhuming and destroying the bodies were themselves killed on conclusion of their work, save for a number of prisoners who managed to escape.<sup>10</sup> The operation took place in two stages; stage one was the removal of the bodies in the death camps and the second stage was the removal of the victims killed by the mobile death squads or *Einsatzgruppen* from mass graves in occupied territory in the East.<sup>11</sup> Although an indeterminate number of corpses were destroyed in this manner, the Nazis were not entirely successful in effacing the corporeal evidence of their crimes “because of the vast numbers, the wide distribution of the mass graves, and because of the swift advance of the Soviet army”.<sup>12</sup>

Desbois writes that there were a number of reasons for the operation. One pertained to the absolute disdain held by the Nazis for the Jewish communities they annihilated, which was encapsulated by the phrase: “They have no rights, not even to our soil”.<sup>13</sup> A further motivation related to efforts to conceal their crimes in order to prevent evidence being unearthed by Allied forces. The Germans became aware that “whenever the Soviets arrived in a village, the first thing they would do was open the graves, photograph the bodies, and draw up a document with the help of the inhabitants of the village, the teacher, the priest, and any surviving Jews. They would

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<sup>10</sup> Shmuel Spector, ‘*Aktion 1005 – Effacing the Murder of Millions*’, (1990) 5(2) *Holocaust and Genocide Studies*, 157-173. In order to maintain the clandestine nature of the operation, “the SS communicated with Berlin by means of meteorological codes: the number of clouds indicated the graves opened, and the height of the rain the number of bodies burnt”, Patrick Desbois, *The Holocaust by Bullets: A Priest’s Journey to Uncover the Truth behind the Murder of 1.5 Million Jews* (New York: Palgrave Macmillan, 2008), p.155.

<sup>11</sup> Spector, ‘*Aktion 1005*’, (n 10).159-171. See also Yitzhak Arad “Operation Reinhard”: Extermination Camps of Belzec, Sobibor and Treblinka’, (1984) XVI *Yad Vashem Studies*, Yad Vashem: Jerusalem, 205- 239, available at Shoah Resource Center, The International School for Holocaust Studies’, [www.yadvashem.org](http://www.yadvashem.org) (last accessed 27 October 2011).

<sup>12</sup> Spector, ‘*Aktion 1005*’, (n 10), 171.

<sup>13</sup> Desbois, *The Holocaust by Bullets*, (n 10), p.155.

also proceed with a thorough scientific analysis of the bodies. The Reich destroyed the corpses so that the Soviet commissions could not establish proof of their crimes".<sup>14</sup> Therefore, a primary motive underlying *Sonderaktion 1005* was to prevent forensic evidence of the crimes being discovered and documented. Although this sabotaged efforts to collect physical evidence of the killings, witness testimony of the operation was provided by surviving members of *Sonderkommando 1005* at a number of trials including the Eichmann trial in Jerusalem.<sup>15</sup>

The Nuremberg Tribunal, thus, relied heavily on documentary and witness testimony and reference to forensic evidence was, in a sense, second-hand. The International Military Tribunal did not operate a forensic programme as such. Any evidence of a medico-legal nature that was mentioned or relied upon in the proceedings was not gathered directly under the auspices of the Tribunal. This aspect is important to note as it marks a critical difference between the nature of forensic evidence presented during this international tribunal and much of the forensic evidence presented during the *ad hoc* Tribunals in the 1990s. Whilst the evidence was collected by a participating party to the proceedings, the Tribunal did not have oversight of the exhumations. Allusion is made throughout the transcripts of the proceedings to forensic evidence,<sup>16</sup> 'medico-legal' investigations, 'legalmedical' investigation, 'exhumation' and 'autopsy'<sup>17</sup> but this does not relate to enquiries or findings

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<sup>14</sup> *Ibid.*

<sup>15</sup> Deborah E. Lipstadt, *The Eichmann Trial* (New York: Schocken Books, 2011), p.53 & 87.

<sup>16</sup> See, for example, trial proceedings of Thursday, 13 December 1945 at which United States Counsellor Dodd introduces a number of exhibits from Buchenwald Concentration Camp, including documents pertaining to parchment made from the tattooed skin of murdered prisoners: "Document 3423-PS (Exhibit USA-252) is a conclusion reached in a United States Army report, and I quote it: 'Based on the findings in Paragraph 2, all three specimens are tattooed human skin'", at p.516, Nuremberg Trial Proceedings, Volume 3, Thursday, 13 December 1945 (Nineteenth Day), pp.514-516, Avalon project, (n 3). The exhibits were themselves used as evidence at the war crime trials which took place in the Concentration Camp under the authority of the United States Army Judge Advocate General, and had been subject to forensic testing by the Pathology Section of the Seventh Medical Laboratory in New York in May 1945, 'Appendix: Documents Concerning Ilse Koch, Jewish Virtual Library, available at <http://www.jewishvirtuallibrary.org/jsource/Holocaust/skinapp.html> (last accessed 27 October 2011).

<sup>17</sup> For example, evidence presented by the Soviet Prosecutor, Counsellor Smirnov on Nazi crimes in Stavropol, presented to the Tribunal on February 18 1946: "I refer to a document which has already been submitted to the Tribunal as Exhibit Number USSR-1, a report of the Extraordinary State Commission on the crimes of the German fascist occupants in the area of Stavropol. I quote from Page 271 of the document book, Paragraph 3, beginning as follows: "During the inspection of a ravine in the vicinity of Koltso Hill and a distance of 250 meters from the high road[...]"[...] a washed-out grave was discovered, 10 meters in depth, from which protruded separate parts of human bodies. As from 26 to 29 July 1943, excavations were carried out at this spot and, as a result, 130 corpses were exhumed. The legalmedical examination proved that the corpse of a 4-months old girl showed no traces of violence. The child had been thrown alive into the ditch where it perished from

resulting from the investigatory powers of the Tribunal. Reference comes through written reports of activity carried out by authorities that were entities independent from the Tribunal, particularly from the Soviet Commission to investigate Nazi crimes - the 'Extraordinary State Commission for ascertaining and investigating crimes perpetrated by the German-Fascist invaders and their accomplices, and the damage inflicted by them on citizens, collective farms, social organisations, State enterprises and institutions of the U.S.S.R.'<sup>18</sup> The individual Prosecuting Powers were authorised under the Charter of the International Military Tribunal to enter evidence gathered independently of the other allied countries. As per Article 15 of the Charter, the Prosecutors had responsibility for the investigations and the assembly of evidence, both unilaterally and collectively.<sup>19</sup> Whilst this may have facilitated the expeditious prosecution of the accused, it did expose the proceedings to a vulnerability that fallacious "evidence" could be presented to the Tribunal. This is exactly what happened in relation to the Katyn charge.

## **(2) Forensic "Evidence": The Katyn Pretence**

Count three of the indictment, pertaining to war crimes, included a charge that alleged: "In September 1941, 11,000 Polish officers who were prisoners of war were killed in the Katyn Forest near Smolensk."<sup>20</sup> This charge was included at the vigorous insistence of the Soviet Prosecutors. As Telford Taylor recalls, there was no doubt as to the fact that the remains of hundreds of Polish prisoners of war were buried at Katyn. Bodies had been exhumed by the Germans when the territory was

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suffocation."..."The autopsy performed on bodies of dead infants by the legal-medical investigation proved that they had been thrown into the ditch alive, together with their mothers who had been shot. All the other corpses showed traces of torture." Monday, 18 February 1946, (Sixty-First Day) Nuremberg Trial Proceedings Vol. 7, p.539, available at Avalon project, (n 3).

<sup>18</sup> The reports were published by the Soviet Government in a volume entitled, *Soviet Government Statement on Nazi Atrocities* (London-New York: Hutchinson & Co., Ltd. 1946). The Extraordinary State Commission was set up in the spring of 1942 and "collected tens of thousands of documents and more than a quarter-million witness statements and examined forensic evidence while the government released numerous international calls for judicial retribution". Norman J.W. Goda, *Tales from Spandau: Nazi Criminals and the Cold War*, (Cambridge: Cambridge University Press, 2007), p.6.

<sup>19</sup> Article 15: "The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties: (a) investigation, collection and production before or at the Trial of all necessary evidence", United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at Avalon project, (n 3).

<sup>20</sup> Indictment, Count Three, Nuremberg Trial Proceedings Vol. 1, available at Avalon project, *ibid*.

under occupation in 1943. The German government had publically attributed blame on the Soviet authorities who in turn accused Germany of being responsible.<sup>21</sup>

In May 1943 the German authorities organized a team of medical doctors from nearly all the countries allied with or occupied by Germany, which concluded that the killings had taken place in March and April of 1940, when the Russians were still occupying the Smolensk area. After the Soviet forces reoccupied Smolensk in September 1943, the government created a Special Commission for Ascertaining and Investigating the Circumstances of the Shooting of Polish Officers by the German-Fascist Invaders in the Katyn Forest. The title sufficiently indicates the outcome of the commission's work.<sup>22</sup>

Despite pleas from the American, French and British Prosecutors to “abandon the charge, which, whatever the truth, would give the German Defence counsel the right to contest it and thus implicate in a heinous atrocity one of the powers conducting the trial”,<sup>23</sup> Rudenko, the Soviet Prosecutor, was adamant about maintaining this accusation. It seemed evident that the Soviet authorities were of the opinion that failure to bring the charge would amount to an admission of Soviet guilt in the minds of the public. To distance themselves from this dubious inclusion in the indictment, the Prosecutors from the other allied powers made it clear that the Soviet Prosecutor must assume the full responsibility of proving the charge.<sup>24</sup> To make matters worse, the Soviet Prosecutors revised the number of Katyn victims upwards from an original inclusion of 925 to the 11, 000 that appeared in the final indictment.<sup>25</sup> The British, French and Americans were right to be concerned, as the Soviets were indeed guilty of this crime.<sup>26</sup>

Soviet Prosecutors had calculated that the document it had submitted to the Tribunal in support of its allegation would suffice as proof of German authorship of the Katyn

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<sup>21</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (London: Bloomsbury Limited, 1993), p117.

<sup>22</sup> *Ibid*, p467.

<sup>23</sup> *Ibid*, p117.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*, p124.

<sup>26</sup> It was not until decades later that the Russians finally admitted responsibility for the murder of the Polish POWs. “In the late 1980s and 1990s, under Gorbachev, the newspapers were filled with reports of newly discovered mass grave sites. Confronted with exhumations and forensic investigation, officials often conceded that mass killings had occurred. They acknowledged, for example – after five decades – NKVD culpability in the massacre of thousands of Polish officers at Katyn forest” Nanci Adler, ‘The Future of the Soviet past Remains Unpredictable: The Resurrection of Stalinist Symbols Amidst the Exhumation of Mass Graves’ 2005 57(8) *Europe-Asia Studies*,1093, 1107.

massacre.<sup>27</sup> This assumption was based on an interpretation of Article 21 of the Charter, which provided that the Tribunal would not require proof of facts of common knowledge and would take judicial notice thereof, as it would official documents and reports emanating from the Prosecuting Powers, including the reports of commissions set up to investigate war crimes.<sup>28</sup> The Soviets had miscalculated, as Dr. Otto Stahmer, the German Defence counsel for Hermann Goering, the former commander of the German Air Force, insisted on calling to testify as witnesses for the Defence the German officers listed in the Soviet accusation.<sup>29</sup> The Tribunal ruled that the Prosecution and Defence could each call three witnesses.<sup>30</sup>

Testimony relating to the Katyn massacre took place on 1 and 2 July 1946. On 1 July, Stahmer called his first witness, Lieutenant Colonel Friedrich Ahrens, who had been stationed near to the Katyn forest. During examination by Stahmer, Ahrens was asked if he had known of the Russian prisoner-of-war camps situated outside of Smolensk in which Polish prisoners had been interned and if he had heard of an order being issued from Berlin to shoot the prisoners of war. The witness replied in the negative.<sup>31</sup> The witness testified that although he had heard rumours about shootings that had taken place in the vicinity he had serendipitously come across bones in a mound in the woods in January or February of 1943. Ahrens informed the officer with responsibility for war graves in the area, believing it might be a soldier's grave. When questioned by Stahmer, Ahrens stated that he had been provided with some details of the subsequent exhumations by Professor Dr. Butz, from the German army group, who performed the excavation of the grave.<sup>32</sup> Although the testimony

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<sup>27</sup> The report was produced by 'The Special State Commission for Ascertaining and Investigating the Circumstances of the Shooting of the Polish Prisoners of War by the German Fascist Invaders in the Katyn Forest', which was established on 13 January 1944. It was chaired by the chief surgeon of the Red Army Nikolai Burdenko, and so it is commonly referred to as the Burdenko Commission. The Commission included, amongst others, five experts in forensic medicine. Anna M. Cienciala, Natalia S. Lebedeva and Wojciech Materski (eds.), *Katyn: A Crime Without Punishment* (New Haven-London: Yale University Press, 2007), pp.226-228. An extract of the Burdenko Commission report was submitted to the Tribunal on 14 February 1946 as USSR Document-054 (doc.106), *ibid.*, p.230.

<sup>28</sup> The text of Article 21 of the Charter reads as follows: "The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official government documents and reports of the United Nations, including the acts and documents of the committees set up by the various countries for the investigation of war crimes, and the records and findings of military and other tribunals of any of the United Nations".

<sup>29</sup> Cienciala, Lebedeva and Materski, *Katyn*, (n 27), pp.230-231.

<sup>30</sup> Taylor, *Anatomy*, (n 21), p.470.

<sup>31</sup> Nuremberg Trial Proceedings Vol.17 (One hundred and sixty-eighth day), Monday 01 July 1946, p.281, available at Avalon project (n 3).

<sup>32</sup> *Ibid.*, p.282.

that followed relating to the exhumations was not first-hand evidence, the inferences made contradicted Soviet claims that the shootings had taken place during the period of German occupation:

DR. STAHLER: Did Professor Butz later give you details of the result of his exhumations?

AHRENS: Yes, he did occasionally give me details and I remember that he told me that he had conclusive evidence regarding the date of the shootings. Among other things, he showed me letters, of which I cannot remember much now; but I do remember some sort of a diary which he passed over to me in which there were dates followed by some notes which I could not read because they were written in Polish. In this connection he explained to me that these notes had been made by a Polish officer regarding events of the past months, and that at the end-the diary ended with the spring of 1940-the fear was expressed in these notes that something horrible was going to happen [...]

DR. STAHLER: Did he give you any further indication regarding the period he assumed the shooting had taken place?

AHRENS: Professor Butz, on the basis of the proofs which he had found, was convinced that the shootings had taken place in the spring of 1940 and I often heard him express these convictions in my presence, and also later on, when commissions visited the grave and I had to place my house at the disposal of these commissions to accommodate them.<sup>33</sup>

The second witness called by Stahlmer was Lieutenant Reinhard von Eichhorn, who was on the staff of Army Group Centre and had been stationed near the Forest. His testimony asserted that it would not have been possible for prisoners to have been shot in or near Katyn without his knowledge. The final witness for the Defence was Ahrens's commanding officer, Lieutenant General Eugen Oberhauser, Chief Signals Officer of the Army Group, who confirmed the general testimony of Ahren and maintained that a signals regiment was not equipped nor was it expected to perform an assignment such as mass executions. Smirnov was afforded the opportunity to cross examine the witnesses but failed to accomplish any advancements for the Soviet's stated case.<sup>34</sup>

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<sup>33</sup> *Ibid.*, p.283.

<sup>34</sup> Taylor, *Anatomy*, (n 21), p.470.

After the testimony of the German witnesses, the Soviet Prosecutor called three witnesses to the stand: Professor Victor Prozorovsky, a Soviet professor of forensic medicine who had been a member of the Burdenko Commission; Professor Anton Marko Markov, a Bulgarian professor of legal medicine, and a member of the German Commission of investigation of the Katyn graves and Professor Boris Bazilevsky, a professor of astronomy, who had been the deputy major of Smolensk during the time of the German occupation.<sup>35</sup>

The investigations conducted by both the German and the Soviet Commission certainly fell far short of the necessary criteria that would be expected by today's standards and in truth even fell short of the standards of the time. This is clear from the proceedings, particularly the testimony of Professor Markov. Members of the German Commission, many of whom were coerced into participating, were under no illusions as to the lack of objectivity and the inherent bias in the investigation. The following excerpt from the trial transcript from 1 July 1946 which records the examination of Professor Markov by the Soviet Prosecutor Counsellor Smirnov, details the significant lack of scientific rigour in the investigatory process:

MR. COUNSELLOR SMIRNOV: Were the necessary conditions for an objective and comprehensive scientific examination of the corpses given to the members of the commission?

MARKOV: The only part of our activity which could be characterized as a scientific, medico-legal examination were the autopsies carried out by certain members of the commission who were themselves medico-legal experts; but there were only seven or eight of us who could lay claim to that qualification, and as far as I recall only eight corpses were opened. Each of us operated on one corpse, except Professor Hajek, who dissected two corpses. Our further activity during these 2 days consisted of a hasty inspection under the guidance of Germans. It was like a tourists' walk during which we saw the open graves; and we were shown a peasant's house, a few kilometers distant from the Katyn wood, where in showcases papers and objects of various sorts were kept. We were told that these papers and objects had been found in the clothes of the corpses which had been exhumed.<sup>36</sup>

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<sup>35</sup> Cienicala, Lebedeva and Materski, *Katyn*, (n 27), p.232.

<sup>36</sup> Nuremberg Proceedings, 1 July 1946, (n 31), p.336.

The examination continues with Counsellor Smirnov asking the witness to give a direct answer as to whether the members of the Commission were given facilities for an ‘objective examination’. Markov’s response makes it clear that this was not the case:

MARKOV: In my opinion these working conditions can in no way be qualified as adequate for a complete and objective scientific examination. The only thing which bore the character of the scientific nature was the autopsy which I carried out.<sup>37</sup>

Smirnov’s riposte is in the form of a question that seeks further clarification on the scientific attributes of the commission’s enquiry, posing the following:

MR. COUNSELLOR SMIRNOV: But did I rightly understand you, that from the 11,000 corpses which were discovered only 8 were dissected by members of the commission.

MARKOV: Quite right.<sup>38</sup>

It was clear from the testimony of the witnesses that there were serious inconsistencies in the allegations made by the Soviet Union and German guilt could not be ascertained in relation to this crime. Telford Taylor’s summation of the episode at the Tribunal provides a suitably critical analysis: “As an effort to determine whether the Soviet or the Nazi forces had killed the Polish prisoners, the Tribunal’s trial was a travesty. All they got were three disagreeing opinions on the time of internment of the corpses and strong evidence from the German officers that the killings did not take place while Ahrens’s regiment was headquartered near the forest”.<sup>39</sup> The charges were dismissed by the United States and British judges,<sup>40</sup> and no reference to this crime was made in the final judgement.<sup>41</sup>

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<sup>37</sup> *Ibid*, p.337.

<sup>38</sup> *Ibid.*.

<sup>39</sup> Taylor, *Anatomy*, (n 21), p.471.

<sup>40</sup> Bernard A. Cook (eds.), *Europe since 1945: An encyclopedia*, vol. 2, (New York-London: Garland Publishing, 2001), p.712.

<sup>41</sup> Nonetheless, all Soviet governments and official publications until mid-April 1990 claimed that the USSR had won its case on Katyn at the Nuremberg Tribunal, Cienciala, Lebedeva and Materski, *Katyn*, (n 27), p.232.

### **(3) “To pass these defendants a poisoned chalice is to put it to our own lips as well”: Reflections on the Katyn Charge at Nuremberg**

What was the contribution made by forensic evidence gathered through the exhumation of mass graves, to the International Military Tribunal? It might appear at first glance that it would suffice to dismiss its value as paltry at best or, to tender a more critical assessment, as detrimental to the overall worth of the proceedings. The Katyn debacle might be viewed by some observers as little more than a wretched attempt by the Soviet authorities to pass off one of their diabolical crimes as having taken place at the hands of the Germans, thereby in some way undermining the merits of the entire trial. For some, indeed, the Katyn massacre, and its story at the Nuremberg trial, is taken as proof in favour of the ‘victor’s justice’ argument against this Tribunal.<sup>42</sup> As a matter of fact the Prosecuting Powers were aware of the danger that critics of the Tribunal might point an accusatory finger at the proceedings, disparaging them as vengeance of the victorious over the defeated, as evidenced by the opening address of Justice Robert Jackson.

Before I discuss particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and of the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate.

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The worldwide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the first World War, we learned the futility of the latter course. The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to

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<sup>42</sup> As William A. Schabas outlines, the charge of “victors justice” has two dynamics, the first relating to procedural shortcomings and the second, more substantial critique, concerns the fact that only “one side” was judged at Nuremberg i.e. the victors sat in judgement of the vanquished. Those who criticise the Nuremberg Tribunal on the basis of this “victor’s justice” argument contend that there is an inherent hypocrisy due to the fact that the allied powers themselves were responsible for acts that violated international law during the war, and yet allied perpetrators were not indicted by the International Military Tribunal. The Katyn massacre is taken as one example of the crimes of the allies, along with the indiscriminate bombings of cities in Germany and Japan and the nuclear attacks against Hiroshima and Nagasaki. William A. Schabas, ‘Victor’s Justice: Selecting “Situations” at the International Criminal Court’, (2010) 43 *The John Marshall Law Review*, 535.

distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to, draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.<sup>43</sup>

Somewhat prophetically, Jackson cautions that to “pass these defendants a poisoned chalice is to put it to our own lips as well”.<sup>44</sup> The erroneous pursuit of the Katyn charge could well be categorised as a poisoned chalice, however, rather than conceding to negative conclusions, an alternative viewing of the Katyn testimony serves to highlight one strength of the International Military Tribunal - the bench did not take judicial notice of the charge and convict on the basis of the Soviet ‘evidence’ that had been submitted to the court. On the contrary, the Defence were afforded the opportunity to examine witnesses summoned in support of their case, and cross-examine the prosecution’s witnesses. This important procedural entitlement resulted in the emergence of what was in effect exculpatory evidence. If the German Defence had not been allowed to examine the expert witnesses in those early days of July 1940, the “evidence” of German culpability may very well have entered the trial record and the defendants, though guilty of many other heinous offences, would have been convicted of a crime they had not committed. Although forensic evidence was not of value in securing a conviction for the related charge, the reason for this was not due to the unreliability of the evidence *per se* but rather was related to the deliberate misinterpretation of the facts and the fallacious nexus with German responsibility alleged by the Soviet Prosecutors.

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<sup>43</sup> Robert Jackson, opening speech, 21 November 1945, Nuremberg Trial Proceedings Vol. 2, p.101, available at Avalon project, (n 3), <http://avalon.law.yale.edu/imt/11-21-45.asp> (last accessed 27 October 2011).

<sup>44</sup> *Ibid.*

## **B. Further Post-War Medico-Legal Investigations: British Army War Crimes Group and the Subsequent Proceedings at Nuremberg**

It is worth briefly mentioning here other investigations of a medico-legal nature that occurred at the conclusion of the War. In addition to prosecutions at the International Military Tribunal in Nuremberg, the allied powers undertook unilateral war crime trials. Of note are the war crime investigations conducted by the United Kingdom for the purpose of providing evidence of alleged war crimes particularly pertaining to murdered allied prisoners of war and the subsequent trials held in Nuremberg by the United States under Control Council Law No. 10.

Medico-legal investigations were carried out by medical and other professionals whose services were retained by the British War Crimes Unit. These investigations relied in large part on the construction of evidentiary material through medico-legal scrutiny involving the exhumation and autopsy of service personnel killed in violation of the laws of war. This contrasted with the position at the International Military Tribunal where Prosecutors had an abundance of documentary material at their disposal.<sup>45</sup> The limited forensic evidence that had been presented, including that related to the Katyn executions was not gathered collectively by the prosecuting powers after the Tribunal was established; rather it had been assembled independently prior to the proceedings at Nuremberg. A detailed account of the work of the Special Medical Sector is to be found in a doctoral thesis for the degree of doctor of medicine submitted to the University of London in 1950 by a member of the team, Dr. Arthur Keith Mant.<sup>46</sup> According to Mant, over one hundred and fifty autopsies following exhumation were performed and additionally several hundreds of exhumations that were carried out by the Graves' Services were witnessed. The time elapsed between the original burial and the exhumation varied from eight months to five years.<sup>47</sup>

War Crimes Investigation Units were put into the field in Europe by Britain towards the end of hostilities. The definition of war crime as employed by the investigative units was that elucidated in the Royal Warrant on the Regulations for the Trial of

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<sup>45</sup> Arthur Keith Mant, 'A Study in Exhumation Data', MD thesis, University of London (1950), p2.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, p.1.

War Criminals.<sup>48</sup> The officers who were in command of the investigation units worked in close liaison with a department of the Judge Advocate General Branch which had been established in North West Europe to deal with the prosecution of war criminals. This department was directly under the control of the Judge Advocate General Branch at the War Office in London. It was from the War Office that general directions on policy were issued. After investigations were completed by the investigation units, all cases were sent to the War Office for final advice before the commencement of court proceedings.<sup>49</sup>

The nature of war crimes investigated fell into two main types; concentration camp cases and the murder of members of the Allied Armed Forces, usually pilots of airborne troops. These investigations were therefore, as recognised by Mant, quite different from those undertaken for the trial of the major war criminals at Nuremberg. The Investigation Units often instigated their enquiries of alleged war crimes following the receipt of limited information: for example, that a pilot who was known to have baled out safely in a specific area, had disappeared. Therefore the units frequently had to “build up the entire case by investigation in the field”,<sup>50</sup> including through the location of the grave of the deceased, exhumation of the grave and subsequent post-mortem examination of the remains by the Unit pathologist.<sup>51</sup>

Medico-legal expertise was also relied upon during the subsequent proceedings in Nuremberg. Expert testimony of British Army Pathologists in the ‘medical experimentation’ trials of twenty Nazi doctors and three other accused is described by Stephen Cordner and Helen McKelvie as “the first systematic medical investigation of human rights abuses [that] was used as evidence in an internationally recognized tribunal”.<sup>52</sup> The medical trial was convened by the United States;

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<sup>48</sup> Royal Warrant, 0160/2498, A.O. 81/1945, Regulations for the Trial of War Criminals, Special Army Order, The War Office 18 June 1945. “War Crime” means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2<sup>nd</sup> September, 1939.”

<sup>49</sup> Mant *A Study in Exhumation Data*, (n 45), p2.

<sup>50</sup> *Ibid*, p3.

<sup>51</sup> *Ibid*, p3.

<sup>52</sup> Stephen Cordner & Helen McKelvie, ‘Developing standards in international forensic work to identify missing persons’ (2002) 84(848) *International Review of the Red Cross*, 867, 867, 868. For a first-hand account of the Medical Case at the Subsequent Proceedings in Nuremberg see further Vivien Spitz, *Doctors from Hell: The horrific account of Nazi Experiments on Humans* (Boulder, Co: Sentient Publications, 2005).

however, behind the scenes “there was considerable liaison between British army and United States medical war crimes investigators”.<sup>53</sup>

## **C. Enforced Disappearances and the re-emergence of Forensic Investigations in a Human Rights Context**

### **(1) Enforced Disappearances**

It is from the practice of enforced disappearance that we can trace the origins of the contemporaneous application of the forensic sciences and medical expertise to the investigations of atrocity crimes.<sup>54</sup> According to Article 2 of the United Nations International Convention for the Protection of All Persons from Enforced Disappearance,<sup>55</sup> enforced disappearance is defined as:

[T]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>56</sup>

The Inter-American Convention pertaining to enforced disappearances, which predates the United Nations Convention by over a decade, recognises this crime as being “a grave and abominable offense against the inherent dignity of the human being”.<sup>57</sup> Enforced disappearance is a crime that violates human rights on a number of levels, both in terms of the separate and distinct rights it violates as a

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<sup>53</sup> Paul Weindling, ‘Human guinea pigs and the ethics of experimentation: the *BMJ*’s correspondent at the Nuremberg medical trial’, (1996) 313 *British Medical Journal*, 1467, 1467.

<sup>54</sup> It is not intended in this section to provide a thorough analysis of the legal framework pertaining to enforced disappearance. The purpose of the following discussion is to present an overview of the main provisions found in international law and to point to the origins of this crime. This is done with the objective of signifying the connectivity between forensic science and the investigation of acts recognised as a crime under international human rights or international humanitarian law. For a comprehensive study on the crime of enforced disappearance in international law see further, Lisa Ott, *Enforced Disappearance in International Law* (Cambridge: Intersentia, 2011).

<sup>55</sup> United Nations International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc.A/61/488.C.N.737.2008, entry into force 23 December 2010.

<sup>56</sup> *Ibid*, Article 2.

<sup>57</sup> OAS Doc.A-60: Inter-American Convention on Forced Disappearance of Persons, 09 June 1994, Entry into force 28 March 1996, at *preamble*.

consequence of its commission and in terms of the victims affected by this crime.<sup>58</sup> As outlined in the Declaration on the Protection of All Persons from Enforced Disappearances, any act of enforced disappearance constitutes the violation of a number of international law rules, including, the right to recognition as a person before the law; the right to liberty and security of person; the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, and it further violates or constitutes a great threat to the right to life.<sup>59</sup> The whereabouts of the disappeared may remain unknown for months, years, decades or even in perpetuity, thus causing particular anguish for relatives. The ripple effect of this offence is not unintentional; the purpose of the practice is to instil fear and uncertainty and to punish not just the individual who is ‘disappeared’ but also the family and the wider community. The consequences of the offence are not limited to a point in time; the effects can perpetuate for an undefined period and thus constitutes a continuing violation. A general comment issued by the Working Group on Enforced or Involuntary Disappearances offers clarification on the continuous nature of this crime:

Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.<sup>60</sup>

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<sup>58</sup> There is a body of case law that recognises that the victim of the crime of enforced disappearance may not just be the person who is the direct victim i.e. the person who is abducted etc., but also his or her relatives may also be regarded as victims. See, for example, *Quinteros Almeida v. Uruguay*, Communication 107/1981, Views of the Human Rights Committee, adopted 21 July 1983; *Blake v. Guatemala*, Judgement of the Inter-American Court of Human Rights, 24 January 1988; *Barrios Altos Case (Chumbipuma Aguirre et al v. Peru)*, Judgement of the Inter-American Court of Human Rights, 14 March 2001; *Kurt v. Turkey*, Judgement of the European Court of Human Rights, 25 May 1998.

<sup>59</sup> Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992), Adopted by General Assembly resolution 47/133 of 18 December 1992. The United Nations Working Group on Enforced or Involuntary Disappearances considers that the individual violations notwithstanding, the crime of enforced disappearances constitutes a “unique and consolidated act, and not a combination of acts”, Report of the Working Group on Enforced or Involuntary Disappearances, 2010. Document A/HRC/16/48. Working Group on Enforced or Involuntary Disappearances General Comment on Enforced Disappearance as a Continuous Crime, at para. 2, available at <http://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf> (last accessed 27 October 2011).

<sup>60</sup> General Comment on Enforced Disappearance as a Continuous Crime, *ibid*, at para. 1.

Enforced disappearance may constitute a crime against humanity<sup>61</sup> and is recognised as such by the Rome Statute of the International Criminal Court.<sup>62</sup> The definition of enforced disappearance as codified by the Rome Statute differs slightly from that of the United Nations Enforced Disappearances Convention. It provides that:

"Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>63</sup>

The Rome Statute definition makes specific reference to 'political organization' as a further entity, in addition to the State, that may enact measures such as the arrest, abduction and holding of persons in incommunicado detention, which can amount to enforced disappearances of persons. Furthermore, under the Rome Statute definition, persons must be placed outside of the protection of the law for a prolonged period of time. The International Criminal Court has subject matter jurisdiction for this crime only as it amounts to a crime against humanity, and as such the conduct must be committed as part of a widespread or systematic attack which is directed against a civilian population.<sup>64</sup> The additional reference to the temporal component of 'a prolonged period' points towards the mental element of this crime, which as Susan Marks and Andrew Clapham indicates, "demand proof of a high level of knowledge and intention on the part of the perpetrator before culpability can be established".<sup>65</sup> In addition the perpetrators must have been aware that the arrest, detention or

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<sup>61</sup> As outlined in the preamble to the United Nations Enforced Disappearance Convention, enforced disappearance constitutes a crime of extreme seriousness and "in certain circumstances defined in international law, [amounts to] a crime against humanity". Article 5 of the Convention provides that: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law". The Preamble to the Inter-American Convention on Forced Disappearance reaffirms that "the systemic practice" of this crime constitutes a crime against humanity.

<sup>62</sup> Article 7(1)(i): "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (i) Enforced disappearance of persons.

<sup>63</sup> Article 7(2)(i).

<sup>64</sup> Rome Statute Article 7(1), UN General Assembly, *Rome Statute of the International Criminal Court (last amended January 2002)*, 17 July 1998, A/CONF. 183/9 and Elements of Crimes, p12, available at [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf) (last accessed 27 October 2011).

<sup>65</sup> Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (Oxford: Oxford University Press, 2005), p126.

abduction would continue unacknowledged or that no information on the whereabouts of the person concerned would be given out.<sup>66</sup> The effect of the additional stipulations, in addition to the general stipulations that are associated with crimes against humanity,<sup>67</sup> is that the range of cases is narrowed considerably. Thus Marks and Clapham speculate that “only a relatively limited subset of cases of enforced disappearance are likely to count as crimes against humanity for the purpose of International Criminal Court jurisdiction”.<sup>68</sup>

In terms of the framework that has developed in international law to monitor the phenomenon of enforced disappearances, alleviate its consequences and hold perpetrators responsible, a number of bodies hold responsibility for components of these tasks. These include, amongst others, structures coming under the ambit of United Nations Bodies, such as the Committee on Enforced Disappearances, the body of independent experts which monitors implementation of the Convention by the States Parties,<sup>69</sup> and the United Nations Working Group on Enforced or Involuntary Disappearances; regional organisations such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights,<sup>70</sup> the Council of Europe<sup>71</sup> and the European Court of Human Rights<sup>72</sup>; and

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<sup>66</sup> *Ibid.*

<sup>67</sup> I.e. that the crimes be committed as part of a widespread or systematic attack, which is committed against a civilian population, with knowledge of the attack.

<sup>68</sup> Marks and Clapham, *Human Rights Lexicon*, (n 65), p126.

<sup>69</sup> United Nations Human Rights, Office of the High Commissioner for Human Rights, *Committee on Enforced Disappearances*, <http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx> (last accessed 27 October 2011).

<sup>70</sup> The Inter-American human rights system, including the Commission and the Court of Human Rights has made a significant contribution to jurisprudence pertaining to enforced disappearance specifically and more generally on the duty of States to investigate and prosecute international crimes and on amnesties as a violation of such obligations and of the rights of victims. Kai Ambos describes the case law of the Inter-American Court of Human Rights as “proactive”, and since the seminal *Velásquez Rodríguez* case [*Velásquez Rodríguez v. Honduras*, Judgement 29 July 1988] it “has continuously held that the State parties to the American Convention on Human Rights are under an obligation to investigate and prosecute international crimes and punish those responsible”, Kai Ambos, ‘Latin American and International Criminal Law: Introduction and General Overview’ (2010) 10 *International Criminal Law Review*, 431, 431. For a comprehensive study on amnesties and their compatibility with the international human rights legal framework, see further, Louise Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford-Portland, Oregon: Hart Publishing, 2008).

<sup>71</sup> The Parliamentary Assembly of the Council of Europe has given attention to combating this phenomenon through a number of motions, resolutions and recommendations including Doc.11830 on the International Convention for the Protection of all Persons from Enforced Disappearances, which calls on member States to *inter alia* sign and ratify the Convention, text of the motion available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc09/edoc11830.htm> (last accessed 27 October 2011).

<sup>72</sup> Like its American counterpart, the European Court of Human Rights has developed an important body of case law on the crime of enforced disappearance and on the duty of State Parties to

international bodies such as the International Criminal Court, and the International Committee of the Red Cross.

As mentioned, the International Criminal Court has jurisdiction for prosecuting perpetrators of this act. Under the principle of complementarity,<sup>73</sup> the Court has jurisdiction only when States are unwilling or unable to adequately investigate and prosecute crimes at the domestic level. States bear primary responsibility for enacting and executing the necessary measures under their criminal justice system.<sup>74</sup> States must also make reparatory measures, including those to ascertain the location of the missing and, in case of death, to recover the remains. The ‘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’, adopted by United Nations General Assembly Resolution 60/147 of 16 December 2005, highlights an important element of the right to reparation. Reparation can come in several forms, including satisfaction. As outlined in the Basic Principles and Guidelines, where applicable, satisfaction should include:

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

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investigate and prosecute violations of the Convention. Recent cases where the court has found the Respondent State (Russia) responsible for disappearances, death and failure to investigate (violations committed in Chechnya) are the cases of *Makharbiyeva and Others v. Russia*, application no. 26595), *Giriyeva and Others v. Russia*, application no. 17879/08), *Isayev and others v. Russia*, application no. 43368/04 and *Nakayev v. Russia*, application no. 29846/05.

<sup>73</sup> The principle of complementarity is provided for in the Rome Statute of the International Criminal Court, under the preambular paragraph 10, Article 1 and Article 17, see William A. Schabas, *An Introduction to the International Criminal Court* 3<sup>rd</sup> edn. (Cambridge: Cambridge University Press, 2007), pp.174-186. Further, Article 53 of the Rome Statute bears relevance to the admissibility criteria as set out in Article 17. For an analysis of Article 17 and Article 53 in relation to the Colombian situation, which is currently under investigation by the Court, and is regarded as an example of ‘positive complementarity’, see, further Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach*, (Heidelberg -Dordrecht-London-New York: Springer, 2010).

<sup>74</sup> United Nations Convention on Enforced Disappearance, (n 55), Article 3: “Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice. Article 4 - Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law”.

expressed or presumed wish of the victims, or the cultural practices of the families and communities;<sup>75</sup>

It is worthy of note that the Basic Principles and Guidelines are not a new expression of requisite obligations. As expressed in one of the preambular paragraphs:

[T]he Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.<sup>76</sup>

The search for the whereabouts of the disappeared or the remains of the deceased is a necessary component of the right to know the truth. The *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, outlines under Principle 4, ‘The Victim’s Right to Know’, that, regardless of any legal proceedings being undertaken, “victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate”.<sup>77</sup> In terms of the right to reparation, the set of principles also recognises that the scope of reparation includes “in the event of decease, that person’s body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted”.<sup>78</sup>

The United Nations Working Group on Enforced or Involuntary Disappearances holds a mandate as specified in Commission on Human Rights resolution 20 (XXXVI) (1980) to assist families in determining what has happened to their missing relatives. Families may directly or indirectly, through human rights organisations acting on their behalf, make individual communications to the

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<sup>75</sup> ‘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’, Annex A/RES/60/147, 21 March 2006, at para. 22(c)

<sup>76</sup> *Ibid*, Preamble.

<sup>77</sup> *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Addendum to *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, UN Doc.E/CN.4/2005/102/Add.1, 8 February 2005, Principle 4.

<sup>78</sup> *Ibid*, Principle 34

Working Group which will then endeavour to establish lines of communications between the families and the governments concerned. The Working Group also requests the offending State to carry out an investigation and the State must inform the Working Group of the results. The Working Group's mandate does not cover situations of international armed conflict, "in view of the competence of the International Committee of the Red Cross (ICRC) in such situations, as determined by the Geneva Conventions of 12 August 1949 and their Additional Protocols of 1977".<sup>79</sup>

There are a series of interlinked legal protections and measures pertaining to the missing in armed conflict.<sup>80</sup> In Chapter I, the connection of the missing to the subject of the dead was highlighted. As such the requirement to search for the remains of the dead is linked to the search for the missing, as until positively identified, it will not be known whether unidentified human remains are those of a person reported missing. Further, the practice of enforced disappearances, in the context of both international and non-international armed conflicts, is prohibited under customary international humanitarian law.<sup>81</sup> Whilst the term 'enforced disappearance' is not explicitly referred to in international humanitarian law treaties, the ICRC study considers that its occurrence violates, or threatens to violate, a number of customary international humanitarian law rules.<sup>82</sup> On account of the "cumulative effect of the

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<sup>79</sup> United Nations Working Group on Enforced or Involuntary Disappearances, (n 59), Fact Sheet No. 6 (Rev.2), Enforced or Involuntary Disappearances.

<sup>80</sup> The ICRC has undertaken a series of measures to combat the problem of the missing, including the drafting of guiding principles or a model law on the missing, *Guiding Principles/Model Law on the Missing: Principles for Legislating the Situation of Persons Missing as a result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families*, (Geneva: International Committee of the Red Cross, 2009). For further details on the work of the International Committee of the Red Cross on combating the problem of the missing, see the website of the ICRC at <http://www.icrc.org/eng/war-and-law/protected-persons/missing-persons/index.jsp> (last accessed 27 October 2011).

<sup>81</sup> ICRC, Customary International Humanitarian Law Study, Rule 98. "Enforced disappearance is prohibited", available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter32\\_rule98](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule98) (last accessed 27 October 2011).

<sup>82</sup> These rules include Rule 99 on the prohibition of the arbitrary deprivation of liberty, Rule 90 on the prohibition of torture and other cruel or inhuman treatment and Rule 89 which is on the prohibition of murder. Additionally, there are extensive provisions in the laws pertaining to international armed conflicts on the need to register, permit visits and transmission of information regarding persons who are deprived of their liberty, which according to the customary international humanitarian law study are aimed, amongst other motives, at preventing enforced disappearances. In non-international armed conflicts, parties to the conflict must also register detained persons, as a step to prevent disappearances. The ICRC has determined that the prohibition on enforced disappearances should also be viewed in light of the rule on respect for family life (Rule 105) and Rule 117 requiring that each party to the conflict takes all feasible steps to account for the missing, and furnish their families with information on their fate, ICRC, Customary International Humanitarian Law Study, *ibid.*

rules”, it has been determined that the practice of enforced disappearance is “prohibited by international humanitarian law”.<sup>83</sup> Indeed, Brian Finucane argues that the criminal prohibition of enforced disappearance derives not from human rights law but rather “has a long and underappreciated history, deriving from the laws of war”.<sup>84</sup> In his article on the origins of the crime of enforced disappearance in the laws of war, he examines, *inter alia*, the significance of the prosecution of Wilhelm Keitel before the International Military Tribunal at Nuremberg and the *Justice* defendants before the American Nuremberg Military Tribunal in respect of this crime. His analysis shows that “the conduct underlying enforced disappearance constituted both a war crime and a crime against humanity at the time of the Second World War and that these offenses were understood to carry individual criminal liability”.<sup>85</sup> Finucane argues that precedent, in terms of case law on enforced disappearance, comes from the Nuremberg war crimes Tribunals’ judgements as opposed to decisions emanating from the Inter-American Court of Human Rights or the European Court of Human Rights. Enforced disappearance, he argues, was prohibited initially as criminal within a restricted legal situation, that of belligerent occupied during periods of armed conflict, but has subsequently expanded to be applicable in further circumstances. In his opinion, the rightful contribution of human rights instruments pertaining to enforced disappearance should be recognised as not that they criminalise this act under international law, but that they criminalise those disappearances which do not amount to war crimes or crimes against humanity.<sup>86</sup>

The genesis of the phenomenon of enforced disappearances has been traced to measures put in place by the Nazi’s during the Second World War relating to the clandestine deportation, detention and frequent extra-legal killings of suspected members of resistance movements. Under Nazi occupation, thousands of individuals were spirited away under the cover of ‘night and fog’, resulting from measures taken due to one of a series of directives which had been designed to implement Hitler’s orders in western occupied territories. The *Nacht und Nebel Erlass*, “Night and Fog Decree”, was issued on 7 December 1941 by Field Marshall Wilhelm Keitel, Chief

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<sup>83</sup> *Ibid.*

<sup>84</sup> Brian Finucane, ‘Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War’ (2010) 3 *The Yale Journal of International Law*, 171, 171.

<sup>85</sup> *Ibid.*, 174.

<sup>86</sup> *Ibid.*, 172.

of the German High Command. Hitler was of the belief that “death sentences create martyrs”<sup>87</sup> and so ordered that, unless guilt could be established beyond any doubt, “everyone arrested for suspicion of ‘endangering German security’ was to be transferred to Germany under cover of night”.<sup>88</sup> An estimated 7000 people<sup>89</sup> were arrested and transported to Germany and on to concentration camps and almost certain death on the basis of this decree.<sup>90</sup> As the Judgement of the International Military Tribunal indicated, the civilians were surreptitiously removed to Germany and it was not permissible for news of their fate to be passed to their relatives, even in cases of death, “the purpose being to create anxiety in the minds of the family of the arrested person”.<sup>91</sup> The rationale behind the decree was further revealed by Keitel in a covering letter, dated 12 December 1941. It stated that:

Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.<sup>92</sup>

Pre-dating the *Nacht und Nebel* Decree, repressive acts of a similar nature also took place in Spain during the Spanish Civil War in the 1930s<sup>93</sup> and continued in the years of the Franco dictatorship that followed. Thousands of Republicans and opponents of Franco were killed and buried clandestinely. Luc Capdevila and Danièle Voldman link the disappearances to the overall strategy of tyrannical domination by General Franco and his supporters, and they remark that “[t]he desire of Franco’s supporters to eliminate all the living who opposed them was extended to the dead, whose bodies disappeared [...] Franco’s insurgents used the dead as a concerted part of their terror campaign.”<sup>94</sup> Other examples may well have preceded the policy put in place by the Nazi’s, such as events in Spain under the Franco dictatorship described here. The disappearances that were enacted under the *Nacht und Nebel Erlass*

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<sup>87</sup> Eric Stover and Molly Ryan, ‘Breaking Bread with the Dead’ (2001) 35(1) *Historical Archaeology*, 7, 8.

<sup>88</sup> *Ibid.*

<sup>89</sup> Kirsten Anderson, ‘How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Responsible for Acts of Enforced Disappearance?’ (2006) 7 *Melbourne Journal of International Law*, 245, 249.

<sup>90</sup> Stover and Ryan, ‘Breaking Bread’, (n 87), 8.

<sup>91</sup> Judgement of the International Military Tribunal, (n 3).

<sup>92</sup> *Ibid.*

<sup>93</sup> The Spanish Civil War took place between the years 1936 and 1939.

<sup>94</sup> Luc Capdevila and Danièle Voldman, *War Dead: Western Societies and the Casualties of War* (Edinburgh: Edinburgh University Press, 2006), p.103.

decree, however, represent the first documented example of this practice.<sup>95</sup> Further, Finucane describes the programme as “the first state-sponsored system of enforced disappearance”<sup>96</sup> and as “the earliest use of enforced disappearance as an explicit state policy”.<sup>97</sup> In a footnote to the text, attention is drawn to a suggestion made by Christopher K. Hall<sup>98</sup> that inspiration for the programme came from “Stalin’s widespread practice of secret arrest and imprisonment in the Soviet Union”.<sup>99</sup> However, documentation attesting to the exact nature of the purges in the Soviet Union is lacking and, therefore, the origin of the system of disappearances is not clear.<sup>100</sup>

Be that as it may, deciphering the precise starting point of this practice is a somewhat pedantic exercise here, as our real interest in enforced disappearances, in terms of how it relates to the emergence of the application of forensic techniques to the investigation of violations of international human rights or humanitarian law in a contemporaneous context, commences at a later point in time. Some decades after events in Western Europe in the 1930s and 1940s, the practice materialised again in a number of South American countries, when the term ‘enforced disappearance’ was coined.<sup>101</sup> Commencing in Guatemala in the 1960s, the practice of enforced disappearance later assumed a core part of Chilean State policy following the 1973 coup and, subsequently, was used on an “unprecedented” scale in Argentina after the 1976 coup.<sup>102</sup> Other countries in Central and Southern America in which policies of enforced disappearances were carried out include Brazil, Honduras, El Salvador,<sup>103</sup> Peru,<sup>104</sup> and Bolivia.<sup>105</sup> In the Philippines, people were systematically disappeared,

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<sup>95</sup> Anderson, ‘How Effective’, (n 89), 249.

<sup>96</sup> Finucane, ‘Enforced Disappearance: A Neglected Origin’, (n 84), 174.

<sup>97</sup> *Ibid.*, 175.

<sup>98</sup> Christopher K. Hall, ‘Enforced Disappearance of Persons’ in Otto Triffterer ed., *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> edn., (München-Oxford-Baden-Baden: C.H. Beck/Hart/Nomos, 2008), at p.221, n.292.

<sup>99</sup> Finucane, ‘Enforced Disappearance: A Neglected Origin’, (n 84), 175, fn.20.

<sup>100</sup> *Ibid.*

<sup>101</sup> “Enforced disappearance” is a translation of the Spanish term *desaparición forzada*, which was coined in the 1960s in reference to the systematic practices of abduction and covert detention initially employed in Guatemala, Marks and Clapham, *International Human Rights Lexicon*, Oxford: Oxford University Press 2005, p122

<sup>102</sup> Marks and Clapham, *Human Rights Lexicon*, (n 65), p122.

<sup>103</sup> Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”; Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Mission to El Salvador: Preliminary Note (5-7 February 2007), UN Doc.A/HRC/4/41/Add.3, 6 March 2007.

<sup>104</sup> On the work of the Truth and Reconciliation Commission established in Peru, which addresses *inter alia* the 70,000 deaths and disappearances that occurred during the internal armed conflict, see

and the practice was known as “salvaging”.<sup>106</sup> The countries mentioned here in no way represents an exhaustive list and the scourge of this crime continues to this day as it occurs in numerous countries throughout the world.<sup>107</sup>

## **(2) Exhumation of Mass Graves in a Human Rights Context: the Emergence of Contemporaneous Practice**

In the mid 1980s, there were a number of advancements that were regarded as pivotal for the requisition of forensic and medical sciences in a human rights context, following a four decade long interval. The activities that unfolded in South America during this period are central to our understanding of how forensic science came to be put to the disposal of law in an international criminal law domain. Indeed, in the *Popović et al*<sup>108</sup> case at the International Criminal Tribunal for the former Yugoslavia, the pioneering nature of the work carried out by core forensic specialists, including forensic anthropologists, in the application of forensic science to the investigation of gross human rights violations during this period, was highlighted. When asked during examination whether Dr. Clyde Snow, a forensic anthropologist, was “one of the top people in this field”,<sup>109</sup> Dr. William Haglund, who was testifying on behalf of the prosecution, replied that Snow is “the pioneer in international human rights forensic work and the application of forensic anthropology and archaeology, especially in the Latin American countries”.<sup>110</sup>

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the final report of the Commission available at <http://www.cverdad.org.pe/ingles/pagina01.php> (last accessed 27 October 2011).

<sup>105</sup> A National Commission for Investigation for Forced Disappearances was established with a mandate to investigate the disappearance of civilians between the years 1964 and 1982, *United States Institute of Peace*, ‘Truth Commission: Bolivia’, available at <http://www.usip.org/publications/truth-commission-bolivia>, (last accessed 27 October 2011).

<sup>106</sup> Stover and Ryan, ‘Breaking Bread’, (n 87), 8.

<sup>107</sup> As Marks and Clapham write; “If the early cases were mostly in Latin America, the more recent ones come from countries encompassing all regions of the world. Of course the statistics of the [United Nations] Working Group [on Enforced or Involuntary Disappearances] cannot be assumed to tell the full story. Nonetheless, they begin to confirm that enforced disappearance is a phenomenon of global proportions”, Marks and Clapham, *Human Rights Lexicon*, (n 65), p123. See also generally, the websites of the International Coalition Against Enforced Disappearances, <http://www.icaed.org/home/> and Enforced Disappearances Information Exchange Center (EDIEC), at <http://www.ediec.org/home/> (last accessed 27 October 2011).

<sup>108</sup> *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević*, Case No. IT-05-88-T.

<sup>109</sup> *Popović at al*, *ibid*, Trial transcript, Thursday 15 March 2007, Examination by Mr. McCloskey, p.8915.

<sup>110</sup> *Ibid*.

In 1983, President Raúl Ricardo Alfonsín, the first president to be democratically elected in Argentina after the end of the tyrannical rule of the military junta, ordered the prosecution of leaders of the junta, and established a National Commission on Disappeared Persons. The National Commission on the Disappearance of Persons (CONADEP),<sup>111</sup> headed by Ernesto Sabato, was formed as a means to respond to the human rights abuses that had taken place in the country, which saw thousands of its citizens arrested, held in detention, tortured and extra-judicially killed by State agents between 1976 and 1983. During the course of 1984 and 1985, a team of forensic practitioners, working under the auspices of the American Association for the Advancement of Science (AAAS), provided “crucial evidence to the National Commission based on their investigation of the causes of death and injuries sustained by victims, to contribute to the case against members of the deposed junta”.<sup>112</sup> CONADEP issued a report on the enforced disappearances and other human rights violations, in September 1984. The report documented, *inter alia*, patterns of abduction, instances of torture, details of the secret detention centres, how death was used as a political weapon, the implications of impunity, agents and structures of repression, demographical information on the victims, the role of the judiciary during the repression and it concluded with a number of recommendations.<sup>113</sup>

After the transition to democracy in Argentina, when impunity started to be replaced with accountability, local judges ordered the exhumations of some of the graves containing the bodies of individuals killed during the *dirty war*.<sup>114</sup> However, the exhumations were unprofessionally carried out and, consequently, Sabato and the Argentinean NGO Grandmothers of the Plaza de Mayo, requested the help of Eric Stover, then head of the Human Rights Program for the American Association for the Advancement of Science (AAAS).<sup>115</sup> The hasty exhumations of graves had not

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<sup>111</sup> In Spanish *Comisión Nacional sobre la Desaparición de Personas*, CONADEP.

<sup>112</sup> Corder and McKelvie, (n 52), 868.

<sup>113</sup> “Nunca Más” (Never Again) – Report of Conadep (National Commission on the Disappearance of Persons) – 1984, English version available at <http://www.desaparecidos.org/nuncamas/web/index2.htm>, (last accessed 27 October).

<sup>114</sup> The ruling military junta called its anti-subversive campaign the *guerra sucia*, which translates as dirty war, which was a reference to the guerrilla tactics used such as unannounced bombings and kidnappings, Stover and Ryan, ‘Breaking Bread’, (n 87), 8.

<sup>115</sup> Kirsten Juhl, *The Contribution by (Forensic) Archaeologists to Human Rights Investigations of Mass Graves*, (Stavanger: Museum of Archaeology, Stavanger, 2005), p.24. Available at

been not carried out with any malicious intent, but rather were conducted in this manner due to the eagerness to finally ascertain the fate of the disappeared. Nonetheless, this method resulted in the comingling of human remains and the destruction of forensic evidence. Furthermore, families of the victims were distressed at the failure to treat the human remains with adequate respect. Stover, travelling with a team of forensic scientists he had assembled under the auspices of the AAAS to assist the Commission in the search for the disappeared, visited morgues and cemeteries throughout the country, whereupon he viewed a multitude of bodies that had been recovered in this manner. On the final day of the initial field visit by the AAAS team, a press conference was held in Buenos Aires in which the scientists called for a halt on all exhumations and recommended the training of a team specifically devoted to the task of scientifically investigating cases of the disappeared. The AAAS forensic experts committed to the project of training a national forensic team. A second team of forensic experts were deployed eight months later and instructed a five-week training workshop to young Argentine archaeology, anthropology and medical students on the exhumation and identification of skeletal remains. A number of these students went on to form the Argentine Forensic Anthropology Team.<sup>116</sup> Through the investigations conducted by this team, the evidence that was produced refuted claims made by members of the military junta that the individuals who had disappeared had either left the country or had been legitimately killed but buried in unmarked graves as they had used false names and were not carrying any identification at the time of their death. Most of the remains examined by the Argentine forensic team showed evidence of execution-style killings, frequently at close range. Other bodies, when discovered, had their hands bound together behind their backs.<sup>117</sup>

The work of the forensic scientists from AAAS and the Argentine Forensic Anthropology team set an important precedent for subsequent investigations of gross human rights violations and of infringements of the laws of war. Paralleling the patterns of disappearance across the Southern cone, forensic science teams emerged in the countries that had been afflicted by this practice. Coincident to developments

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[http://am.uis.no/getfile.php/Arkeologisk%20museum/publikasjoner/ams-nett/Mass\\_Graves2.pdf](http://am.uis.no/getfile.php/Arkeologisk%20museum/publikasjoner/ams-nett/Mass_Graves2.pdf) (last accessed 27 October 2011).

<sup>116</sup> Stover and Ryan, 'Breaking Bread', (n 87), 9.

<sup>117</sup> *Ibid.*

in Argentina, forensic teams undertook investigations in other countries in South America, and beyond, where bodies of the disappeared lay in hitherto unknown or unmarked graves. The work of such teams performed crucial humanitarian functions for the families of the missing. In addition, their forensic activities were a function of the criminal justice or transitional justice mechanisms that were instigated to redress the excesses of the former regimes.<sup>118</sup> Requests from medical action groups in Chile, the Philippines and El Salvador were made to human rights groups based in the United States “to help document abuses, official complicity and break down the walls of impunity”.<sup>119</sup> Thereafter, missions of inquiry were established with the support of a number of groups “including the (US) National Academy of Sciences, the International League for Human Rights and the American Public Health Association, as well as the AAAS”.<sup>120</sup> Forensic anthropology teams were also formed or utilised in Guatemala, Brazil, Peru and Honduras.

Another important legacy of the AAAS’s work in Argentina was “the eventual application of mitochondrial DNA (or mtDNA) analysis in the identification of the skeletal remains of the disappeared”. This form of DNA typing held several advantages over the previously utilised nuclear DNA testing for forensic functions, as its recovery from forensic samples was easier than that of nuclear DNA. Further, mtDNA is inherited solely from the mother, and so it enabled comparative samples to be taken from any single maternal relative for the purposes of confirmation or exclusion of identity.<sup>121</sup>

As demonstrated in the particulars on the advancement of forensic investigations of human rights violations in Argentina, referred to above, the AAAS was instrumental

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<sup>118</sup> See further, R.H. Kirschner and K.E. Hannibal, ‘The application of the forensic sciences to human rights investigations’ (1994) 13(5-6) *Medicine, Science and Law*, 451. For a comparative analysis of the work of the truth commissions established in Haiti, South Africa and Guatemala, including the role of forensic expertise, see further Audrey R. Chapman and Patrick Bell, ‘The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala’ (2001) 23(1) *Human Rights Quarterly*, 1.

<sup>119</sup> Cordner and McKelvie, ‘Developing standards’, (n 52), 868, citing K. Hannibal and R. Lawrence, ‘The health professional as human rights promoter: Ten years of physicians for human rights (USA)’, (1996) 2(1) *Health and Human Rights*, 113.

<sup>120</sup> Cordner and McKelvie, *ibid.*

<sup>121</sup> Stover and Ryan, ‘Breaking bread’, (n 87), 11. Several hundred children were also kidnapped from mothers considered as subversives by the State during the dirty war. These children count among the disappeared. On the use of DNA and genetic typing for the purposes of identifying these missing children, see, further, A.M. Di Lonardo, P. Darlu, M. Baur, C. Orrego and M.C. King, ‘Human genetics and human rights. Identifying the families of kidnapped children’ (1984) 5(4) *American Journal of Forensics and Medical Pathology*, 339.

in instigating professional and proficient medico-legal work in South America. Another American organisation that merits particular mention here is the Boston-based non-governmental organisation formed in 1986, Physicians for Human Rights. Internal armed conflicts taking place on the territory of El Salvador, Nicaragua and Guatemala spilled over the borders into neighbouring Honduras. In addition, the country was used as a base for cold war activities sponsored by the United States. The Center for Justice and International Law released a report in 1994 that detailed the disappearance of 187 individuals in the ten year period between 1979 and 1989. The report related details of how the cold war legacy of the military and Battalion 3-16, a CIA-supported and trained death squad, were complicit in the disappearance and politically motivated murders of scores of left-wing activists.<sup>122</sup> In the same year, 1994, “with the aid of expertise provided by Physicians for Human Rights the political climate permitted the first exhumations of suspected victims of these disappearances”.<sup>123</sup> A cooperative working relationship was established between Physicians for Human Rights and the Supreme Court of Honduras, the Prosecutors Office, and a human rights organisation that worked on the issue of the disappeared, *Comite de Familiares de Detenidos Desaparecidos en Honduras* (Committee of Families for the Detained and Disappeared of Honduras). As a result, three missions were conducted by Physicians for Human Rights in 1994 and 1995, and, through a combination of the work of Physicians for Human Rights and the advanced investigatory work of the Honduran agencies, the forensic investigators were successful in locating and exhuming bodies of the missing. Haglund maintains that the “exhumations and identifications were essential to the initiation and advancement of trials of the Honduran court system”.<sup>124</sup> Another important feature of the work undertaken in Honduras was that the team composition was both multi-disciplinary and multi-national. For example, on one of the enquiries conducted during this period, the team consisted of an American forensic anthropologist, two members of the Guatemalan Forensic Team (*Equipo Forense*) and a forensic pathologist and

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<sup>122</sup> Center for Justice and International Law (CEJIL), Human Rights Watch/Americas, *The Facts Speak for Themselves: The Preliminary Report on Disappearances of the National Commissioner for the Protection of Human Rights in Honduras* (New York, NY: Human Rights Watch, 1994) cited in William D. Haglund, ‘Archaeology and Forensic Death Investigations’, (2001) 35(1) *Historical Archaeology*, 26, 30.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

forensic dental consultant assigned to the team by the Honduran Supreme Court. The Guatemalan members of the team brought with them “considerable experience in excavation of commingled graves, having worked not only in their home country, but also on missions in Argentina and Iraqi Kurdistan”.<sup>125</sup> Physicians for Human Rights was later to assume an integral role in the forensic activities of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

#### **D. Conclusion**

The purpose of this chapter has been to outline some notable examples of forensic investigations of crimes of an international character, such as war crimes, crimes against humanity and genocide conducted prior to the establishment of the United Nations Tribunals in the 1990s. Whilst, in reality, war crimes were committed by all belligerents during the course of the Second World War, atrocious acts, unrivalled in terms of the gravity and the numbers of victims, were committed by the Axis powers. Judicial mechanisms were established in order to hold a number of perpetrators to account, including an International Military Tribunal convened by the four major allied powers of the United States of America, France, the United Kingdom and the Soviet Union. This chapter has outlined how forensic evidence was utilised during the course of the proceedings and has shown how although medico-legal experts testified at the Tribunal, the evidence offered to the court concerned fabricated charges included in the indictment at the behest of the Soviet Prosecutors. Thus, although this can be considered as an early example of the use of forensic evidence at an international criminal tribunal, it could not be considered as constituting a successful case. The evidence was not gathered specifically for the International Military Tribunal and was not gathered by investigators under the supervision of the Court. In this fundamental way, the use of medico-legal evidence stands in contrast to the collection and use of forensic evidence by the international tribunals in the 1990s

As outlined in this chapter, experts from the science and medical disciplines were engaged in the investigation of crimes recognised as constituting criminal violations

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<sup>125</sup> *Ibid.*

that were international in character antecedent to the investigations that occurred in the 1990s under the auspices of the *ad hoc* international criminal tribunals. Early examples stem from the period after the close of the Second World War when allied powers, collectively and unilaterally, prosecuted the authors of war crimes and crimes against humanity. In spite of the potential that the collaboration of science and law for purposes of international criminal prosecutions offered, the alliance was evanescent at that juncture. It has been observed that after the post-War contribution to “international efforts to prosecute war crimes, there was a hiatus in the involvement of medical science in documenting human rights abuses for evidentiary purposes until the mid-1980s”.<sup>126</sup> This hiatus corresponded to a general moratorium in the development of international criminal law as international politics, namely Cold War politics, hampered any effective advancement. The successes of the International Military Tribunals established in Nuremberg and Tokyo had in the first instance prompted proposals to establish a permanent international criminal court, and some initial movement was made in that direction by the United Nations. However, progress ground to a halt in the 1950s, supposedly as a definition of the crime of aggression was penned, but in reality “Cold War tensions had in fact made progress on the establishment of any international jurisdiction virtually impossible”.<sup>127</sup> It was not until the 1980s that the relevance of scientific techniques to the scrutiny of violations of human rights or humanitarian law was again recognised and a further decade before it was applied before an international criminal tribunal. The experience gained from the application of forensic and medical expertise to the investigation of extrajudicial killings in Latin American countries such as Argentina, Guatemala and Chile served to benefit the forensic exhumations carried out for the *ad hoc* Tribunals. Members from the forensic teams from each of the aforementioned countries participated in the excavations that took place in Rwanda and the former Yugoslavia “and their experience was integrated into the methodology used”.<sup>128</sup> Thus, the nascent investigations of crimes committed in the context of armed conflict and gross human rights violations described in this

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<sup>126</sup> Cordner and McKelvie, ‘Developing standards’, (n 52), 868.

<sup>127</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), p.11.

<sup>128</sup> William D. Haglund, Melissa Connor and Douglas D. Scott, ‘The Archaeology of Contemporary Mass Graves’ (2001) 35(1) *Historical Archaeology*, 57, 58,59

chapter can be considered as forming the bedrock of the large-scale investigations conducted under the auspices of the United Nations International Criminal Tribunals.

## **Chapter IV: The Balkan Conflict: Forensic Investigations by the International Criminal Tribunal for the former Yugoslavia**

### **Introduction**

Forensic exhumations of mass graves entail a substantial number of logistical, financial, legal, scientific and social considerations. For all the demands of such activity, however, excavation of grave sites can provide a valuable source of evidence for international criminal tribunals. As highlighted in the sixth annual report of the International Criminal Tribunal for the former Yugoslavia,<sup>1</sup> “[e]xhumations of human remains buried in mass graves are conducted in order to provide corroborating physical evidence of crimes”.<sup>2</sup> Indeed, the content of the mass grave provides attestation of criminal activity that can prove most convincing when utilised in a forensic capacity. It is not surprising, therefore, that the international criminal tribunals established in 1993 and 1994 by United Nations Security Council Resolutions in the wake of atrocities in the former Yugoslavia and Rwanda - the International Criminal Tribunal for the former Yugoslavia<sup>3</sup> and the International Criminal Tribunal for Rwanda<sup>4</sup> - have included forensic investigatory methods in the activity of the Prosecutor’s office. In the following two chapters the thesis will examine how medico-legal investigations of war crimes, crimes against humanity and genocide have been conducted by the *ad hoc* international criminal tribunals. The current chapter will focus on investigations pertaining to the conflict in the former Yugoslavia. A review of preliminary fact-finding missions carried out by the United Nations in the Balkans whilst the conflicts were on-going will be made before focusing on the investigations conducted by or on behalf of the Prosecutor’s Office in the International Criminal Tribunal for the former Yugoslavia. Due

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<sup>1</sup> Full title: The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

<sup>2</sup> Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc.A/54/187-S/1999/846, 25 August 1999, at para.129.

<sup>3</sup> Established pursuant to United Nations Security Council Resolution 827, UN Doc.S/RES/827 (1993), 25 May 1993.

<sup>4</sup> Established pursuant to United Nations Security Council Resolution 955, UN Doc. S/RES/955 (1994), 8 November 1994.

consideration will also be given to the legal basis for the investigations and exhumations.

As highlighted in Chapter I, there are a number of obligations codified in international humanitarian law that pertain to the appropriate treatment of the dead during and after armed conflict. The motivations that have informed the codification of such regulations have been of a humanitarian nature and as such as were not drafted with the requirements of international forensic investigations for criminal justice purposes in mind. In light of this an important question should be raised. Do the dynamics of forensic investigations for criminal tribunals complement or conflict with the humanitarian requirements of body recovery as provided for in international humanitarian law? In an effort to provide an answer to this question, the final section of this chapter will explore the synergy between the needs of the court and broader transitional justice needs.

### **A. Preliminary investigations: Investigating Atrocity Crimes in the Former Yugoslavia**

Two notable fact finding missions were carried out in the Balkans, prior to the establishment of the Yugoslav Tribunal, on behalf of the United Nations. The Special Rapporteur on extrajudicial, summary or arbitrary executions completed a field mission in Croatia in December 1992. The Commission of Experts, established in October 1992 pursuant to a United Nations Security Council Resolution (Resolution 780) to investigate and gather evidence concerning allegations of war crimes in the former Yugoslavia, held a mandate from October 1992 to April 1994, with its final report being submitted to the Security Council on 27 May 1994. Both of these missions utilised forensic expertise in order to investigate some of the mass grave sites alleged to hold the bodies of individuals killed in violation of the laws of war. Although operating independently and under separate mandates, the two

investigative bodies cooperated in their work and exchanged practical support as well as information gathered in the course of their enquiries.<sup>5</sup>

From 15 to 20 December 1992, the United Nations Special Rapporteur on extrajudicial killings, Mr. Bacre Waly Ndiaye, completed a site visit to Croatia in order to carry out preliminary investigations into the reports that were being received concerning the alleged burial of victims of war crimes in mass graves across the former Yugoslavia. Assistance in conducting site assessments was provided by the team of forensic experts working on behalf of the Commission of Experts. Mr. Ndiaye gave a definition of mass graves as locations where three or more victims of extrajudicial, summary or arbitrary executions were buried, not having died in combat or armed confrontations”.<sup>6</sup> This became the definition adopted and applied by the Yugoslav Tribunal.<sup>7</sup> The Special Rapporteur along with a forensic expert visited four sites. Their findings corresponded in large part to the allegations showing the sites were consistent with mass graves. Medico-legal investigations can also eliminate the probability of criminal activity and in one case the information gathered in the field in conjunction with witness testimony “seemed to exclude the possibility that those buried there had been victims of war crimes”.<sup>8</sup>

The report prepared by the Special Rapporteur highlighted a number of concerns of a practical nature he considered would need to be tackled before further investigations into mass graves were conducted. Specialists would need to work for a considerable period of time in order to locate, excavate and examine the bodies from the graves. Adequate facilities such as mortuaries would be needed for post-mortem examinations. Logistical measures would need to be taken to provide for office

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<sup>5</sup> Mutual assistance included sharing forensic experts to assist with the investigation of mass graves. Also an agreement was made between the Special Rapporteur and the Chairman of the Commission “to the effect that cases where there is prima facie evidence of a mass grave containing the remains of victims of war crimes would be forwarded to the latter for in-depth investigations.” *Situation of Human Rights in the Territory of the Former Yugoslavia: Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, Annex I, Summary of the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on His Mission to Investigate Allegations of Mass Graves from 15 to 20 December 1992, UN Doc.E/CN.4/1993/50, 10 February 1993, at para. 2, (Special Rapporteur Report).*

<sup>6</sup> *Ibid*, at paragraph 5. Cross ref 5

<sup>7</sup> Kirsten Juhl, *The Contribution by (Forensic) Archaeologists to Human Rights Investigations of Mass Graves* (Stavanger: Museum of Archaeology, Stavanger, 2005), p.16. Available at [http://am.uis.no/getfile.php/Arkeologisk%20museum/publikasjoner/ams-nett/Mass\\_Graves2.pdf](http://am.uis.no/getfile.php/Arkeologisk%20museum/publikasjoner/ams-nett/Mass_Graves2.pdf) (last accessed 27 October 2011).

<sup>8</sup> Special Rapporteur Report, *Situation of Human Rights in former Yugoslavia*, (n 5), at para. 7.

space, accommodation and transport of personnel. Financial arrangements would be needed to cover the various costs. The mass graves had to be treated as a crime scene and the site had to be protected until the end of the investigation in order to preserve the evidence. The security of the team working at the site had to be guaranteed. In addition, there were legal uncertainties that the Special Rapporteur felt would have to be addressed if mass graves were to be investigated in order to obtain evidence that would be used in war crimes proceedings. The issues he raised included: it had to be determined what appropriate body should have responsibility for conducting the proceedings, for example, should it be a national court or an international Tribunal? The legal grounds for jurisdiction were unclear and the appropriate rules of procedure, the legal basis for these rules and the extent to which domestic laws governing the excavation of graves and exhumation of remains needed to be taken into account. Further, what would be the policy in relation to municipal authorities that were not recognised by the United Nations but in *de facto* control of the territory on which mass graves were situated? An issue of overriding importance was the requirement for the investigations to be seen as impartial, as war crimes were being committed by all sides.<sup>9</sup> These pertinent questions were tackled to varying degrees of success with the establishment of the Yugoslav Tribunal and will be considered further throughout this chapter.

It became increasingly apparent that considerable infringements of the laws of war were taking place in the course of the conflict and, at the request of the Security Council, the United Nations Secretary General set up an expert body to look into alleged violations. A five-member Commission of Experts was established pursuant to Security Council Resolution 780 (1992) to investigate grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.<sup>10</sup> The Yugoslav Commission concluded that grave breaches of the Geneva Conventions and other violations of international humanitarian law had been committed in the former Yugoslavia, including mass killings, ethnic cleansing, torture, rape, pillage and destruction of

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<sup>9</sup> *Ibid.*, at paras. 9-11.

<sup>10</sup> The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), “the Yugoslav Commission”.

civilian property.<sup>11</sup> The Commission's second chairperson M. Cherif Bassiouni, who replaced Fritz Kalshoven upon his resignation in September 1994, has described the Commission of Experts as "the first stage in the establishment of the Tribunal [for the former Yugoslavia]".<sup>12</sup> At the time of its establishment, it was unclear whether the Commission was to be the precursor to an International Criminal Tribunal. There was, as Bassiouni describes, "a missing link".<sup>13</sup> The chasm referred to by Bassiouni was the documentation of atrocity crimes, proof of which was needed to justify the establishment of such a court. The first step, therefore, was establishing the Commission; the next was for the Commission to uncover enough evidence to warrant the creation of a significant judicial mechanism, such as an international tribunal.<sup>14</sup> Indeed, Resolution 780 made no reference to the creation of an international criminal tribunal but rather called upon the United Nations Secretary General to take into account the commission's conclusions in "any recommendations for further appropriate steps".<sup>15</sup> For some countries involved in the endeavour to negotiate an armistice such steps would have preferably amounted to domestic trials, but the drafters of the resolution, through this linguistic ambiguity, deliberately "left the door open for an international judicial response".<sup>16</sup> Once the International Criminal Tribunal for the former Yugoslavia was established in May 1993, the Commission focused its work on prosecution-orientated evidence, thus reinforcing its links with the Tribunal.<sup>17</sup>

### **(1) The Use of Forensic Expertise by the Yugoslav Commission of Experts**

In the execution of its mandate, the Commission tasked a non-governmental organisation that specialised in the application of medical and forensic techniques to

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<sup>11</sup> Letter Dated 24 May 1994 From the Secretary-General to the President of the Security Council, Boutros Boutros-Ghali, accompanying the Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc.S/1994/674, 27 May 1994.

<sup>12</sup> M. Cherif Bassiouni, 'The Commission of Experts Established pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia' (1994) 5(2-3) *Criminal Law Forum*, 279, 283.

<sup>13</sup> M. Cherif Bassiouni, 'The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the Former Yugoslavia', in M. C. Bassiouni ed., *Post-Conflict Justice*, (Ardsey, New York: Transnational, 2002), p. 429, at p.432.

<sup>14</sup> *Ibid.*

<sup>15</sup> United Nations Security Council, 'Resolution 780 (1992)', UN Doc.S/RES/780 (1992), Adopted 6 October 1992, at para.4.

<sup>16</sup> Michael P. Scharf *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*, Durham, North Carolina: Carolina Academic Press, 1997, p42.

<sup>17</sup> M. Cherif Bassiouni, 'The United Nations Commission of Experts', (n 13), p440.

the investigation of international crimes including human rights violations, war crimes and crimes against humanity, to undertake a number of mass grave exhumations. This organisation, Physicians for Human Rights, and the Yugoslav Commission, concluded a Cooperation Service Agreement regarding the completion of forensic investigations commencing in December 1992.<sup>18</sup> The investigatory approach adopted by the Commission in which forensic expertise was utilised as a part of its mandate to collect and analyse evidence of violations of the laws of war, including grave breaches of the Geneva Conventions, not only produced *prima facie* evidence of violations of humanitarian law and crimes against humanity, it also lent support to the estimated high number of casualties through the reported disclosure of 187 mass graves.<sup>19</sup>

A number of leading experts from medico-legal and forensic science backgrounds were deployed by the Commission to explore suspected grave sites. For example, in December 1992, forensic anthropologists Clyde Snow and Eric Stover, accompanied by Becky Saunders, an archaeologist from Louisiana State University and Morris-Tidball Binz, an Argentine physician and former member of the Argentine Forensic Anthropology Team<sup>20</sup> conducted a brief, three-day excavation of a mass grave on a farm called Ovčara, nine miles south of the Croatian city of Vukovar. The grave was suspected of containing the bodies of over 200 lightly wounded soldiers and hospital staff taken from a municipal hospital following a period of sustained attack on the city by Yugoslav armed forces (JNA). Under the command of Army Major Veselin Sljivancanin, on 20 November 1991, JNA troops had removed these individuals - all protected persons under the Geneva Conventions - and had taken them by bus to the Ovčara farm. The men were lined up beside a freshly dug mass grave whereupon they were summarily executed.<sup>21</sup> The exploratory exhumation exposed evidence that the grave contained the bodies of Croatian decedents. Stover recalls:

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<sup>18</sup> Final report of the United Nations Commission of Experts established pursuant to security council resolution 780 (1992), S/1994/674/Add.2 (Vol. V), 28 December 1994, Annex X.A Mass graves – Ovčara near Vukovar, UNPA sector east I, (Prepared by William J. Fenrick), Part Two, II Introduction. Available at <http://www.ess.uwe.ac.uk/comexpert/anx/X-A.htm> (last accessed 27 October 2011).

<sup>19</sup> Bassiouni, 'The Commission of Experts', (n 12), 289, n28.

<sup>20</sup> This four member forensic team was assembled by Physicians for Human Rights, Final report of the United Nations Commission of Experts, (n 18), Part Two, I Executive Summary.

<sup>21</sup> Eric Stover and Molly Ryan, 'Breaking Bread with Dead' (2001) 35(1) *Historical Archaeology*, 7, 19, 20. See also *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-

As UN troops stood guard, we dug a trench 7 m long and 1 m wide until human remains were exposed. Below the skull of one of the skeletons, resting on the shoulder bones, was a silver chain bearing a Roman Catholic cross and a silver-colored medallion with the inscription; “BOG I HRVATI.” Or, in English, “God and Croats”.<sup>22</sup>

The report submitted to the Yugoslav Commission by the team concluded that the grave was indeed a mass grave containing in the region of 200 bodies. The report was also able to conclude:

[T]he grave appeared to be consistent with witness testimony purporting that the site was «the place of execution and interment of the patients and medical staff of Vukovar Hospital on 20 November 1991».[sic]<sup>23</sup>

It was recommended that a second, larger forensic team should be deployed to the site to recover the bodies for medico-legal examination. A second Physicians for Human Rights team returned to the area in October 1993 having received written permission from the Governments of Croatia and the Republic of Serbian Krajina. The team were informed by local Serb officials, however, that a resolution had been passed by the Regional Council of Vukovar that prohibited further excavation of the site and consequently the forensic team was unable to complete the exhumation. The team was able to contend, nevertheless, that the calibre of the cartridge cases found

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13/1, “*Vukovar Hospital*”, Third Consolidated Amended Indictment, 15 November 2004 and Trial Judgement of 27 September 2007.

<sup>22</sup> Stover and Ryan, ‘Breaking Bread’, (n 21), 20.

<sup>23</sup> Final report of the Commission of Experts, (n 18), Part Two, I Executive Summary. During the December 1992 forensic investigation the skeletal remains of two individuals were recovered from the surface and nearby the mass grave. Both had gunshot wounds to the head. A shallow test trench was dug across the gravesite and revealed nine more bodies. Additionally, a large concentration of spent 7.62 by 39 millimetre cartridge cases was found, in a pattern west to north-west of the gravesite. The PHR forensic team concluded, based on this preliminary site exploration, that:

- a. “a mass execution took place at the gravesite;
- b. the grave is a mass grave, containing perhaps as many as 200 bodies;
- c. the remote location of the grave suggests that the executioners sought to bury their victims secretly;
- d. there is no indication that the grave has been disturbed since the time of execution and interment;
- e. The grave appears to be consistent with witness testimony that the site is the place of execution and interment of the patients and medical staff members, who disappeared during the evacuation of Vukovar Hospital on 20 November 1991. However, before that determination can be made with scientific certainty, the grave will need to be excavated and a number of bodies will need to be identified using forensic methods and procedures; and
- f. the fact that two bodies bore necklaces with Roman Catholic crosses--one bearing a small metal plate with the inscription «BOG I HRVATI» (God and Croats)--suggests that the grave is likely to contain the remains of Croatsians”. *Ibid*, II Introduction.

near the grave and that the surface distribution of the cases seemed to confirm the earlier conclusion that a mass execution had taken place at that site.<sup>24</sup>

There was some resistance to the proactive role adopted by the members of the Yugoslav Commission by certain Western governments who feared that the investigative nature of the mandate could imperil the ongoing peace negotiations. In September 1993 Fritz Kalshoven resigned from his post as Commission chairperson. According to Michael Scharf, the resignation was in protest at the lack of full political support from major governments.<sup>25</sup> He was apparently particularly irate at the uncooperativeness of the United States and the United Kingdom, being permanent members of the Security Council that voted for the establishment of the Commission. One particular incident is cited in Scharf's book as an example given by Kalshoven to illustrate the lack of support. The United Kingdom was asked by the Commission to supply a combat engineering unit to assist with the exhumation of the Ovčara mass grave. Kalshoven recounts, "Britain simply didn't react to our request".<sup>26</sup> It should be pointed out, however, that notwithstanding the plausibility that the political obstacles faced by the Yugoslav Commission could reasonably have been the main instigation for the first chairperson's resignation, the final report submitted by the Commission to the Security Council stated that Kalshoven resigned for medical reasons.<sup>27</sup>

The Commission acquired a new lease of life after Bassiouni took up the reins. Funds donated to a trust fund established for the Commission in March 1993 became available from August 1993.<sup>28</sup> At the initiative of Bassiouni, a documentation centre and database was established at De Paul University's International Human Rights Law Institute. With a cash-flow secured, the costly business of mass grave exhumation was ostensibly facilitated. The United States, for example, provided \$150,000 to accomplish the exhumation of the mass grave from the Vukovar massacre.<sup>29</sup> This exhumation, however, was ultimately not achieved by the Commission which had suspended work on the site during the winter months; the freezing Croatian winter not being conducive to site excavation. In December 1993,

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<sup>24</sup> *Ibid*, Part Two, I Executive Summary.

<sup>25</sup> Scharf, *Balkan Justice*, (n 16), p.46

<sup>26</sup> Cited in Scharf, *ibid*, p.46.

<sup>27</sup> Final Report of the Commission of Experts, (n 18), B. Composition.

<sup>28</sup> Scharf, *Balkan Justice*, p.45.

<sup>29</sup> *Ibid*, p.47.

the Commission was informed that it was to be terminated at the end of April 1994 and so work on that particular exhumation could not be completed.<sup>30</sup>

In the comprehensive final report submitted by the Commission of Experts to the Security Council, a number of issues and findings were reported, including “mass graves in general and mass grave investigations conducted in Ovčara and Pakracka Poljana”.<sup>31</sup> The final report incorporated 23 annexes, three of which pertained to mass graves. They contained some noteworthy information such as the number of mass graves the Commission had documented, the number of graves in each geographic region, the number of graves by ethnicity of both victim and perpetrator and the number of graves near detention facilities,<sup>32</sup> details which are relevant when establishing the nature and pattern of war crimes, genocide and crimes against humanity. At the end of its mandate in April 1994, the Commission handed over the database it had established to record its findings, including the various details of mass graves, and all of its documents and materials to the Prosecutors Office at the Yugoslav Tribunal. The Office of the Prosecutor commenced its investigations on the basis of the Commission’s material and also used some of the personnel associated with the Commission, thus creating continuity between the functions and efforts of the Commission and of the Yugoslav Tribunal.<sup>33</sup>

The preliminary investigations discussed here were important as they provided compelling support to the allegations that serious atrocities were being carried out during the course of the armed conflicts in the former Yugoslavia. Indeed, the initiation of the Yugoslav Commission has been described as “an extraordinary act”<sup>34</sup> as it was the first occasion since the creation of the International Military Tribunal at Nuremberg that collective action had been taken to form an international body for the purposes of investigating alleged violations of international humanitarian law with a view towards prosecuting those responsible before an international criminal tribunal.<sup>35</sup> Evidence of a medico-legal nature can be very

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<sup>30</sup> *Ibid*, p.48. The exhumation of the Vukovar mass grave was successfully carried out in 1996 by Physicians for Human Rights under the auspices of the International Criminal Tribunal for the former Yugoslavia.

<sup>31</sup> M. C. Bassiouni, ‘The Commission of Experts’, (n 12), 321.

<sup>32</sup> *Ibid*, 333, 334.

<sup>33</sup> Bassiouni, ‘The United Nations Commission’, p.442.

<sup>34</sup> Stover and Ryan, ‘Breaking Bread’, (n 21), 20.

<sup>35</sup> *Ibid*, 20.

powerful when utilised in a forensic capacity. However, any forensic evidence must be able to withstand the demands of a robust criminal justice mechanism such as an international tribunal. The court must be satisfied that the evidence presented by the prosecution in the trial of a defendant goes towards proving guilt beyond a reasonable doubt. In the same vein, forensic evidence submitted by a Defence team must be found to meet the rigorous standards expected in criminal institutions of this nature. When adequately applied, forensic evidence can be seen as a tool to strengthen the fair trial guarantees of criminal proceedings.<sup>36</sup> The Yugoslav Tribunal, therefore, instigated a forensic programme which enabled it to deploy teams either directly or on its behalf in order to conduct medico-legal investigations that met the high standard required for an international criminal trial.

## **B. Forensic Investigations Conducted by the International Criminal Tribunal for the Former Yugoslavia**

The International Criminal Tribunal for the former Yugoslavia was established by the United Nations Security Council in May 1993.<sup>37</sup> The Tribunal has jurisdiction over four categories of crimes: grave breaches of the Geneva Conventions of 1949,<sup>38</sup> violations of the laws or customs of war,<sup>39</sup> genocide<sup>40</sup> and crimes against humanity.<sup>41</sup> The Tribunal has competence to prosecute persons suspected of responsibility for crimes under the jurisdiction of the court committed in the territory of the former Yugoslavia since 1991.<sup>42</sup> As the Tribunal is a sub-organ of the Security Council it has an important feature in that “it imposed a binding obligation on all member States of the United Nations, including those making up the former Yugoslavia, to

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<sup>36</sup> Éadaoin O’Brien, ‘The International Criminal Tribunal for the former Yugoslavia and the investigation of mass graves: Strengthening fair trial guarantees through the application of forensic science’, in Querkin Berisha and Luciana Goisis, eds., *Un Percorso Di Studio Sui Diritti Umani*, (Bergamo: University of Bergamo Press, 2011) (forthcoming).

<sup>37</sup> Pursuant to Resolution 827, UN Doc.S/RES/827 (1993), 25 May 1993.

<sup>38</sup> Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, September 2009, Article 2. Accessed at [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) (last accessed 27 October 2011)

<sup>39</sup> *Ibid*, Article 3

<sup>40</sup> *Ibid*, Article 4

<sup>41</sup> *Ibid*, Article 5.

<sup>42</sup> *Ibid*, Article 1.

comply with the requests, warrants and orders of the Tribunal”.<sup>43</sup> Article 29 of the Yugoslav Tribunal’s statute sets out the duty of States to cooperate with the court. The article, entitled “Co-operation and judicial assistance”, creates an obligation for States to cooperate with the Tribunal in the investigation and prosecution of individuals who are accused of committing serious violations of international humanitarian law. Furthermore, States are required to comply “without undue delay with any request for assistance or an order issued by a Trial Chamber” in a number of circumstances, including the production of evidence.<sup>44</sup> Further strength was given to the requirement of cooperation by the former States of Yugoslavia through the 1995 ‘General Framework Agreement for Peace in Bosnia and Herzegovina’ (Dayton Peace Accords) to which the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia were parties. Article IX of the Agreement required that:

The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the Annexes to this Agreement, or which are otherwise authorized by the United Nations Security Council, pursuant to the obligation of all Parties to cooperate in the investigation and prosecution of war crimes and other violations of international humanitarian law.<sup>45</sup>

In addition, cooperation with the Yugoslav Tribunal was specifically required as outlined in Annex 1 of the Accord on ‘Agreement on the Military Aspects of the Peace Settlement’.<sup>46</sup> The signing of the Dayton Peace Accords facilitated an enlarged role for the Office of the Prosecutor in regard to on site investigations. As reported by the Tribunal to the United Nations General Assembly and the Security Council: “The fieldwork of the Office of the Prosecutor has been greatly enhanced by the signing of the Dayton Accord which gave its staff the freedom of movement

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<sup>43</sup> Graham T Blewitt, ‘The Role of Forensic Investigations in Genocide Prosecutions before an International Criminal Tribunal’ (1997) 39(4) *Medicine, Science & the Law*, 284, 284.

<sup>44</sup> Statute, (n 38), Article 29(2)(b).

<sup>45</sup> ‘The General Framework Agreement for Peace in Bosnia and Herzegovina’ Article IX (14/12/1995), available from the website of the Office of the High Representative and EU Special Representative (OHR) [http://www.ohr.int/dpa/default.asp?content\\_id=379](http://www.ohr.int/dpa/default.asp?content_id=379), (last accessed 27 October 2011).

<sup>46</sup> *Ibid*, ‘Agreement on the Military Aspects of the Peace Settlement, Article X: “The Parties shall cooperate fully with all entities involved in implementation of this peace settlement, as described in the General Framework Agreement, or which are otherwise authorized by the United Nations Security Council, including the International Tribunal for the Former Yugoslavia”.

necessary to carry out investigations in areas which, until then, had been inaccessible”.<sup>47</sup>

Such provisions should have ensured that Tribunal investigators, including forensic experts, had unhindered access to mass grave sites. Compliance with the Tribunal was not always straight-forward, however, and States were not at all times forthcoming in fulfilling their obligations.<sup>48</sup> Not entirely surprisingly, the problem of political opposition to international criminal investigations did not radically diminish when the International Criminal Tribunal for the former Yugoslavia assumed responsibility for investigations including the mass grave exhumations. In both Rwanda and the former Yugoslavia, “regional political considerations and long-held attitudes did not disappear when the conflicts ended. Governments within and outside the conflict zone regularly refused to cooperate with investigators”.<sup>49</sup> Notwithstanding the obstacles the Tribunal investigators encountered in the course of their work, the Yugoslav Tribunal nonetheless completed an impressive forensic programme yielding evidence that has been utilised in numerous trials.

### **(1) Prosecutorial Strategy and Forensic Investigations**

Responsibility for investigation, including medico-legal investigation, rests with the Prosecutor as per Article 16(1) of the Tribunal’s statute.<sup>50</sup> The Prosecutor has powers to act independently and does not require further authorisation to go about this work.<sup>51</sup> The relevant provision in the statute is Article 18 which provides that:

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental

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<sup>47</sup> Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc.A/51/292- S/1996/665, 16 August 1996, summary.

<sup>48</sup> Mark B. Harmon and Fergal Gaynor, ‘Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings’ (2004) 2 *Journal of International Criminal Justice*, 403, 409.

<sup>49</sup> Raymond McGrath, ‘Problems of Investigations into War Crimes and Crimes Against Humanity During and After Ethnic Conflict’, in Bassiouni, *Post –Conflict Justice*, (n 13), pp.893-90, p.894.

<sup>50</sup> Article 16(1) ICTY Statute: “The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991”.

<sup>51</sup> ICTY – UNICRI, *ICTY Manual on Developed Practices*, (Turin: United Nations Interregional Crime & Justice Research Institute, 2009), p.11.

organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.<sup>52</sup>

Richard Goldstone, the first chief Prosecutor at the Tribunal, organised the Prosecutor's office into six sections, one of which was an investigation section composed of investigators, analysts, and interpreters. Additionally, field offices were established in Balkan cities including Belgrade, Sarajevo and Zagreb in order to provide support to investigative teams and to liaise with local governments.<sup>53</sup> The Tribunal was selective in the sites it exhumed, choosing where to excavate in line with a prosecutorial strategy. Indeed, for the Tribunal, it was imperative the exhumations generated substantial evidence, therefore, as reported in the Tribunal's fourth annual report detailing activity from 1 August 1996 to 31 July 1997, they "were only conducted at sites where it was believed significant evidence could be obtained to support indictments or to provide evidence in support of future indictments".<sup>54</sup>

## **(2) The Forensic Programme**

The four objectives of the exhumation programme as identified by the Tribunal were:

- To obtain evidence regarding the identity of victims killed during the conflict;
- To establish the circumstances and causes of death;
- To link primary and secondary mass graves;
- To reveal attempts to cover up the crimes.<sup>55</sup>

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<sup>52</sup> Article 18 ICTY Statute.

<sup>53</sup> Scharf, *Balkan Justice*, (n 16), p.85.

<sup>54</sup> Fourth Annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc.A/52/375- S/1997/729, 18 September 1997, at para. 64.

<sup>55</sup> ICTY – UNICRI, *ICTY Manual*, (n 51), p.17.

The exhumation programme at the Yugoslav Tribunal commenced in July 1996<sup>56</sup> and largely ceased in 2001, with only a residual forensic programme remaining.<sup>57</sup> The modus operandi for exhuming the mass graves varied; initially, work was conducted by external agencies such as non-governmental organisations and specialists donated by States, with Tribunal staff in attendance. Over time, the Tribunal developed internal forensic capacity. The 2009 manual prepared by the Yugoslav Tribunal and the United States Interregional Crime and Justice Research Institute (UNICRCI) which provides an overview of the practices established at the Tribunal highlights that exhumations are expensive and complex exercises and it found that the “most cost-effective exhumations [were] those conducted by external agencies with tribunal staff in attendance”.<sup>58</sup>

As the conflict was still ongoing at the time the International Criminal Tribunal for the former Yugoslavia was established, it was initially unsafe to deploy investigators into the field. As a precursor to field missions, protection had to be established to enable the Tribunal staff to safely conduct investigations and operate the forensic programme.<sup>59</sup> Initial exhumations became possible after a 1996 agreement between the Tribunal and the NATO ‘Implementation Force’ in Bosnia and Herzegovina (IFOR) ensured the security of investigation teams for the duration of their on-site missions on territory under Bosnian Serb control in Republika Srpska. This development was regarded as critical by the Prosecutor’s Office as “access to mass grave sites gave the Prosecutor the opportunity to integrate the evidence obtained from exhumations into his investigate strategy”.<sup>60</sup>

The constructive relationship that developed between the Tribunal and NATO forces did appear to suffer from some teething problems, however. Gary Jonathan Bass contends that IFOR was “reluctant to be dragged into war crimes investigations,

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<sup>56</sup> Third Annual Report, (n 47), at para.79

<sup>57</sup> Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/57/379-S/2002/985, 4 September 2002, at para.223.

<sup>58</sup> ICTY – UNICRI, *ICTY Manual*, (n 51), p.17. The retention of the services of outside agencies is permitted under the rules of procedure and evidence. In accordance with Rule 39 of the rules of procedure and evidence of the Yugoslav Tribunal, which pertains to the conduct of investigations, the prosecutor is authorised to “(i)...collect evidence and conduct on-site investigations” and he or she may in fulfilment of this task, *inter alia*, “(iii) seek...the assistance of ...any relevant international body”.

<sup>59</sup> ICTY – UNICRI, *ICTY Manual*, *ibid*, p.12.

<sup>60</sup> Third Annual Report, (n 47), pp.25, 26.

most notably the excavation of mass graves”.<sup>61</sup> IFOR, he continues, “preferred not to expose its soldiers to fields that might be hiding mines, nor to antagonize the Bosnian Serbs by digging up evidence of their worst atrocities”.<sup>62</sup> The mass graves became a “flashpoint” between chief Prosecutor, Richard Goldstone, US Secretary of State, Madeleine Albright, and John Shattuck, the Assistant Secretary of State for Democracy, Human Rights and Labor under Bill Clinton, on the one hand, and IFOR, on the other. IFOR command was adamant that they did not have the capacity to guard grave sites or provide security for the teams exhuming the graves.<sup>63</sup> Albright continued to insist on NATO cooperation and IFOR eventually drew up lists of sites to monitor several times daily, both directly and through remote technology. From the military point of view though, the investigators were not easy to work with. Bass provides a quote from an IFOR military commander painting the Tribunal and its investigators in a less than complementary light:

There was [...] a lack of clarity on which sites the tribunal was interested in. And they had a lack of specificity as to *this* site, *this* piece of ground right here, this round intersection or this soccer field are the fields and we want them watched. And they could not produce a list and a location...[T]hey were very difficult to work with, because they were not well coordinated in their efforts. They didn't know exactly where they wanted to go, and they wanted to kind of explore. They would hear a rumour and suddenly decide they wanted to go check out an area. We'd explain to them, we don't operate on an ad hoc basis, that if they want to go look at an area, we needed about 24 hours to brief our soldiers and make a reconnaissance, organize the security, and ...coordinate with the local police authorities.<sup>64</sup>

In April 1996, Tribunal investigators arrived at Srebrenica but the American IFOR commanders refused to clear the sites they wanted to excavate of land mines. The Tribunal, therefore, sought the assistance of a private humanitarian minesweeping organisation, the Norwegian Peoples Aid, to de-mine the relevant areas and they carried out this vital work in July 1996. IFOR ultimately agreed to secure the area for the forensic team during the day, however, when the Tribunal investigators left at the

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<sup>61</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton-Oxford: Princeton University Press, 2000), p.253.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, pp.253-254.

end of the working day, so too did IFOR.<sup>65</sup> This created a major problem as the mass grave was effectively a crime scene which was now open to sabotage endangering the integrity of the physical evidence.<sup>66</sup> Two of the forensic experts working on the exhumations, William Haglund and John Gerns, had to take it upon themselves to sleep by the site at night in order to safeguard it.

Another incident that occurred in 1996 demonstrates the destructive consequences that can result when military forces become overly zealous in their assistance to the exhumation project. The excavation of the Ovčara grave in Croatia was scheduled to commence in early August 1996. The grave had been discovered by Clyde Snow in October 1992, after which UNPROFOR had cordoned off the area and posted Russian peacekeepers to guard it. On 7 May 1996, the Yugoslav Tribunal sent a letter to General Jacques Klein, the new United Nations administrator in Vukovar, with a request that the grave and the surrounding area be swept for mines. Klein, “unlike his more reluctant IFOR counterparts in Bosnia, ordered his ordnance team, which happened to have a South African mine sweeper to hand, to sweep the site, flattening all in its path”,<sup>67</sup> thus obliterating all the surface markers of the grave. Fortunately, a detailed map of the site had been made in 1992 and the forensic team succeeded in relocating the mass grave for exhumation.<sup>68</sup>

The forensic programme was advanced in the second half of 1996 with a team of forensic experts exhuming five mass graves between July and November. Four of the exhumations took place in Bosnia and Herzegovina with a fifth grave site excavated at Ovčara, near Vukovar, in Croatia.<sup>69</sup> These first exhumations were conducted by Physicians for Human Rights at the invitation of the Office of the Prosecutor. To give a sense of the scale of expert personnel involved in such an operation, over the five months of the exhumations by the Physicians for Human Rights mission in the Balkans, in total over 90 scientists from 19 countries were deployed to assist.<sup>70</sup> The excavations of the Bosnian graves proved extremely valuable in corroborating

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<sup>65</sup> *Ibid*, p.254.

<sup>66</sup> Eric Stover and Gilles Peress, *The Graves: Srebrenica and Vukovar* (Zurich-Berlin-New York: Scalo, 1988), p.148

<sup>67</sup> *Ibid*, p.152.

<sup>68</sup> *Ibid*, pp.151-153.

<sup>69</sup> Fourth Annual Report, (n 54), at paras 65-67.

<sup>70</sup> Stover and Ryan, ‘Breaking Bread’, (n 21), 21. Members of the Argentine and Guatemalan forensic teams were among the personnel working on the Balkan investigations, *ibid*.

witness testimony divulging details of the execution of hundreds of male civilians who had surrendered to Bosnian Serb soldiers following the Serb takeover of Srebrenica in July of 1995. The claims made by Bosnian Serbs that these mass graves held the bodies of combatants killed in the course of legitimate military engagement was contradicted by the forensic findings of ligatures around the wrists of many of the men, of blindfolds and close range bullet wounds,<sup>71</sup> objects and wounds inconsistent with battle-field deaths. By the end of November, the forensic teams, under the leadership of William Haglund, had recovered approximately 200 bodies from the Ovčara grave and over 500 from the four Bosnian sites. Each body was electronically mapped to its location in the grave, then placed in a white body bag and stored in a refrigeration unit before being transported to a mortuary. The bodies from the Ovčara site were taken under United Nations guard to the medical school at the University of Zagreb. The remains from the Bosnian graves were removed to the town of Kalesija where they were autopsied by teams of forensic pathologists and anthropologists in a makeshift morgue set up in an old garment factory.<sup>72</sup> Post-mortem examinations were conducted on the remains recovered from the mass graves to determine the cause and manner of death and also to establish the victim's demographic profile.<sup>73</sup>

The exhumation project was delayed for the first six months of 1997 due to funding shortages. After an appeal by the Prosecutor, United Nations Member States donations valued at a total of \$2.2 million enabled the programme to recommence in early July. Three sites were exhumed, all in Bosnia-Herzegovina.<sup>74</sup> By 1998, there were ten investigative teams operating under the direction of the Office of the Prosecutor, including one team dedicated to conducting enquiries pertaining to Kosovo. Reports of serious violations of international humanitarian law being committed in Kosovo in March 1999 necessitated "urgent and unprecedented action"<sup>75</sup> by the Prosecutor in order to investigate alleged criminal activity being reported by the refugees that were fleeing the territory. Thus the exhumation

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<sup>71</sup> Stephen Cordner and Helen McKelvie, 'Developing standards in international forensic work to identify missing persons' (2002) 84(848) *International Review of the Red Cross*, 867, 873.

<sup>72</sup> Stover and Ryan, 'Breaking Bread', (n 21), p.23.

<sup>73</sup> Fourth Annual Report, (n 54), at paras. 65-67. Following the post-mortem examinations at both locations the remains were then transferred to the local authorities, Stover and Ryan, 'Breaking Bread', (n 21), 23.

<sup>74</sup> Fourth Annual Report, at para. 119.

<sup>75</sup> Sixth Annual Report, (n 2), at para. 126.

programme commenced in Kosovo in 1999. Tribunal investigators were deployed under the protection of the NATO ‘Kosovo Force’ (KFOR). The work was considered significantly different from previous operations in Bosnia and Herzegovina. According to the Yugoslav Tribunal, the sites exhumed were, by and large, those that the local community had knowledge of, and the identities of the decedents buried within were known.<sup>76</sup> As elucidated by members of the Danish-Swedish forensic teams who carried out autopsies on the remains recovered from some of the grave sites, in the majority of cases they processed, “the identity of the deceased was known prior to the autopsy, either by a name tag on the body, in the coffin, on the grave, or because the body had been buried by the relatives who aided in the exhumations”.<sup>77</sup> Nonetheless, individual identification of the remains was of secondary importance for the Tribunal and, as per prosecution instructions, the principle objective of the post-mortem examination was to establish the cause and manner of death.<sup>78</sup>

The forensic exhumations also differed in Kosovo in that entire forensic teams were donated by a significant number of countries and, thus, there was a larger and more diverse concentration of forensic activity in Kosovan territory during the period of investigation. It was considered necessary for the Prosecutor to seek assistance from United Nations Member States due to “[t]he extent of the scale of alleged atrocities”.<sup>79</sup> By 31 July 1999 a minimum of eight countries had provided teams with a further three making preparations to send teams to Kosovo. As a result, it was “possible for the Prosecutor’s investigators, with the assistance of the forensic teams, to record and document the level of criminal activity”<sup>80</sup> that had occurred in that country. The forensic examination of crime scenes and exhumation of mass graves in Kosovo in 1999 was carried out entirely by gratis personnel who worked over a period of four months. Selected sites were given priority “based on a number of

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<sup>76</sup> Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc.A/55/273-S/2000/777, 7 August 2000, at para. 180.

<sup>77</sup> Susan Sprogø-Jakobsen, Anders Eriksson, Hans Petter Hougen, Peter J. T. Knudsen, Peter Leth and Neils Lynnerup, ‘Mobile Autopsy Teams in the Investigation of War Crimes in Kosovo in 1999’ (2001) 46(6) *Journal of Forensic Science*, 1392, 1392.

<sup>78</sup> *Ibid.*

<sup>79</sup> Sixth Annual Report, (n 2), at para. 126.

<sup>80</sup> *Ibid.*, at para. 126. According to Sprogø-Jakobsen *et al*, teams from the following countries took part in the forensic investigations of suspected war crimes in the summer and autumn of 1999: Austria, Belgium, Canada, Denmark, France, Germany, Iceland, The Netherlands, Spain, Sweden, UK and the USA, Sprogø-Jakobsen *et al*, ‘Mobile Autopsy Teams’, (n 77), 1392.

factors, including the *Milošević* indictment, exposed bodies, alleged numbers, personnel security and accessibility of the sites”.<sup>81</sup> The forensic programme in Kosovo was concluded in 2000. During the two year period in which excavations were carried out for the Tribunal, in the region of 4,000 bodies or body parts were exhumed.<sup>82</sup>

### **(3) The Scope and Scale of Site Excavation**

Mass murders of the scale witnessed in the former Yugoslavia can result in the creation of multiple mass grave sites related to the same incident as perpetrators seek to conceal the evidence of their crimes. Indeed, a documented phenomenon from the Balkan conflicts was the unearthing of a number of mass graves by the offenders and the reburial of the human remains of the victims into secondary and tertiary graves, as referred to in Chapter II. Thus, many of the exhumations were not considered as isolated crime scene investigations but rather as part of a large scale project linking the mass execution sites, burial sites and the perpetrators over a sizeable period of time and space. To illustrate the magnitude and dimension of such an operation, let us consider the exhumations that were performed by Tribunal investigators and the forensic teams in Eastern Bosnia and Herzegovina in relation to the Srebrenica mass killing.

After the fall of the Srebrenica “safe area” in Bosnia and Herzegovina in 1995, thousands of Muslim men and boys surrendered to the Bosnian Serb Army (VRS) at a village close to Srebrenica called Potočari or were captured or surrendered after fleeing through the woods from the enclave.<sup>83</sup> The men were taken to a series of

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<sup>81</sup> Seventh Annual Report, (n 57), at para. 180.

<sup>82</sup> Eighth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc.A/56/352-S/2001/865, 17 September 2001, at para.191.

<sup>83</sup> The fall of Srebrenica is documented in a detailed report of the Secretary General of the United Nations, which was prepared pursuant to a resolution of the General Assembly, ‘Report of the Secretary-General pursuant to General Assembly resolution 53/35, The fall of Srebrenica’, UN Doc.A/54/549, 15 November 1999, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/348/76/IMG/N9934876.pdf?OpenElement> (last accessed 27 October 2011). The first case at the Yugoslav Tribunal to prosecute the Srebrenica murders was the trial of *Prosecutor v. Radislav Krstić*, Case No. IT-98-33. As this was the first case heard by the Tribunal concerning Srebrenica, the Prosecution had to judicially establish that genocide had occurred, Caroline Alyce Tyers, ‘Hidden Atrocities: The Forensic Investigation and Prosecution of

detention points and over a number of days were systematically executed by soldiers of the VRS. The number of men murdered in this manner numbered in the region of 8,000, and news of the killings and burials of the Bosnian Muslims came to international attention. In an attempt to eliminate evidence of their crimes, units of the VRS “participated in a second attempt to conceal the crimes by digging up the bodies from the initial mass graves and transferring them to secondary graves”.<sup>84</sup>

A 2000 report prepared for the International Criminal Tribunal for the former Yugoslavia by Dean Manning, an investigator for the Office of the Prosecutor, summarises the forensic findings of the experts working on the investigations of the Srebrenica graves and execution sites between 1996 and 1999.<sup>85</sup> A second report summarising the forensic evidence gathered in 2000 was also prepared for the Tribunal by Manning.<sup>86</sup> The basic objectives of the Srebrenica exhumations project were identified by Manning as consisting of the following: “to corroborate victim and witness accounts of the massacres; to determine an accurate count of victims; to determine cause of death and time of death; to determine the identity of the victims and any link to the missing from Srebrenica; to determine the gender of the victims; to identify any links between primary mass graves and secondary mass grave sites; to identify links to the perpetrators”.<sup>87</sup>

In the period between the fall of Srebrenica and the writing of the first report, 39 mass graves relating to the atrocity were identified by Tribunal investigators of which 17 were exhumed. A minimum of 1883 individuals were recovered from these

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Genocide’, PhD thesis, University of Tennessee: TRACE – Tennessee Research and Creative Exchange, (2009), p.8.

<sup>84</sup> Dean Manning, ‘Srebrenica Investigation: Summary of Forensic Evidence – Execution Points and Mass Graves.’, ICTY Evidence Report, Unpublished document Property of the United Nations, ICTY, 16 May 2000, available at [http://www.domovina.net/archive/2000/20000516\\_manning.pdf](http://www.domovina.net/archive/2000/20000516_manning.pdf) (last accessed 27 October 2011).

<sup>85</sup> *Ibid.*

<sup>86</sup> ‘Srebrenica Investigation. Summary of Forensic Evidence Mass Graves Exhumed in 2000, Lazete 1, Lazete 2C, Ravince, Glogova 1.’ ICTY Evidence Report, Unpublished document Property of the United Nations, ICTY, February 2000.

<sup>87</sup> *Prosecutor v. Slobodan Milošević*, Case No.IT-02-54-T, Witness Statement – Investigations Team Leader Dean Paul Manning, 24 November 2003, at para.9 available at <http://www.slobodan-milosevic.org/documents/P642-1a.pdf> (last accessed 27 October 2011) .

graves, along with unconnected body parts numbering into the thousands.<sup>88</sup> It was determined after post-mortem examination that at least 1424 individuals died from gunshot wounds,<sup>89</sup> and at least 407 ligatures and 270 blindfolds were located on or with the bodies. Several of the mass graves were located due to aerial images provided to the Yugoslav Tribunal by United States' authorities, which captured scenes in which the graves were visible at the time of, or soon after, their creation. The imagery also provided information on the location and creation dates of some of the secondary mass graves. Evidence was located during the exhumations that indicated the remains were those of some of the missing from Srebrenica. Personal effects found on the bodies and in the graves included identity documents and items of Muslim religious affiliation such as copies of Koranic verses and Muslim amulets. Dutch newspapers, ration packs and other personal items which suggested an immediate connection to the Dutch Battalion of Peacekeepers, who had been stationed at Srebrenica and Potočari were also uncovered.<sup>90</sup> An investigation of this magnitude produces a vast quantity of material and documentation to be used as evidence. Each exhumed body was autopsied and examined by a forensic pathologist and in many cases also by a forensic anthropologist. In the region of 50,000 pages of autopsy reports and more than 30,000 photographs were produced from these examinations. Approximately 11,000 physical exhibits, excluding bodies and body parts, were collected and a vast quantity were analysed by forensic experts.<sup>91</sup>

In 2001, the Office of the Prosecutor implemented a new strategy relating to mass grave exhumations. To this end it carried out exhumations at one Kosovan site and

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<sup>88</sup> In addition to the estimated 1883 minimum number of individuals recovered from the exhumed graves, a further minimum of 2571 individuals were believed at that point to be contained in probed, but unexcavated, graves known to the International Criminal Tribunal for the former Yugoslavia. The total number of individuals accounted for by Yugoslav Tribunal at the time the report was produced was, therefore, approximately 4454. Dean Manning, 'Srebrenica Investigation', (n 84), p.3.

<sup>89</sup> The report details the following data on sex and cause of death for the remains recovered from the mass graves from the period 1996 through 2009:

“SEX: • 1656 individuals were determined to be male; • 212 individuals were undetermined; • 1 individual was determined to be female

CAUSE OF DEATH: • 1424 individuals died of gunshot wounds; • 169 individuals died of probable or possible gunshot wounds; • 5 individuals died of shrapnel injuries; • 4 died of other causes (trauma, possible suffocation); • 1374 individuals died of undetermined causes”. *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

monitored 9 other sites throughout the former Yugoslavia.<sup>92</sup> The Prosecutor determined during 2001 that the exhumations undertaken by her Office would largely cease that year and, thereafter, only a residual forensic capacity should remain.<sup>93</sup> Although the forensic field activities substantively ended a decade ago, the forensic evidence gathered in the course of these investigations continues to be utilised in ongoing proceedings before the Tribunal to this day.<sup>94</sup> In addition to the prosecution of suspected war criminals by the Yugoslav Tribunal, domestic prosecutions of war criminals have been conducted in the national courts of the Balkan States, as rule of law projects have re-established effective and functional judiciaries. Forensic evidence has been relied upon in a number of such trials.

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<sup>92</sup> Ninth Annual Report, (n 57), at para. 210.

<sup>93</sup> *Ibid*, at para. 223.

<sup>94</sup> The most recent judgement from the Yugoslav Tribunal in which forensic evidence is cited is in the case of *Prosecutor v. Momčilo Perišić*, Case No.IT-04-81, Trial Judgement of 6 September 2011. Forensic evidence from mass grave exhumation or post-mortem examination of the victims' remains has also been relied on, to various degrees, in the following cases: *Prosecutor v. Drazen Erdemovic*, Case No.IT-96-22-T, Sentencing Judgement of 29 November 1996; *Prosecutor v. Goran Jelusic*, Case No.IT-95-10-T, Trial Judgement of 14 December 1999; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No.IT-95-14/2/T, Trial Judgement of 25 February 2001; *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgement 2 August 2001, *Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac*, Case No.IT-98-30/1, Trial Judgement of 2 November 2001; *Prosecutor v. Mitar Vasiljevic*, Case No.IT-98-32-T, Trial Judgement of 29 November 2002; *Prosecutor v. Slobodan Milosovic*, Case No.IT-02-54-T, Witness Statement – Investigations Team Leader Dean Paul Manning, 24 November 2003, available at <http://www.slobodan-milosevic.org/documents/P642-1a.pdf> ; *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, Case No.IT-02-60-T, Trial Judgement of 17 January 2005; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Trial Judgement of 1 September 2004; *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No.IT-03-66-T, Trial Judgement of 30 November 2005; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Trial Judgement of 27 September 2006; *Prosecutor v. Milan Martić*, Case No.IT-95-11-T, Trial Judgement, 12 June 2007; *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No.IT-95-13/1-T, Trial Judgement of 27 September 2007; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, 12 December 2007; *Prosecutor v. Rasim Delić*, Case No.IT-04-83-T, Trial Judgement of 15 September 2008; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No.IT-98-32/1-T, Trial Judgement of 20 July 2009; *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, Case No. IT-05-87-T, Trial Judgement of 26 February 2009; *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević*, Case No.IT-05-88-T, (Public Redacted) Trial Judgement Volume I, 10 June 2010. Forensic evidence from exhumations and forensic post-mortem examinations conducted by national institutions in the Balkans has also been presented before the Yugoslav Tribunal. See, for example, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No.IT-04-84-T, Trial Judgement of 3 April 2008. The Trial Chamber was less than satisfied with the evidentiary standard in this case, however, which lead it to a conclusion that: “The evidence before the Trial Chamber with regard to perpetrators and circumstances of many of the alleged murders is vague, inconclusive, or simply non-existent”, *ibid*, at para.147.

### **C. Synergising Forensic Investigations with Humanitarian Mandates**

As indicated previously in this thesis, outside of a criminal justice context, the motivation for organising exhumations of mass graves holding the remains of victims of armed conflict frequently fulfils a humanitarian mandate. Exhumations are carried out to recover and identify victim's remains, and return them to their family and community who can then conduct culturally appropriate mortuary rituals thus providing a form of closure for survivors. As outlined in Chapter I, international humanitarian law delineates a number of obligations that parties to a conflict are required to adhere to regarding the appropriate treatment of the dead. These are responsibilities of the State, although the State is not precluded from seeking the assistance of non-governmental organisations in upholding these particular international humanitarian law duties. International criminal tribunals exhume mass graves with the express purpose of finding evidence that provides a nexus between the charges listed in an indictment, and the actions of those accused of committing crimes under the jurisdiction of the courts. Therefore, the purpose of humanitarian excavations and the purpose of criminal investigations may appear to stand in opposition. However, the two overall objectives of evidentiary motivated investigations versus humanitarian searches are not necessarily mutually exclusive and both can be fulfilled in a complementary fashion. The efforts required to search for, locate and recover these remains may overwhelm local capacity, particularly in circumstances where the national medico-legal system is rudimentary or has been disrupted due to the conflict. Through its investigatory activities, tribunals can play a role in fulfilling some of the obligations towards the deceased, in particular in the search for the dead and their subsequent identification. The International Criminal Tribunal for the former Yugoslavia has facilitated the recovery of human remains from the Yugoslav conflict in a number of ways.

First, the Tribunal has cooperated with organisations functioning on the ground in the region and has established a reciprocal relationship that has satisfied some of the needs of both the Tribunal and the humanitarian organisations working on

identifying the missing. A number of dedicated organisations or offices have been established in the former Yugoslavia to operate under a purely humanitarian mandate to recover, identify and repatriate the remains of the war victims to their surviving families and communities. Commissions on Missing Persons were established throughout the Balkans, some under the auspices of major international organisations. In Kosovo, an Office on Missing Persons and Forensics was established as part of the United Nations Mission in Kosovo (UNMIK) with the task of determining the whereabouts of missing persons from the war.<sup>95</sup> The European Union Rule of Law Mission in Kosovo (EULEX) operates an Office on Missing Persons and Forensics and conducts exhumations in order to retrieve remains for humanitarian purposes. This office coordinates with the government of Kosovo on the location of mass graves and missing persons with the express aim of achieving identifications and is tasked with obtaining information from Serbia regard possible mass graves in Kosovo from the conflict in 1998-1999.<sup>96</sup>

Prominent in the region in fulfilling a role to ensure the cooperation of governments in the location and identification of the missing is the humanitarian organisation the International Commission on Missing Persons (ICMP). The ICMP was established in 1996 at the initiative of the United States President Bill Clinton at the G-7 Summit in Lyon France, and it utilises DNA, as well as more traditional identification techniques, in the identification of large numbers of the war missing.<sup>97</sup> The Tribunal has been able to utilise information compiled by the ICMP through its exhumation and identification work in order to calculate statistical data on the missing and dead from areas in the Balkans, notably those related to the fall of Srebrenica.<sup>98</sup> The

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<sup>95</sup> Jose Pablo Baraybar, 'When DNA is Not Available, Can We Still Identify People? Recommendations for Best Practice' (2008) 53(3) *Journal of Forensic Science*, 533, 533.

<sup>96</sup> 'EULEX co-ordinates with Kosovo government on missing persons', SETimes.com, 20 October 2009, available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/newsbriefs/setimes/newsbriefs/2009/10/20/nb-09](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/newsbriefs/setimes/newsbriefs/2009/10/20/nb-09), (last accessed 27 October 2011).

<sup>97</sup> International Commission on Missing Persons, <http://www.ic-mp.org/>, (last accessed 27 October 2011). For an account of the search for the remains of the men missing following the Srebrenica massacre and the use of DNA in this endeavour see further, Sarah E. Wagner, *To know where he lies: DNA technology and the search for Srebrenica's missing* (California: University of California Press, 2008).

<sup>98</sup> Helge Brunborg, Ewa Tabeau and Arve Hetland, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia, *Missing and Dead from Srebrenica: The 2005 Report and List, Expert Report for the Case of VUJADIN POPOVIĆ et al. (IT-05-88)*, 16 November 2005, available at [http://www.icty.org/x/file/About/OTP/War\\_Demographics/en/popovic\\_srebrenica\\_050916.pdf](http://www.icty.org/x/file/About/OTP/War_Demographics/en/popovic_srebrenica_050916.pdf) (last accessed 27 October 2011).

Yugoslav Tribunal has also utilised lists of missing persons compiled by Physicians for Human Rights.<sup>99</sup>

Although the Tribunal is concerned primarily with the examination of bodies for forensic purposes, and identification of decedents is not necessarily a component of the Tribunal's investigations, there is not always a clear-cut dichotomy between forensic and humanitarian needs. This can be seen in the trial judgement of the *Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin* case. In reference to the Ovčara grave referred to above, which was exhumed on behalf of the Tribunal in August 1996, it was indicated that the exhumation and the autopsies of the bodies were carried out by both international and domestic experts. Whilst the exhumation was conducted under the authority of the Tribunal, representatives of the Croatian and Yugoslav government were also present during the site excavation and the autopsies. In addition, several other international organisations, including the European Community Monitoring Mission, the Organization for Security and Co-operation in Europe, and the International Commission for Missing People participated also in the exhumation.<sup>100</sup>

Following the exhumation of the bodies, they were transported to the Institute of Forensic Medicine in Zagreb, where the post-mortem examinations were carried out by international forensic experts, under the monitoring of the Deputy Head of the Institute of Forensic Medicine in Croatia, Dr. Davor Strinović, and a member of the Republic of Croatia Government Commission for Detainees and Missing Persons. The international experts were working according to a specific mandate; their primary task was to determine the cause of death in each case.<sup>101</sup> The forensic team conducted the autopsies "according to applicable Croatian requirements and in accordance with international standards and described all their findings, including findings that may not have been linked directly to the cause of death but may have had relevance to the process of identification".<sup>102</sup> The process of identification began after the autopsies were completed, and in 1997 the Commission for Missing Persons

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Trial Judgement 27 September 2007, at para.492.

<sup>101</sup> *Ibid.*, at para. 493.

<sup>102</sup> *Ibid.*, at para.493.

“took custody of the bodies exhumed at the Ovčara mass grave in order to carry out this task”.<sup>103</sup>

International organisations such as the ICRC have highlighted the imperative to retrieve the remains of the dead for reasons other than criminal justice requirements, that is, for the social, psychological and legal needs of the deceased’s families and communities and have instigated important programmes directed towards body recovery during periods of armed conflict and other mass casualty crises.<sup>104</sup> The work of the ICRC on reuniting families separated by conflict and disasters assists families in ascertaining what happened to their missing loved ones, the fulfilment of this right to know thus alleviating the anguish of uncertainty.<sup>105</sup> For the former Yugoslavia, the ICRC gained access to information gathered by the Yugoslav Tribunal that concerned closed cases or was not being used for trial purposes. The ICRC was able to analyse the information in order to select useful data for the clarification of the fate of missing persons, particularly “indications of the locations of remains, lists of persons presumed dead and documentation on alleged grave sites”.<sup>106</sup> Conversely, the Tribunal was able to utilise data compiled by the ICRC on missing persons and the deceased. Missing person lists have been described as “an important component of the source material acquired and used by the OTP in all stages of [its] work, i.e. in investigation, trial preparation, trial and even post-trial (i.e. appeal) stage, and are compared with other OTP sources related to victims of the IHL violations in question”.<sup>107</sup>

During the course of the investigatory phase, the lists are scrutinised for potential leads in connection with victims and incidents. The lists are also evaluated to

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<sup>103</sup> *Ibid*, at para.496.

<sup>104</sup> Morris Tidball-Binz, ‘Managing the dead in catastrophes: guiding principles and practical recommendations for first responders’ (2007) 89(866) *International Review of the Red Cross*, 421, 442.

<sup>105</sup> International Committee of the Red Cross, ‘Reuniting families separated by conflict and disasters’ 29 October 2010, available at <http://www.icrc.org/eng/what-we-do/reuniting-families/overview-reuniting-families.htm>, (last accessed 27 October 2011).

<sup>106</sup> Monique Crettol and Anne-Marie La Rosa, ‘The missing and transitional justice: the right to know and the fight against impunity’ (2006) 88(862) *International Review of the Red Cross*, 355, 359.

<sup>107</sup> Ewa Tabeau, ‘ICRC lists of missing persons as part of the OTP information system on victims of IHL violations committed in the 1990s conflict in the former Yugoslavia’, in : María Teresa Dutli and Noreen Majeed (eds.), *Report of the Second Universal Meeting of National Committees on International Humanitarian Law, Geneva, 10-21 March 1997, Legal Measures and Mechanisms to Prevent Disappearances, to Establish the Fate of Missing Persons, and to Assist Their Families* (Geneva: ICRC, September 2007), p.162.

ascertain crime patterns. The lists are further cross-referenced with associated sources on victims in order to establish the numbers of missing also reported dead and the circumstances of the deaths. Regarding the indictments, names of the missing have been frequently included as victims, based on the outcome of the investigation stage. Records of missing persons may be presented to the court during the trial phase as confirmed victims of incidents outlined in the indictment, as corroborated by other evidentiary sources. Missing person lists have also been used during the trial and appeal stage as a reference source for victims names cited by witnesses, documents or by the Defence. ICRC lists of missing persons from Bosnia and Herzegovina have been valuable in trials at the Yugoslav Tribunal particularly in relation to Srebrenica cases such as *Krstić*,<sup>108</sup> *Blagojevic et al.*,<sup>109</sup> *Vujadin Popovic et al.*<sup>110</sup> and the *Slobodan Milosevic*<sup>111</sup> trial.<sup>112</sup> Individual cases from missing person lists were cross-referenced with cases reported in other sources that related to the same incidents, with the aim of ascertaining whether the missing individuals could be confirmed as victims or as survivors. The intention of this exercise was that the end result would mean an increase in “the quantity and quality of the OTP information about individual cases”.<sup>113</sup> This was required for “trial purposes in the first place, but at the same time the end result of these searches can be beneficial to the families of the missing who can learn from these results about the fate of the missing”.<sup>114</sup>

Second, although the International Criminal Tribunal for the former Yugoslavia only conducted exhumations for evidentiary purposes, these activities contributed to the humanitarian endeavours to locate and identify remains. Even though the forensic activity was initially conducted as part of a criminal investigation, exhumations uncovered valuable information which the national authorities and humanitarian organisations operating in the region have been able to utilise in the search for the dead and missing. In some cases, suspected grave sites transpired not to contain human remains, or were considered irrelevant to the Tribunal’s on-going

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<sup>108</sup> *Krstić*, (n 83).

<sup>109</sup> *Prosecutor v. Vidoje Blagojevic and Dragan Jokic*, Case No.IT-02-60-T.

<sup>110</sup> *Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević*, Case No.IT-05-88-T.

<sup>111</sup> *Prosecutor v. Slobodan Milosevic*, Case No.IT-02-54-T.

<sup>112</sup> Ewa Tabeau, (n 107), p.168.

<sup>113</sup> *Ibid.*, p.163.

<sup>114</sup> *Ibid.*

investigations, however, the site excavations nonetheless “served a valuable purpose because they helped to inform relatives that their loved ones were not in the place they were thought to be”.<sup>115</sup>

Another manner in which the Tribunal has contributed to national efforts to locate and identify the missing is through the transfer of specialised material to relevant organisations in the Balkans. When the forensic programme of the Tribunal was drawn to a close in accordance with the initial completion strategy of the Tribunal, valuable resources were transferred to organisations working in the area:

In support of initial completion strategy activities, the General Services Section planned and organized the orderly closure of the forensics programme of the Office of the Prosecutor and the Tribunal’s field offices in Skopje, Macedonia and Pristina, Kosovo. Surplus assets, including special equipment and vehicles, were transferred to agencies with compatible mandates such as UNMIK, the International Commission on Missing Persons and the European Union Police Mission in Bosnia and Herzegovina.<sup>116</sup>

However, satisfactorily fulfilling the needs of the criminal justice system and the needs of the families can pose some challenges and it can be difficult to strike a balance between both sets of interests.<sup>117</sup> Exploring the friction between the requirements of victims’ families and war crime tribunals, Eric Stover and Rachel Shigekane, have highlighted that “[i]deally, the relationship between the families of the missing and international war crimes tribunals should be symbiotic, benefiting both the relatives *and* the courts but, in reality, it rarely is”.<sup>118</sup> Discussing exhumations relating to the graves of Srebrenica the authors convey that:

Rather than initiating or encouraging another international entity to make a long-term effort to identify the Srebrenica victims, the OTP opted to turn over the remains to local forensic scientists who lacked both the resources

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<sup>115</sup> ICTY – UNICRI, *ICTY Manual*, (n 51), p17.

<sup>116</sup> Eleventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc.A/59/215.S/2004/627, 16 August 2004, at para. 388.

<sup>117</sup> Eric Stover and Rachel Shigekane, ‘The missing in the aftermath of war: When do the needs of victims’ families and international war crimes tribunals clash?’(2002) 84(848) *International Review of the Red Cross*, 845; Eric Stover and Rachel Shigekane, ‘Exhumation of mass graves: balancing legal and humanitarian needs’, in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004), pp.85-103.

<sup>118</sup> Stover and Shigekane, ‘The missing in the aftermath of war’, *ibid*, p.847.

and skills to do efficient investigative work themselves and thus set back the identification process by years.<sup>119</sup>

It must be remembered, however, that the work of the Yugoslav Tribunal was in many ways unprecedented. The Tribunal was a unique institution composed of staff from a multitude of different countries and jurisdictional backgrounds. In 1996, the year the forensic programme commenced, the chief Prosecutor Richard Goldstone's then staff of 180 personnel – lawyers, police and military investigators, computer technicians, administrative assistants and analysts - came from almost forty countries. As Goldstone revealed “[t]hat has never been done before; it was not done at Nuremberg [...] This is the first time in history that there has been an international prosecutor's office investigating international war crimes”.<sup>120</sup> The forensic investigations conducted for the *ad hoc* Tribunals were a learning curve for all involved. As voiced one of the forensic anthropologist working in the Balkans exhuming graves for the Yugoslav Tribunal:

This is a new thing for all of us...Archaeologists have experience digging up many skeletons, but exhuming decomposing bodies in situations like we have here poses new problems and ways of approaching them.<sup>121</sup>

Likewise, there was no existing template to guide the relationship between the Tribunal and humanitarian organisations who sought to recover the war dead. Practice developed through experience gained on the ground. Whilst mistakes may have been made, the knowledge gained over the course of the life of the Tribunal will make a valuable contribution to future forensic investigations conducted by other international institutions. In this way the forensic programme of the International Criminal Tribunal for the former Yugoslavia and the synergy formed with humanitarian organisations working in accordance with the obligations toward the dead, as outlined in international humanitarian law, forms an important legacy of this institution.

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<sup>119</sup> *Ibid*, 856.

<sup>120</sup> Richard Goldstone ‘Assessing the Work of the United Nations War Crimes Tribunal’, Address of the Honorable Justice Richard Goldstone, Former Chief Prosecutor for the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda, and Justice of the Constitutional Court of South Africa, Stanford Law School, October 12, 1996, (1997) 33(1) *Stanford Journal of International Law*, 1, 4,5

<sup>121</sup> Quote from William Haglund, speaking to Stover in Stover and *Peress, The Graves*, (n 66), 154, 155.

## D. Conclusion

In May 1980 the President of Socialist Federal Republic of Yugoslavia, Marshal Josip Broz Tito, passed away. Yugoslavia, a once unified country, which had been composed of six Socialist Republics and two Socialist Autonomous Provinces, began to unravel. Within a decade, the territory descended into armed conflict.<sup>122</sup> Whilst the conflict was still ongoing, the United Nations took what at the time was considered exceptional action – it passed a resolution to establish an international criminal tribunal in order to prosecute individuals suspected of committing heinous crimes in connected with the war. Resolution 827, adopted by the United Nations Security Council on 25 May 1993, was prompted by the “grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia”.<sup>123</sup> The reported crimes, which were later substantiated through judicial proceedings, were horrific. The acts which had prompted the Security Council to take such a step included “mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing”, including for the acquisition and the holding of territory”.<sup>124</sup> The armed conflict was considered to “constitute a threat to international peace and security”<sup>125</sup> and thus, in an effort to bring it to a halt, the international criminal Tribunal was established as an *ad hoc* measure to prosecute perpetrators and “contribute to the restoration and maintenance of peace”.<sup>126</sup>

In the execution of its mandate, the International Criminal Tribunal for the former Yugoslavia has conducted extensive investigations in order to support the charges listed in the indictments against individuals accused of committing war crimes, crimes against humanity and genocide in the Balkans.<sup>127</sup> During the course of these

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<sup>122</sup> The history of the formation of Yugoslavia after the First World War, its dissolution, and the vicious armed conflict that ensued is long and complex. For an informative account see, further, Leslie Benson, *Yugoslavia: A Concise History* (Hampshire-New York: Palgrave MacMillan, 2004); Allan Little and Laura Silber, ‘The Death of Yugoslavia’ (London: Penguin Books, 1996).

<sup>123</sup> United Nations Security Council Resolution, S/RES/827 (1993), 25 May 1993, preamble.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> The International Criminal Tribunal for the former Yugoslavia has indicted a total of 161 people. To date proceedings have been concluded against 126 persons and are ongoing for 35 accused.

enquiries, the Tribunal embarked on a five year active forensic programme of mass grave exhumations, undertaken in order to gather forensic evidence from the graves and the bodies of those murdered during the conflict. In view of the level of forensic activity sustained by the Tribunal, it is not unreasonable to conclude that the employment of forensic evidence, gathered through the exhumation of mass graves, formed an integral part of the prosecutorial strategy of this court. Indeed, that the existence of mass graves, littered throughout the Balkans, would be perceived to hold important forensic value was indicated even before the Tribunal was established, through the work of the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Commission of Experts, established pursuant to a United Nations Security Council Resolution (Resolution 780), both of which made use of forensic expertise in the implementation of their mandates.

In the final section of this chapter, it was outlined how the Tribunal collaborated with organisations, tasked with locating the missing from the armed conflict, which have been working in the Balkans. The practice of the International Criminal Tribunal for the former Yugoslavia, as discussed in the examples given, demonstrates that when a reasonable level of cooperation is established between an international tribunal and humanitarian agencies established to locate, identify and repatriate the missing from armed conflict, a symbiotic relationship can be established that satisfies the requirements of both the legal system and broader societal needs. The experiences of the Tribunal and its working relationship with organisations in the former Yugoslavia is specific to this context but it does demonstrate how the work of tribunals can help fulfil the humanitarian obligations of States in regard the treatment of dead after conflict. The Yugoslav Tribunal has contributed to efforts to locate and identify the deceased and missing through information sharing and national capacity building. In this way it represents an important legacy of the work of this institution.

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Website of the International Criminal Tribunal for the former Yugoslavia, available at <http://www.icty.org/> (last accessed 27 October 2011).

## Chapter V: The Rwandan Genocide: The Role of Forensic Exhumations at the International Criminal Tribunal for Rwanda

### Introduction

A year and a half after the establishment of the International Criminal Tribunal for the former Yugoslavia, an *ad hoc* Tribunal was established to prosecute individuals considered most criminally responsible for war crimes, crimes against humanity and the planning and instigation of acts of genocide related to the 1994 Rwandan genocide. The International Criminal Tribunal for Rwanda was established in November 1994 pursuant to United Nations Security Council Resolution 955.<sup>1</sup> The Tribunal has subject matter jurisdiction over three categories of crime: genocide,<sup>2</sup> crimes against humanity<sup>3</sup> and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.<sup>4</sup> The temporal jurisdiction of the Rwandan Tribunal is limited to a period of one calendar year, from 1 January 1994 and 31 December 1994. It has jurisdiction *ratione personae*<sup>5</sup> and *ratione loci*<sup>6</sup> for war crimes, crimes against humanity and genocide committed either in the territory of Rwanda or in respect of Rwandan citizens who have committed acts in connection with the 1994 genocide in neighbouring States.<sup>7</sup> The Rwandan Tribunal was largely based on the model of the Yugoslav Criminal Tribunal and initially the two Tribunals shared both the Chief Prosecutor and the Appeals Chamber.<sup>8</sup> Following a subsequent amendment by the Security Council, the Rwandan Tribunal was provided with a separate Prosecutor.<sup>9</sup>

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<sup>1</sup> The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, UN Doc. S/RES/955 (1994).

<sup>2</sup> Statute of the International Criminal Tribunal, November 1994, Article 2, available at <http://www.un.org/ictt/statute.html>, (last accessed 27 October 2011).

<sup>3</sup> *Ibid*, Article 3.

<sup>4</sup> *Ibid*, Article 4.

<sup>5</sup> “By reason of his person”: refers to personal jurisdiction.

<sup>6</sup> “By reason of the place”: refers to territorial jurisdiction.

<sup>7</sup> *Ibid*, Article 1.

<sup>8</sup> William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), p.4.

<sup>9</sup> UN Doc.S/RES/1503 (2003), para. 8.

Forensic evidence, gathered as a result of the exhumation of mass graves was presented in two of the early trials: the trial of *Prosecutor v. Clément Kayishema and Obed Ruzindana*<sup>10</sup> and the trial of *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*.<sup>11</sup> Kayishema and Ruzindana were named on the first indictment which was issued by the Tribunal on 12 December 1995.<sup>12</sup> In order to obtain such evidence, forensic exhumations were conducted at two sites in Rwanda. These sites were targeted due to their alleged association with the defendants during the genocide. Despite the potential value of utilising forensic evidence in additional trials at the Rwandan Tribunal, the forensic exhumation programme was relatively short lived and ceased after these two excavation activities. This chapter will detail the forensic investigations. Further, it will be considered why the forensic programme did not extend beyond these two exhumation projects and why forensic evidence was not considered necessary in additional trials. Prior to focusing attention on the work of the Tribunal, the chapter will briefly consider a number of fact-finding missions carried out on behalf of the United Nations in Rwanda, where the presence of mass graves was considered as an indication that the acts committed amounted to a genocide. In the course of these missions forensic expertise was either used, or identified as necessary, to establish facts in relation to the mass killings.

### **A. Investigating Atrocity Crimes in Rwanda: United Nations Special Rapporteur Reports and the Enquiries of the Commission of Experts Established Pursuant to Security Council Resolution 935**

The genocide erupted in Rwanda on 6 April 1994, however, in many ways it was not an unforeseen event. There were a number of contributing factors that are relevant to understanding how this heinous crime took place. Whilst it is not intended to give a

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<sup>10</sup> *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T.

<sup>11</sup> *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T.

<sup>12</sup> Schabas, *The UN International Criminal Tribunals*, (n 8), p.30; *Prosecutor of the Tribunal against Clément Kayishema, Ignace Bagilishema, Charles Sikubwabo, alloys Ndimbati, Vincent Rutaganira, Mika Muhimana, Ryandikayo, Obed Ruzindana*, First Amended Indictment and *The Prosecutor of the Tribunal against Clément Kayishema and Obed Ruzindana*, First Amended Indictment Case No. ICTR-95-1-1 Joint document, available at <http://unictr.org/Portals/0/Case/English/kayishema/indictment/indictment%201.pdf> (last accessed 27 October 2011).

detailed account here of the background to the genocide, it is prudent to give a brief synopsis in order to provide some context.

A historical cycle of violence existed between two ethnic groups in Rwanda, the majority Hutu and minority Tutsi, who had dominated the political landscape during the colonial period.<sup>13</sup> The distinction between members of the two ethnic groups pertained not to any biological factors but rather originated in pre-colonial socio-economic differences. “Hutus were cultivators and Tutsis were herdsman”,<sup>14</sup> the latter being afforded a higher social status. Germany was the first European country to colonise the area that is now Rwanda, and influenced by race theories popular at that time, authorities set about clearly defining “‘ethnic’ identities”.<sup>15</sup> Rwanda was turned over to Belgium by the League of Nations as a spoil of the First World War and “the Belgians made this polarization the cornerstone of their colonial policy”.<sup>16</sup> This divide and conquer approach entrenched perceived differences between the members of the population designated as Tutsi and those designated as Hutu. From the late 1950s, and in the decades following decolonisation in the 1960s, tensions between the two groups manifested with tragic consequences and periodic violence erupted which saw the slaughter of members of one group or the other. In addition, a series of pogroms drove waves of Tutsis into the neighbouring countries. Denied their right to return, in 1990 the displaced Tutsis launched a military assault. A subsequent peace agreement was reached in August 1993 which provided for reparations for the refugees. Further, a power-sharing government was to be installed and the transition supervised by a peacekeeping mission under the auspices of the United Nations.<sup>17</sup>

However, extremists within the then government of President Habyarimana, who were opposed to the peace process because of the consequences it would bring regarding political and economic power, put into place a radical strategy to eliminate the Tutsis and moderate Hutus who stood in their way.<sup>18</sup> A plane carrying President

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<sup>13</sup> Schabas, *The UN International Criminal Tribunals*, (n 8), pp.24-25.

<sup>14</sup> Philip Gourevitch, *We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda* (New York: Farrar, Straus and Giroux, 1998), p.48.

<sup>15</sup> *Ibid*, p.54.

<sup>16</sup> *Ibid*.

<sup>17</sup> Schabas, *The UN International Criminal Tribunals*, (n 8), p.25.

<sup>18</sup> Gerald Gahima, ‘Alternatives to prosecution: The case of Rwanda’, in Edel Hughes, William A. Schabas and Ramesh Thakur (eds.), *Atrocities and international accountability: Beyond transitional justice* (Tokyo–New York–Paris: United Nations University, 2007), pp.159-181, p.160.

Habyarimana was shot down on its descent into Kigali airport on 6 April 1994.<sup>19</sup> Within hours roadblocks were set up in Kigali and the genocide commenced. The genocide lasted until approximately mid-July and happened concurrently with a civil war between Hutu extremists and the Tutsi-led Rwandese Patriotic Front (RPF). Although the armed conflict and genocide coincided, they have been understood as interconnected but separate events and indeed as Philip Gourevitch highlights “the mobilization for the final extermination campaign swung into full gear only when Hutu power was confronted by the threat of peace”.<sup>20</sup> The United Nations Mission in Rwanda (UNAMIR), which consisted of a small contingent of peacekeepers, was powerless in the face of this organised atrocity and rather than sending reinforcements, the Security Council ordered the withdrawal of the majority of the peacekeeping troops. The RPF succeeded in halting the *génocidaires* by mid-July, at which point many hundreds of thousands had lost their lives.<sup>21</sup>

Reports of the genocide spread from Rwanda to third States and international organisations such as the United Nations. Whilst it is widely accepted that the response of the international community was wholly and shamefully inadequate,<sup>22</sup> some attempts were made to at least ascertain the nature and pattern of atrocities taking place. In this vein, a number of missions of enquiry were established by the United Nations in addition to the establishment of an international criminal tribunal.

### **(1) Field Mission by the Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions**

The United Nations Special Rapporteur for extrajudicial, summary or arbitrary executions, Mr. B.W. Ndiaye, completed a mission to Rwanda from 8 to 17 April 1993. Due to the brief duration of the visit and the shortage of material and human resources at the Special Rapporteur’s disposal, “there was no question of undertaking an in-depth fact-finding or verification mission, which would have entailed, *inter alia*, substantial logistic and scientific resources; for example, experts in forensic

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<sup>19</sup> Responsibility for this act has never been positively attributed to any one individual or political group.

<sup>20</sup> Gourevitch, *We wish to inform you*, (n 14), pp.98,99.

<sup>21</sup> Schabas, *The UN International Criminal Tribunals*, (n 8), p.25.

<sup>22</sup> See, for example, Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (London: Arrow Books, 2004); Linda Melvern, *A People Betrayed: The Role of the West in Rwanda’s Genocide* (London-New York: Zed Books, 2000).

medicine would have been needed to verify the existence of mass graves.”<sup>23</sup> The report, however, made recommendations for future action and stated that “[t]horough inquiries, with the assistance of teams of specialists in medicine, archaeology and legal anthropology, should be opened into all allegations of mass graves, whether attributed to the Rwandese Armed Forces, the FPR<sup>24</sup> or civilian populations”<sup>25</sup> as a means of combating impunity<sup>26</sup>

## **(2) Field Mission by the Special Rapporteur of the Commission on Human Rights**

Field enquiries were carried out by the United Nations Special Rapporteur of the Commission on Human Rights on the situation of human rights in Rwanda, Mr. René Degni-Ségui. The Special Rapporteur submitted several reports to the United Nations and his third report, which was submitted to the United Nations Security Council and General Assembly in November 1994, made reference to the presence of mass graves throughout Rwanda. The Special Rapporteur carried out a number of visits to the country in accordance with a mandate afforded to him by the Commission on Human Rights in resolution S-3/1 of 25 May 1994.<sup>27</sup> Whilst investigations were undertaken by Mr. Degni-Ségui which led to the discovery of mass graves, it is not clear from the report if these investigations were medico-legal in nature, that is, it is not indicated in the report whether exhumations or forensic site examinations took place. However, the discovery of mass graves was construed as constituting one of the elements to indicate the planned genocide of the Tutsis:

The various elements constituting genocide appear to be increasingly confirmed by the on-the-spot investigation that has been carried out. Such elements include the discovery of mass graves, the existence of evidence

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<sup>23</sup> United Nations Economic and Social Council, Commission on Human Rights, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories: Extrajudicial, summary or arbitrary executions, Addendum, Report by Mr. B.W. Ndiaye. Special Rapporteur, on his mission to Rwanda from 8 to 17 April 1993*, UN. Doc.E/CN.4/1994/7/Add.1, 11 August 1993, at para. 6.

<sup>24</sup> The Rwandese Patriotic Front.

<sup>25</sup> Ndiaye, *Mission to Rwanda*, (n 23), at para. 75.

<sup>26</sup> *Ibid.*, at para. 75.

<sup>27</sup> United Nations General Assembly/Security Council, *Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Situation of human rights in Rwanda, Annex, Third report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, UN Doc. A/49/508/Add.1, S/1994/1157/Add.1, 14 November 1994, at para. 1.

and proof indicating that the massacre of the Tutsi was planned and the identification of those primarily responsible.<sup>28</sup>

As the Special Rapporteur conveys in the report, mass graves and other deposition sites appeared to be in abundance throughout the country and he provides a very visceral description of the tragic humanitarian disaster he was witness to:

Several mass graves have been found throughout the country as a result of the various investigations carried out - there being one or two in each commune. A provisional list of about 50 mass graves has thus been drawn up, with more than 6 in towns such as Gitarama and Cyangungu. The Special Rapporteur and several members of the observer team were personally able to identify several mass graves, namely, at Chamvuzo, Nyundo, in the Gisenyi communal cemetery and in Cyangungu. At Nyundo, three septic tanks were later used to inter those massacred, who numbered over 300. The inhabitants of Nyarubuye and the surrounding area were not, however, entitled to burial. The bodies of some lie strewn about the courtyard and alleys of the parish and others are piled one upon the other in the classrooms of the parish school and in the church, while yet others were discovered in the neighbouring village, some having had their hands bound behind their backs before being executed. Skeletons of persons of all ages abound: women, men, old persons and even babies. The senses - sight, smell and touch - are all revolted by the spectacle.<sup>29</sup>

### **(3) The Rwandan Commission of Experts Established Pursuant to Security Council Resolution 935**

Similar to the preliminary investigations conducted in the former Yugoslavia by the Commission of Experts under Security Council Resolution 780, the United Nations Security Council requested the Secretary General to establish an expert body to investigate violations of international humanitarian law and genocide in Rwanda. The Rwandan Commission of Experts was established in 1994 pursuant to Security Council resolution 935.<sup>30</sup> Prior to the field mission, a number of meetings were held

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<sup>28</sup> *Ibid*, at para. 6.

<sup>29</sup> *Ibid*, at para. 7.

<sup>30</sup> The Commission of Experts established pursuant to Security Council resolution 935 (1994) “the Rwanda Commission”.

by the Rwandan Commission, including a number that pertained to forensic investigations and the transfer of potential prosecutorial orientated evidence to the International Criminal Tribunal for Rwanda. Work was commenced by the Rwandan Commission in mid-August 1994 in Geneva and during its first session internal methods of work, rules of procedure and a plan of action were adopted.<sup>31</sup> The plan of action determined that on-site investigations would be conducted. The primary objective of the plan was “to produce specific evidence likely to be used for prosecution and to identify individuals responsible for having perpetrated grave violations of international humanitarian law as well as possible acts of genocide.”<sup>32</sup> Furthermore, the Commission had information that suggested the presence of mass graves in multiple locations in Rwanda. Therefore, it aimed to deploy two or three investigatory teams consisting of specialised forensic experts to areas with suspected grave sites for a period of no more than three weeks for the purpose of determining the facts surrounding the creation of these graves. The Commission outlined that the “purpose of this exercise will be to determine the existence of the mass graves, gather physical evidence, interview witnesses, to take pictures and make video recordings.”<sup>33</sup>

Appeals were made to Member States for assistance in order to improve the implementation of the Rwandan Commission’s mandate. Prior to departure for Rwanda, the Commission’s Chairperson, Mr. Atsu-Koffi Amega, held a meeting with 21 government representatives in Geneva in order to outline the Commission’s plan of action and made a request for assistance, including forensic expertise, to facilitate the exhumation of mass graves.<sup>34</sup> The Commission also met with Mr. Justice Richard Goldstone, then Prosecutor of the International Criminal Tribunal for Rwanda, to discuss potential arrangements for transmitting evidence and documentation from the Commission of Experts to the Office of the Prosecutor at the Tribunal.<sup>35</sup>

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<sup>31</sup> *Final Report of the Commission of Experts established pursuant to Security Council Resolution 935 (1994)*, UN Doc. S/1994/1405, 9 December 1994, at para. 15.

<sup>32</sup> *Ibid*, Appendix V: ‘Plan of action, On-site investigation of allegations of grave violations of international humanitarian law, including possible acts of genocide’, at para. 1.

<sup>33</sup> *Ibid*, at para. 5.

<sup>34</sup> *Final Report of the Commission of Experts 935*, (n 31), at para. 17.

<sup>35</sup> *Ibid*, at para. 21.

The Rwandan Commission conducted a field mission in Rwanda and three of its neighbouring countries, the United Republic of Tanzania, Burundi and Zaire, from 29 August to 17 September 1994, during which it initiated several investigations.<sup>36</sup> It was determined during this period, in accordance with its plan of action, that a second mission would be necessary. Investigations were carried out “with a view to meeting the high procedural and evidentiary standards of international law and justice”.<sup>37</sup> The Commission also oversaw and was supported by the work of the Special Investigative Unit of the Human Rights Field Operation in Rwanda.<sup>38</sup> Two teams had been created by the Special Investigative Unit, a Site Investigation Team and a Documentation and Evidence Team. The former had competence to conduct “field investigations into massacres and mass grave sites with the assistance of experienced forensic experts”.<sup>39</sup> A team of experts comprising two investigative experts and two forensic experts was put at the disposal of the Rwandan Commission by Spain for the purpose of its second mission.<sup>40</sup> On the basis of all the information gathered by the Rwanda Commission, it concluded that serious violations of international humanitarian law and acts of genocide had been committed in Rwanda, in a planned and systematic manner.<sup>41</sup>

## **B. Forensic Investigations conducted by the International Criminal Tribunal for Rwanda**

In contrast to the level of forensic activity maintained by the International Criminal Tribunal for the former Yugoslavia, the forensic programme operated by the Rwandan Tribunal was a considerably more moderate affair.<sup>42</sup> Both the number of sites targeted for exhumation and the number of remains recovered for forensic examinations were significantly fewer than that of its contemporary. Consequently,

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<sup>36</sup> *Ibid*, at paras. 22, 23.

<sup>37</sup> *Ibid*, at para. 24.

<sup>38</sup> The United Nations Field Operation in Rwanda was run under the auspices of the United Nations High Commissioner for Human Rights, available at <http://reliefweb.int/node/29842> (last accessed 27 October 2011).

<sup>39</sup> *Final Report of the Commission of Experts* 935, (n 31), at para. 24.

<sup>40</sup> *Ibid*, at para. 26.

<sup>41</sup> *Final Report of the Commission of Experts* 935, (n 31), at paras. 58-92.

<sup>42</sup> Éadaoin O’Brien, ‘The Contribution of Forensic Anthropology to International Criminal Justice: Mass grave exhumations conducted by United Nations International Criminal Tribunals’ (2010) 13(2) *Irish Journal of Anthropology*, 52,54.

the forensic activity also took place over a shorter time scale. In Rwanda, excavations were conducted at two sites. In addition to the main exhumation activity, the locations were also subject to preliminary site assessment. In September and October 1995, a forensic team, working under the auspices of the Tribunal, undertook an exploratory mission in Kibuye in the West of Rwanda, with the purpose of determining logistical matters and initiating planning for future forensic investigations including the targeting of sites for exhumation, forensic investigation and analysis. The main exhumation activity, at the Kibuye Roman Catholic Church and the adjacent Home St. Jean, took place between December 1995 and February 1996. A minimum number of 493 individuals were recovered from the site by the archaeologists and anthropologists working on the mission and the victims' remains were forensically examined by the team's forensic anthropologists and pathologists. The second forensic investigation took place at a site in Kigali, from which the remains of 27 victims were exhumed and subjected to post-mortem examination.<sup>43</sup> An assessment mission in September 1995 and site visits in February and May 1996 preceded the main forensic investigation which took place between 30 May 1996 and 17 June 1996.<sup>44</sup> As was also the case with the Yugoslav Tribunal, the use of an external institution that specialised in the forensic investigation of war crimes and human rights violations was mandated by the rules of procedure and evidence of the Tribunal.<sup>45</sup>

The investigations, including forensic exhumations, were overseen by the Office of the Prosecutor. As per Article 15 of the Statute of the International Criminal Tribunal for Rwanda, the Prosecutor bears responsibility for both the investigation and prosecution of alleged crimes. Article 15(1) states that:

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<sup>43</sup> William D. Haglund, Team Leader for forensic investigations on PHR missions to Rwanda under the auspices of the United Nations International Criminal Tribunal for Rwanda, personal communication with author, 05 June 2011.

<sup>44</sup> William Haglund, PhD, 'Forensic Investigations at the Amgar Garage and Nearby Vicinity, Kigali, Rwanda, 30 May 1996 to 17 June 1996', Report submitted to the International Criminal Tribunal for Rwanda, 1 July 1997, at p.1. (Copy on file with author)

<sup>45</sup> Rule 39 of the rules of procedure and evidence, on the 'Conduct of Investigations', states, *inter alia*, that the Prosecutor may, in the conduct of an investigations, "(i) [...] collect evidence and conduct on-site investigations; (ii) Take all measures deemed necessary for the purpose of the investigation [...]; (iii) Seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body [...]"

The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.<sup>46</sup>

With identical wording to the corresponding article in the statute for the Yugoslav Tribunal, Article 17 of the Rwandan Tribunal's Statute, which pertains to the investigation and preparation of the indictment, provides that:

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.<sup>47</sup>

When established, the Prosecutor's Office comprised four main sections: an Investigation Section, a Prosecution Section, a Legal Services Section and an Administration and Records Section. Some of the divisions were based in Kigali, while others, such as the Legal Services Section, were shared by the Rwandan Tribunal with the Yugoslav Tribunal.<sup>48</sup> In addition to the offices located in Kigali, the seat of the Rwandan Tribunal is in Arusha, Tanzania.<sup>49</sup> At the time of its initiation, the Investigations Section was the largest of the four Offices of the Prosecutor sectors and it comprised investigators, lawyers, intelligence analysts, advisers, statisticians, demographers, interpreters, translators and support staff, a

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<sup>46</sup> Article 15 ICTR Statute.

<sup>47</sup> Article 17 ICTR Statute.

<sup>48</sup> 'Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994', Annex covering the period from 8 November 1994 to 30 June 1996, adopted at the third plenary session of the Tribunal', UN Doc.A/51/399-S/1996/778, 24 September 1996, at para. 15.

<sup>49</sup> The seat of the International Criminal Tribunal for Rwanda was established in accordance with Resolution 977 (1995) Adopted by the Security Council at its 3502nd meeting, on 22 February 1995, S/RES/977 (1995).

scientific director and experts in forensic medicine. As communicated in the first annual report, this section was organised into eight to ten multidisciplinary teams and the Investigations Section bore responsibility for the handling of all investigations.<sup>50</sup>

In October 1995, two members of the forensic medicine team conducted a preliminary study of a communal grave situated in the Kibuye prefecture and their tests confirmed the presence of human remains. This team also prepared the groundwork for the more substantial forensic investigations that were to come by completing an initial charting of the distribution of skeletal elements over the site area. Subsequent forensic investigations were conducted in conjunction with Physicians for Human Rights.<sup>51</sup>

### **(1) Forensic Investigations in the Kibuye Province**

As discussed in the previous chapter on forensic investigations conducted by the International Criminal Tribunal for the former Yugoslavia, sites are chosen for exhumation in line with a prosecutorial strategy. The site in the Kibuye province was selected for forensic examination by the Rwandan Tribunal as it represented one of the areas most affected in terms of the number of Tutsis murdered during the genocide. When the Tribunal commenced investigations, this area came up repeatedly.<sup>52</sup> As Philip Gourevitch reports:

On the national average, Tutsis made up a bit less than fifteen percent of Rwanda's population, but in the province of Kibuye the balance between Hutus and Tutsis was close to fifty-fifty. On April 6, 1994, about a quarter million Tutsis lived in Kibuye and a month later more than two hundred thousand of them had been killed. In many of Kibuye's villages, no Tutsis survived.<sup>53</sup>

Unburied remains testified to the horrors that had occurred at this location and eye witness accounts made it clear that the Kibuye Roman Catholic Church and Home St. Jean Complex was a massacre site. In addition, two suspected *génocidaires*,

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<sup>50</sup> 'Report covering the period from 8 November 1994 to 30 June 1996', (n 48), at para.16.

<sup>51</sup> *Ibid.*

<sup>52</sup> Personal interview with Ms Holo Makwaia, Trial Attorney, Office of the Prosecutor, International Criminal Tribunal for Rwanda, Arusha, Tanzania, 14 April 2010.

<sup>53</sup> Gourevitch, *We wish to inform you*, (n 14), p.29.

Clément Kayishema and Obed Ruzindana, were amongst the first to be apprehended by the court and evidence linked these two defendants to events at Kibuye.<sup>54</sup>

A reported 4,000-6,000 people had gathered for refuge at the Kibuye Catholic Church and Home St. Jean following the outbreak of the genocide. Although the exact date is unrecorded, in or around 17 April, the area was surrounded by gendarmes, communal police and armed civilians. The inhabitants of the Church complex were attacked and murdered with a variety of weapons including machetes, grenades, guns and cudgels. Those who survived the initial attack were searched for and killed during the course of the following few days. Many of the remains were buried in a minimum of four mass graves within days of the executions. There were some witnesses to the burials who indicated to investigators that an area behind the church was the location where the remains from the massacre had been placed, later designated by the forensic investigators as Grave 1. In addition, the bodies of numerous individuals remained unburied and were left scattered to decompose on the surface. At the request of the International Criminal Tribunal for Rwanda, an initial assessment of Grave 1 was conducted by Physicians for Human Rights in September 1995, with the purpose of confirming the presence and condition of human remains. Following on from this preliminary site assessment, a three-phase project was planned. The first phase was undertaken over a period of two weeks in which a team of archaeologists documented the site, produced a topographic map of the site and photographically documented evidence in the church and adjacent buildings, which included a school, workshops, and a small hostel. As a security consideration, the area was swept for mines and unexploded ordnance.<sup>55</sup>

The second phase pertained to the recovery and analysis of the surface human remains which had decomposed to a skeletal state.<sup>56</sup> Forensic anthropologists were employed to assist archaeologists in the body recovery and also to conduct laboratory analysis of the remains. Analysis included “a skeletal inventory, inventory

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<sup>54</sup> Interview with Holo Makwaia, (n 52).

<sup>55</sup> William D. Haglund, Melissa Connor and Douglas D. Scott, ‘The Archaeology of Contemporary Mass Graves’ (2001) 35(1) *Historical Archaeology*, 57, 59

<sup>56</sup> *Ibid.* Fifty-three discrete skeletal assemblages were recovered and were found in various compositional states ranging from complete individuals to isolated bones. Most were incomplete. Dispersion of the remains was attributed to a number of factors: “(1) consumption and scattering by scavenging animals; (2) scattering and burial through agricultural activity; (3) disturbance by local foot traffic; (4) down-slope movement assisted by gravity and rain water, and (5) incomplete collection and reburial by local residents”, *ibid.*, 60-61.

of artifacts found with the remains, age, sex, and race estimates, and an inventory of trauma seen on the remains”.<sup>57</sup> Where the anthropologist could suggest a probable cause of death, it was noted in their anthropological report for subsequent ratification by the pathologist. In addition to the recovery of surface remains, during this phase potential grave sites, other than grave 1, were indicated by local people working on the excavations. Test trenches and probes were utilised in order to determine whether or not human remains were present.<sup>58</sup> Approximately three weeks was dedicated to this phase.

The third phase of the forensic investigation included excavation of Grave 1 and the post-mortem examination of the exhumed bodies.<sup>59</sup> At the start of this period of investigation, a morgue was erected on site to ensure there would be no need to transport the remains in an attempt to minimise related security and logistical concerns associated with transferring bodies to another location. However, there were other logistical problems that arose due to the creation of a temporary mortuary; fresh water and electricity had to be established at the site and equipment such as an x-ray machine had to be brought in. A contingent of United Nations troops provided security for the church, grave, and examination areas.<sup>60</sup>

An estimated minimum number of 493 individuals were exhumed and post-mortem examinations were conducted on each individual.<sup>61</sup> Forensic examinations were completed in order to achieve two objectives: to establish patterns of injury and cause of death, and secondly, to collect and preserve evidence.<sup>62</sup> In addition to archaeologists, the forensic team consisted of four trained and experienced forensic pathologists, assisted by two pathology assistants, an orthopaedic surgeon who operated the radiographic equipment, at least five anthropologists, under the supervision of William D. Haglund, who assisted in establishing the biological profiles of the remains and who took custodial care of the evidence and an

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<sup>57</sup> *Ibid*, 61.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*, 60.

<sup>60</sup> *Ibid*, 61.

<sup>61</sup> *Ibid*, 62. The minimum number of individuals was calculated based on the number of crania recovered, *ibid*.

<sup>62</sup> Physicians for Human Rights, ‘Forensic Investigations of Human Remains at Kibuye Roman Catholic Church and Home St. Jean Complex’ Expert report submitted on behalf of the Prosecution in the trial of *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, p.3. (Copy on file with author)

archaeologist who was charged with taking photographs and maintaining a photograph log.<sup>63</sup>

## **(2) Forensic Investigations in Kigali**

The second site subject to forensic examination was in Kigali at a location known as the Amgar Garage. The crime scene investigation was again led by forensic anthropologist, William D. Haglund from Physicians for Human Rights. An expert report documenting the findings was prepared for the International Criminal Tribunal for Rwanda,<sup>64</sup> to be submitted as evidence in the *Georges Rutaganda* trial.<sup>65</sup> Haglund was assisted by a six person team of forensic experts deployed on behalf of Physicians for Human Rights.<sup>66</sup> Additionally, expert assistance was provided by a Tribunal investigator and evidence technician, and by a Tribunal forensic anthropologist.<sup>67</sup> The investigation was carried out with the express purpose of collecting evidence for the Rwandan Tribunal and details on sex, age, cause of death and patterns of injury were recorded following an examination of each individual. Information pertaining to personal identification of the deceased was also collected and furthermore, information regarding circumstances of burial and time of death was documented.<sup>68</sup> Twenty-four hour security was provided by a private company contracted through the Tribunal.<sup>69</sup>

Twenty-seven skeletal remains were recovered from the site. Eighteen individual's remains were categorised as complete to nearly complete skeletal remains. Three of the bodies were recovered from a latrine at the location designated by investigators as RUG-1, a further three bodies were removed from a ravine designated as RUG-6 and twelve bodies were exhumed from seven shallow graves (each containing one to three individuals), in the area labelled RUG-7. In addition, a minimum number of nine individuals, determined by a representation of left pelvic bones, were found in

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<sup>63</sup> *Ibid*, p.4.

<sup>64</sup> Haglund, 'Forensic Investigations at the Amgar Garage', (n 44).

<sup>65</sup> *Rutuganda*, (n 11).

<sup>66</sup> In addition to Haglund, the team consisted of three anthropologists, an archaeologist, a forensic pathologist and a physician assistant, Haglund, 'Forensic Investigations at the Amgar Garage', (n 44), p.v.

<sup>67</sup> *Ibid*. Non-professional staff were also utilised on the dig, as ten to fourteen local labourers were employed to assist in activities such as clearing the area under examination of trash and excavating pits that were being searched for human remains. *Ibid.*, p.11, p.38.

<sup>68</sup> *Ibid*, p.1.

<sup>69</sup> *Ibid*, p.53.

an assemblage of bones,<sup>70</sup> the location designated by investigators as RUG-4. It was determined that 25 of the individuals were male, one was female and there were the remains of one child of undetermined sex.<sup>71</sup>

Before the exhumation and recovery of the remains, the entire site was mapped.<sup>72</sup> During the investigation, a comprehensive photographic record was maintained and a field logbook was used to document each exposure.<sup>73</sup> A record of physical evidence was maintained in an evidence log, for which each piece of evidence gathered was assigned an evidence number. According to Haglund, “[w]hen located, evidence was logged, photographed, mapped, and then collected into a labeled evidence container”.<sup>74</sup> Suspected graves at the location were detected through witness testimony and “surface visual indicators, such as surface irregularities, differences in vegetation, soil coloration and compaction, and depressions”.<sup>75</sup> Following the exhumation, the human remains were subject to anthropological examination in order to determine the “sex, age, stature, geographical affinity, pattern of injury, and cause of death”.<sup>76</sup> Certification of cause and manner of death was provided by a forensic pathologist after a review of the narrative and photographic documentation of injuries produced by the anthropological examination.<sup>77</sup> At the conclusion of the forensic investigation, following an arrangement that had been made between the local commune, the Ministry of Justice

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<sup>70</sup> The bones had been collected from the vicinity by local residents and placed in a commingled pile. Information pertaining to the specifics of their collection, including their original location prior to being moved to the Amgar garage site was not available to the investigators, *ibid*, p.16.

<sup>71</sup> *Ibid*, p.vi.

<sup>72</sup> The initial mapping of the Amgar Garage location was carried out by the International Criminal Tribunal for Rwanda investigator on 10 May 1996. Subsequent mapping was completed by archaeologists working as part of the PHR team. Features included in the map included, *inter alia*, “topology, buildings, human remains, areas of probable graves, nearby buildings, and other relevant cultural features”, *ibid*, p.4.

<sup>73</sup> *Ibid*, p.5. The purpose of the photographic record was to document “the general site characteristics, the procedures and progress of excavations and evidence collection, the process of body exposure and recovery, the recording of the burial contexts for discovered bodies, and the examination and documentation of evidence, such as clothing and artifacts found with each body”. *Ibid*, p6.

<sup>74</sup> *Ibid*, p6.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*, p7. The anthropological examinations took place in an examination area that was assembled at the International Criminal Tribunal for Rwanda Amahoro Complex in Kigali, *ibid*, pp.6, 7.

<sup>77</sup> *Ibid*, p7.

and the *MINITRASO*,<sup>78</sup> the remains were placed into wooden boxes and on 18 June 1996, they were turned over to local representatives for final disposition.<sup>79</sup>

### **C. Why was Forensic Evidence not used more extensively by the International Criminal Tribunal for Rwanda?**

In a report by the Secretary-General of the United Nations on the financing of the International Criminal Tribunal for Rwanda, dated 11 March 1996, it was stated that forensic analysis “is critical to the investigation of the Tribunal”.<sup>80</sup> It was therefore proposed to establish a forensic unit in order to “undertake scientific analysis relating to the mass murders”.<sup>81</sup> It was anticipated that four posts would be created: a medico-legal investigations director, a senior investigator, a statistical/demographic advisor and a forensic investigator.<sup>82</sup> Travel would be undertaken by the investigative teams throughout Rwanda, “*inter alia*, to follow up on investigative leads, interview witnesses and visit mass graves to undertake forensic studies”.<sup>83</sup>

In terms of the costs associated with using consultants and experts, it was estimated that:

Resources in the amount of \$1,454,000 would provide for professional expert advice on evidence brought before the Tribunal, including the need for forensic examination of exhibits and provision of expert testimony. Specifically, this would cover the cost of mapping of mass graves (\$116,000), which involves one forensic and one cartographic consultant for a six-month period; forensic experts for mass grave exhumation

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<sup>78</sup> Ministère de Travail et des Affaires Sociales.

<sup>79</sup> Haglund, ‘Forensic Investigations at the Amgar Garage’, (n 44), p37.

<sup>80</sup> ‘Financing of the International Criminal Tribunal for the Prosecution of Persons responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994’, UN Doc. A/C.5/50/54, 11 March 1996, at para. 40. The report detailed the requirements of the International Criminal Tribunal for Rwanda for the full year 1996, *ibid*, at para. 5.

<sup>81</sup> *Ibid*, at para. 40.

<sup>82</sup> *Ibid*, at para. 40.

<sup>83</sup> *Ibid*, at para.47. It was estimated that “forensic studies of mass graves would involve travel from 30 to 60 days per trip”, *ibid*.

(\$750,000); statistical and demographic investigations (\$456,000); and testifying by expert witnesses (\$132,000).<sup>84</sup>

Whilst forensic expertise was utilised by the Rwandan Tribunal, the forensic programme ultimately transpired not to be as comprehensive as initially forecast, and overall could not be said to have been ‘critical to the investigation of the Tribunal’, in the sense that many convictions have been secured in the absence of forensic evidence. The two sites subject to excavation and forensic examination by the International Criminal Tribunal for Rwanda related to just two of countless places of genocide in the country. Exhumations and forensic investigations featured in the early life of the Rwandan Tribunal but forensic evidence was only presented in a small number of trials and the exhumation project was discontinued after the two main exhumation missions. Given the fact that the Tribunal was established in late 1994 and trials are still ongoing, why was the forensic programme of such a short duration, particularly when compared with the activity undertaken by the International Criminal Tribunal for the former Yugoslavia? There are several possible reasons that might explain its early cessation.

### **(1) Opposition from the Rwandan Government and the Prioritisation of Memorialisation**

Kirsten Juhl cites William Haglund as giving the following reasons as to why no more excavations were carried out after the Amgar Garage investigation:

Chief Prosecutor Goldstone made an agreement with the Rwandans that no further forensic exhumations would take place, and thus ICTR made no further requests. The UN peacekeeping forces pulled out of Rwanda shortly after the completion of the Kibuye grave. Thus, no international security was provided for the Amgar Garage investigation, which had to rely on unsatisfactory private security. There was a lack of funding. And the needs of the ICTY prevailed at the time.<sup>85</sup>

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<sup>84</sup> *Ibid*, at para. 45. A further figure of \$40,000 was requested for DNA analysis at centres outside of Rwanda on the remains of approximately 80 bodies for identification purposes and \$10,000 for laboratory testing to identify and date forensic evidence, *ibid*, at para. 50.

<sup>85</sup> Kirsten Juhl, *The Contribution by (Forensic) Archaeologists to Human Rights Investigations of Mass Graves* (Stavanger: Museum of Archaeology, Stavanger, 2005), p.145. Available at [http://am.uis.no/getfile.php/Arkeologisk%20museum/publikasjoner/ams-nett/Mass\\_Graves2.pdf](http://am.uis.no/getfile.php/Arkeologisk%20museum/publikasjoner/ams-nett/Mass_Graves2.pdf) (last accessed 27 October 2011).

Turning firstly to the suggestion that the Tribunal yielded to requests or pressure on the part of the Rwandan government that resulted in the cessation of the forensic programme, as referred to by Juhl above, there are two possible explanations which might explain why the Rwandan government might have been motivated to impede forensic activities. The first reason pertains to memorialisation of the dead. The second relates to questions of criminal culpability of members of the RPF for war crimes committed against Hutu civilians.

In an interview with this author, a senior legal advisor to the International Criminal Tribunal for Rwanda recalled that, in the early days of the Tribunal excavations were conducted but it soon became obvious that this was not something that the Rwandan government was happy with, as it was perceived as being somehow disrespectful to the bodies and the memory of the deceased.<sup>86</sup> Not long after the end of the genocide, the new government set about a process of reconciliation in an effort to rebuild the devastated country. Justice was sought, not just in the form of criminal prosecution and sanctions, but also in the form of reparation and repentance. Gourevitch notes that whilst members of the government in place during the atrocities had incited Hutus to kill their Tutsi neighbours, appealing to their sense of “civic virtue”, members of the new government travelled through Rwanda “to spread the gospel of reconciliation through accountability. Mass reburial ceremonies for genocide victims were a favourite forum for the new message”.<sup>87</sup>

In her research exploring the ways in which genocide sites were being preserved in Rwanda, Susan E. Cook noted that three distinct but associated activities have taken place in relation to these sites: preservation and restoration of human and structural remains; memorialisation and commemoration of the victims; and documentation and research on the events.<sup>88</sup> During the course of her research, Cook conducted a

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The lack of security due to the withdrawal of the United Nations peace keeping troops, has also been cited by Haglund to this author as a reason for the cessation of the forensic exhumations by the International Criminal Tribunal for Rwanda, in Rwanda. Haglund, personal communication, (n 43).

<sup>86</sup> Personal interview with Mr. Mohammed Ayat, International Criminal Tribunal for Rwanda building Kigali, Rwanda, 08 April 2010.

<sup>87</sup> Gourevitch, *We wish to inform you*, (n 14), p.250.

<sup>88</sup> Susan Cook, ‘The Politics of Preservation in Rwanda’, in Susan E. Cook (ed.), *Genocide in Cambodia and Rwanda: New Perspectives* (New Brunswick, N.J.: Transaction Publishers, 2006), pp.281-99, p.284.

series of interviews with a range of people from diverse political and institutional perspectives, from government workers to survivors, advocacy groups, scholars and ordinary Rwandans, in order to get a clearer sense of what Rwandans themselves thought about the genocide sites. While there was a divergence in agendas between the different interest groups, she identified that everyone she spoke to had something in common which was “a sense that memorialization and documentation of the genocide [was] far more important in Rwanda than preservation of genocide sites for forensic or pedagogical purposes”.<sup>89</sup>

Cook had the expectation that the national judiciary would have placed an emphasis on the importance of preservation of the genocide sites for forensic investigative purposes. However, on the contrary, when she asked a member of the Ministry of Justice about the preservation of the sites in order to safeguard physical evidence, the official noted that as the Ministry was at that time in the process of implementing the gacaca system, in which the evidence was for the most part based on eyewitness testimony, they were consequently not all that interested in ensuring the preservation of forensic evidence at the massacre sites. It was suggested that it was a possibility that only in the high-level cases being tried at the International Criminal Tribunal for Rwanda was forensic evidence relevant. The official “implied that at the local level, people know what happened, and who did what, and that eyewitness testimony is more than sufficient to establish the facts of a particular case. Forensic evidence is thus a luxury they cannot afford, and do not really need”.<sup>90</sup>

It may be that the requirement to preserve the mass graves and genocide sites as crime scenes until they could be forensically examined was at odds with an alternative agenda that the Rwandan government was pursuing in connection with the remembrance of and memorialisation of the genocide. In addition to the mass reburial of the human remains of genocide victims at designed memorial sites, some of the bodies have been interred in open ossuaries at the memorial sites or indeed form a central part of the memorial. The display of human remains for memorialisation purposes is in itself a contentious issue which has been subject to

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<sup>89</sup> *Ibid*, p291.

<sup>90</sup> *Ibid*.

some criticism and debate.<sup>91</sup> Although they have been denied, allegations have been made that families have been forced to bring exhumed victims' remains to official genocide memorial sites to be reinterred in collective graves.<sup>92</sup> Exhibiting bones in such a public fashion, conflicts with traditional mortuary rituals in Rwanda, and with the religious tenants of Christian and the dominant Catholic faith. Indeed the whole process of genocide memorialisation is extremely politicised.<sup>93</sup> The memorials commemorate only Tutsi victims and serve as a space to construct a narrative of the genocide which is in line with the official account propagated by President Paul Kagame's government.

Another possible explanation might be that the Rwandan authorities blocked access to mass grave sites in order to prevent the discovery of the human remains of Hutu civilians killed by RPF soldiers. This is mere conjecture and cannot be independently verified with the information available to this author. It is not implausible as an explanation and criticism has been laid elsewhere that prosecutions for war crimes and crimes against humanity related only to acts against Tutsi civilians whereas violations of international law perpetrated by RPF fighters have not been investigated or prosecuted in a systematic manner. Crimes attributable to the RPF were documented before, during and after the genocide<sup>94</sup> and the nature of the offences were such that they have been said to constitute grave human rights violations.<sup>95</sup> Writing in relation to criticisms levelled against the gacaca process for only bringing to account perpetrators who have committed crimes against Tutsis during the genocide, Gerald Gahima explains that the position taken by the Rwandan government has been to deny responsibility for the crimes perpetrated by the RPF. Whilst it has acknowledged that some members of the RPF did commit abuses, the government contended that they were carried out by soldiers in their individual capacity rather than as members of the force and were neither widespread nor

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<sup>91</sup> For a discussion on the Rwandan memorial sites and the display of human remains see, further, Sara Guyer, 'Rwanda's Bones' (2009) 36(2) *Boundary 2*, 155.

<sup>92</sup> Mary Harper, 'Rwanda genocide: Opposition claims 'forced exhumations'', 27 May 2011, BBC News available at <http://www.bbc.co.uk/news/world-africa-13582150>, (last accessed 27 October 2011).

<sup>93</sup> Lars Waldorf, 'Goats & Graves: Reparations in Rwanda's Community Courts', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for victims of genocide, crimes against humanity and war crimes* (Leiden: Martinus Nijhoff Publishers, 2009), pp. 515-539, p.523.

<sup>94</sup> See, for example, the Human Rights Watch-International Federation of Human Rights report, Alison Deforges, *Leave None to Tell the Story: Genocide in Rwanda* (New York-London-Paris: Human Rights Watch; International Federation of Human Rights, 1999), pp.540-559

<sup>95</sup> Gahima, 'Alternatives to prosecution', (n 18), p.173.

systematic. The position of the government has been that offences committed by members of the RPA needs to be distinguished from the genocide. To this end it contends that the appropriate forum for the investigation and prosecution of alleged RPA crimes is in the military court justice system and not in other systems which have been established to bring to justice perpetrators associated with the genocide.<sup>96</sup> Taking this as the stance of the Rwandan government, one might extrapolate that the government did not want an international forensic team, sent under the auspices of an international criminal tribunal, to target certain mass graves for fear of evidence of systematic human rights violations - that could be ascribed to the RPF - being unearthed.

The forensic expert report on the Kigali Amgar Garage exhumation prepared by Haglund acknowledges that permission to conduct the forensic investigation was granted by the *Chef de Cabinet, Ministre de la Justice of the Government of Rwanda*.<sup>97</sup> This suggests that although the Tribunal was empowered to conduct investigations, including forensic exhumations, on Rwandan territory, the approval of the Rwandan government was actually a necessary component for facilitating the forensic excavations. Indeed, Article 17(2) takes into account that there may be circumstances in which the support of the national State may be sought: “[I]n carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned”. However, this is not framed in terms of an obligation. The stronger language found in the first sentence where the Article provides that “the Prosecutor *shall* have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations” is absent.<sup>98</sup> Rather it is outlining that, where appropriate, the Prosecutor may foster a constructive working relationship with authorities in the State where the investigations occur. The International Criminal Tribunal for Rwanda was established through a United Nations Security Council resolution under Chapter VII powers and, therefore, the Rwandan State and government was, and is, obligated to comply with the resolution and with the requests and warrants issued by the

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<sup>96</sup> *Ibid*, p.174.

<sup>97</sup> Haglund, ‘Forensic Investigations at the Amgar Garage’, (n 44), p.38.

<sup>98</sup> My emphasis.

Tribunal.<sup>99</sup> The Rwandan government was consequently compelled to meet the terms of requests and orders emanating from the Tribunal including those that related to investigations. However, it is evident that genuine acquiescence on the part of the national authorities was essential for investigations to run efficiently. It is no secret that relations between the Tribunal and the Rwandan government did not run smoothly at all times. As articulated by William Schabas, “[r]elations with Rwanda itself, whose cooperation was essential for investigations, were often stormy”.<sup>100</sup> Whilst permission by the national State to undergo forensic investigations was not a *de jure* requirement, it seems that it was in reality a *de facto* condition. It is likely, therefore, that if the Rwandan government had objected to the continuation of the forensic programme by the Tribunal, it may have become extremely difficult to continue such investigations, in the absence of their approval.

It is impossible to say with any certainty whether the Office of the Prosecutor was unduly influenced by pressure from the Rwandan government not to proceed with further forensic exhumations of mass graves due to a perceived fear that evidence of systematic crimes perpetrated by the RPF against members of the Hutu population might be unearthed or due to the prioritisation given to memorialisation. One can only assume that an institution such as the International Criminal Tribunal for Rwanda, established by and conferred with powers by the United Nations Security Council, has based its decisions in respect of investigatory and prosecutorial strategy on the interests of justice and not those of politics.

## **(2) Security and Financial Concerns**

Adequate security to protect both the crime scene and the personnel working on the site is imperative for safe and successful forensic investigations. The first forensic investigation conducted on behalf of the Rwandan Tribunal at Kibuye was afforded the protection of a contingent of United Nations troops,<sup>101</sup> whilst the second forensic

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<sup>99</sup> Richard Goldstone, ‘Assessing the Work of the United Nations War Crimes Tribunal’ Address of the Honorable Justice Richard Goldstone, Former Chief Prosecutor for the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda, and Justice of the Constitutional Court of South Africa, Stanford Law School, October 12, 1996, (1997) 33(1) *Stanford Journal of International Law*, 1, 4.

<sup>100</sup> Schabas, *The UN International Criminal Tribunals*, (n 8), pp.30,31.

<sup>101</sup> Haglund, Connor and Scott, ‘Contemporary Mass Graves’, (n 62), 61.

mission had to rely on the employment of a private security firm.<sup>102</sup> Ostensibly it is not the role of a United Nations peacekeeping force to provide security for a criminal investigation and the previous chapter has highlighted how tensions arose when IFOR was requested to assume the role of security guards at a mass grave site in the former Yugoslavia. It would indeed be disquieting if the decision on whether an international tribunal could initiate forensic investigations rested on the availability of peacekeeping personnel to provide protection. One might imagine that provided the budget was made available, a carefully selected armed private security firm should be able to provide an adequate level of security. It does not seem entirely plausible that security was a major factor in the cessation of forensic activities. If it had been the case that security was inadequate, surely it would have made more sense to redress this rather than taking the decision to discontinue an entire forensic programme.

In terms of lack of financing for the exhumations, this again does not appear to provide an adequate explanation for why the forensic programme stopped after two forensic missions. When enquiries were made about funding for the exhumations by this author, Holo Makwaia, a trial attorney in the Office of the Prosecutor, observed that the forensic experts were seconded. Physicians for Human Rights donated the staff and the equipment necessary to complete the exhumations and the Tribunal provided logistics. In Makwaia's opinion, funding did not play a part in the decision and it mainly pertained to prosecutorial strategy.<sup>103</sup>

### **(3) Vast Number of Deceased Impeded the Execution of an Extensive Forensic Programme**

Juhl provided a further explanation as to why the forensic programme was discontinued, maintaining that according to Stover and Shigekane "the sheer number of dead also made it impossible to undertake large-scale forensic investigations".<sup>104</sup> While there is no definitive consensus on the number of people killed during the genocide, it certainly numbered hundreds of thousands of civilians, who were

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<sup>102</sup> Haglund, 'Forensic Investigations at the Amgar Garage', (n 44), p.53.

<sup>103</sup> Interview with Holo Makwaia, (n 52).

<sup>104</sup> Juhl, *The Contribution by (Forensic) Archaeologists*, (n 85), p.145.

murdered in a matter of months. At the more conservative end of the scale, estimates placed the figure around at least a half million.<sup>105</sup> At the upper end of the scale, it is contended that upward of one million men, women and children died during the genocide.<sup>106</sup> A 2004 census carried out by the Ministry of Youth, Culture and Sports in Rwanda determined that 937,000 Tutsi and moderate Hutus were killed during the 100 days of genocide.<sup>107</sup> Conventional estimations cite the figure as circa 800,000.<sup>108</sup>

In some cases people were killed and thrown directly into mass graves, in other circumstances the bodies lay where they fell and were later collected for burial. Local administrators made arrangements to dispose of the dead using garbage trucks<sup>109</sup> and, in Kigali and Butare, prisoners were released from the prison to form work gangs that collected the corpses lying on the roadsides.<sup>110</sup> In some places

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<sup>105</sup> In a 1999 report for Human Rights Watch, Alison Desforges states the number of dead was at least half a million: "In the thirteen weeks after April 6, 1994, at least half a million people perished in the Rwandan genocide, perhaps as many as three quarters of the Tutsi population. At the same time, thousands of Hutu were slain because they opposed the killing campaign and the forces directing it." Deforges, *Leave None to Tell the Story*, (n 94), p.6. The Kambanda judgement from the International Criminal Tribunal for Rwanda alluded to the "killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days". *The Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Trial Judgement and Sentence of 4 September 1998, at para. 111.

<sup>106</sup> The judgement in the *Akayesu* trial stated the "estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more". *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Trial Judgement of 2 September 1998, at para. 111.

<sup>107</sup> 'RWANDA: Census finds 937,000 died in genocide' 2 April 2004 Source: IRIN humanitarian news and analysis, available at <http://www.irinnews.org/report.aspx?reportid=49384>, (last accessed 27 October 2011). When the announcement of this figure was made, it was stated that the death toll could increase as the Gacaca system became fully functional. As part of their testimony, perpetrators prosecuted via this process were expected to reveal details about the individuals they had killed. The minister for youth, culture and sports, Robert Bayigamba, the government official who revealed the figures at a news conference in Kigali, commented that: "We shall come up with the exact figure after the Gacaca courts complete their work", *ibid*.

<sup>108</sup> "Rwanda: How the genocide happened", BBC News 17 May 2011, available at <http://www.bbc.co.uk/news/world-africa-13431486>, (last accessed 27 October 2011).

<sup>109</sup> Melvern, *A People Betrayed*, (n 22), p5.

<sup>110</sup> Gourevitch, *We wish to inform you*, (n 14), p.115. The 1999 Human Rights Watch – International Federation of Human Rights report documented that: "Burgomasters were also charged with disposing of the bodies. Sometimes they left the bodies unburied for days or weeks, a practice which contributed to the "normality" of violent death, but after a while public health considerations dictated disposal of the remains. Authorities summoned people for umuganda which consisted of stuffing bodies down latrines, tossing them in pits, throwing them into rivers or lakes, or digging mass graves in which to bury them. In Kibuye, workers used a bulldozer to push bodies into a pit behind the little church on a peninsula jutting into the lake. In Kigali, Gikongoro, Butare, and elsewhere, authorities also called upon drivers of bulldozers to assist in disposing of the bodies. In Kigali, prisoners went through the streets every three days to gather up the bodies, a service that prisoners performed in Butare as well. One witness related his shock in the early days of killing when he came across a group of prisoners, dressed in their pink prison shirts and shorts, tossing cadavers into a truck. They were appropriating all valuables from the bodies, stripping glasses and watches from them, plunging their hands into pockets to be sure they had extracted all they could from the dead, and then squabbling among themselves over the division of the spoils", Deforges *Leave None to Tell the Story*, (n 94), pp.186, 187.

survivors managed to inter the dead,<sup>111</sup> in others the killers were ordered to complete this task. Not all the dead were buried, indeed an abundance of the bodies were callously discarded in a multitude of manners, including being dumped into latrines,<sup>112</sup> burnt,<sup>113</sup> thrown into rivers, thrown into Lake Kivu and left unburied where animals including dogs and birds scavenged on the decomposing remains. Preventing the burial of the dead was in some cases a further means to de-humanize and degrade the Tutsi population.<sup>114</sup>

It should be noted, however, that the article by Stover and Shigekane, cited by Juhl, pertains to the conflicting needs of international criminal Tribunals regarding evidentiary requirements and the humanitarian needs of the victims' families.<sup>115</sup> Thus the claim that the sheer number of dead rendered a comprehensive forensic programme not feasible should be read in light of the preceding paragraph:

Ideally, the relationship between the families of the missing and international war crimes tribunals should be symbiotic, benefiting both the relatives and the courts but, in reality, it rarely is. Since the establishment of the two ad hoc international criminal tribunals for the former Yugoslavia and Rwanda in the early 1990s, only a small fraction of the remains of the missing have been identified and returned to families for proper burial. This can largely be attributed to the clandestine manner in which the bodies of

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<sup>111</sup> See, for example, Deforges, *ibid*, p544.

<sup>112</sup> Some men, women and children were thrown into latrines while still alive and left to die of suffocation or starvation.

<sup>113</sup> For example: "When RPF soldiers arrived in the commune of Rusatira in early July, they killed persons pointed out by a Hutu councillor. At most houses, they threw the dead into latrines, but at one house with a flush toilet, they burned the bodies", Deforges, *Leave None to Tell the Story*, (n 94), p.548.

<sup>114</sup> There are sadly a multitude of examples that have been documented pertaining to how the human remains were disrespected as a final indignity to the murdered. One will be provided here for illustration: "In many places, killers refused to permit the burial of victims and insisted that their bodies be left to rot where they had fallen. Persons who attempted to give a decent burial to Tutsi were sometimes accused by others of being 'accomplices' of the enemy. The Hutu widow of a Tutsi man killed at Mugonero in Kibuye expressed her distress at the violation of Rwandan custom, which is to treat the dead with dignity. Speaking of Pastor Elizaphan Ntakirutimana of the Adventist church, she stated: 'What gives me grief is that after the pastor had all these people killed, he didn't even see to burying them, including his fellow pastors. They lay outside for two weeks, eaten by dogs and crows'", *ibid*, p.164

<sup>115</sup> The tension relates to the judicial needs of the international criminal tribunals that underlie the purpose of the forensic exhumations to recover bodies and subject them to forensic examination, with the aim of gathering forensic evidence that can be utilised in war crime and genocide trials, on the one hand, and the needs of the victims' families to receive information about the whereabouts of their loved ones remains and the requirement of repatriation of the bodies for re-burial in the community, on the other. As discussed in the article, the needs of the criminal Tribunals can at times take priority over the needs of the surviving relatives and bodies of the missing, even those exhumed by the Tribunals, can remain unidentified.

the victims were disposed of, making their recovery difficult, if not impossible, without the cooperation of the actual perpetrators who for obvious reasons would rather remain anonymous. In Rwanda, the sheer number of dead (estimated between 500,000 and 800,000) has made it virtually impossible for the country's government or the International Criminal Tribunal for Rwanda (ICTR) to undertake large-scale forensic investigations.<sup>116</sup>

While it certainly may be accurate that the vast number of dead could have been an impediment to the undertaking of large-scale forensic investigations, this factor alone does not explain why there was there was an initial perception that forensic evidence was critical to the investigations and a forensic programme was put in place but was subsequently terminated in the early days of the Tribunal's life. The scale of killing and the various methods by which the dead were disposed of would for sure have inhibited the full recovery and identification of the all genocide victims. However, it seems unlikely that this could have been the main factor preventing further forensic examinations in Rwanda by the Tribunal, in light of the fact that international criminal Tribunals will not usually seek to exhume all mass graves or examine all crime scenes associated with the conflict but rather will target particular sites in line with a prosecutorial strategy.

#### **(4) Prosecutorial Strategy**

In interviews carried out by this author with lawyers from the Office of the Prosecutor at the Rwandan Tribunal who worked on the cases that utilised forensic evidence from the mass grave exhumations, one of the main reasons cited for the cessation of the forensic programme pertained to prosecutorial strategy. Although the forensic evidence that was used in the early trials was considered to be very strong evidence, the prosecution had a lot of direct evidence in addition to forensic evidence, including the testimony of individuals who had survived some of the massacres. As revealed by one trial lawyer, initially the prosecution had to prove the

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<sup>116</sup> Eric Stover and Rachel Shigekane, 'The missing in the aftermath of war: When do the needs of victims' families and international war crimes tribunals clash?' (2002) 84(848) *International Review of the Red Cross*, 845, 847.

fact that genocide had undeniably occurred in Rwanda in 1994.<sup>117</sup> The analysis of the wounding patterns and the demographical composition of the remains exhumed from mass graves in Rwanda provided the Tribunal with one method of confirmation that the atrocious crimes committed in that country constituted genocide. Once it was judicially established that genocide had occurred there was less of an imperative to utilise forensic investigatory methods.<sup>118</sup> Therefore, the perceived added value of availing of forensic evidence was minimal as it was determined after a certain point that forensic evidence would not increase the likelihood of securing convictions above and beyond what could be offered by the use of witness testimony and documentary evidence.

In addition, at the point in time that the exhumations were conducted at the Kibuye site, the bodies had not been moved and thus the crime scene was preserved, ensuring the forensic integrity of the site. Subsequently, many grave sites were interfered with by members of the local community who conducted unofficial exhumations in an attempt to locate the remains of their loved ones,<sup>119</sup> or graves were exhumed for official reburial ceremonies by the State. In terms of the case law from the International Criminal Tribunal for Rwanda, there is one decision that supports this explanation. During the course of the *Akayesu* trial, the Defence Counsel filed a motion on 29 December 1997 requesting an inspection of a site at the Taba 'bureau communal' in order to establish proof of the existence of one or several mass graves between 19 April and the end of July 1994. If such graves were to be located, the Defence Counsel further requested that the contents of these graves be verified. In addition, the Defence requested an order from the Tribunal for the performance of a forensic analysis of three cadavers.<sup>120</sup>

It was maintained by the Defence that the site inspection was needed based on inconsistencies in prosecution witnesses testimony heard during the course of the trial. A number of witnesses had claimed that there were mass graves at the site in question; however, several other witnesses had failed to mention their existence. Therefore, Counsel for the accused argued in the motion that the inconsistency called

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<sup>117</sup> See *Kayishema and Ruzindana*, (n 10), Judgement of 21 May 1999.

<sup>118</sup> Interview with Holo Makwaia, (n 52).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 'Decision on the Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis', 17 February 1998.

into question the witnesses' credibility and created an urgent need for the site to be inspected. In support of this request, reference was made to Article 17(2) of the Statute which confers power upon the Prosecutor to 'conduct on-site investigations'. The Defence contended that "the Prosecutor, who has the burden of proof, did not order such an investigation. Consequently, the Defence believes it is now obliged to make up for this culpable failure".<sup>121</sup> The Defence furthermore submitted that if that on-site inspection was carried out with all the parties present it would "provide evidence to substantiate or not (as the case may be) the physical and psychological acts allegedly perpetrated at the site".<sup>122</sup> The Defence submitted that the Tribunal was empowered to order an on-site inspection at any time before the proceedings prior to the judgement in accordance with Rule 89<sup>123</sup> of the Rules of Procedure and Evidence.<sup>124</sup> Responding, the Prosecutor did not oppose the site visit but submitted that although such a visit might be informative and could assist the Trial Chamber in the final analysis of the evidence before it, a visit was "not essential for a just determination of the case".<sup>125</sup>

Considering the provisions made in Rule 89(b) and (c), the Tribunal deliberated that it was empowered to order site inspections were this necessary. However, there were two factors of importance that influenced its deliberations. First, the Tribunal noted the Prosecutor's contention that on-site investigations had indeed been carried out at the Taba commune, headed by Mr. Halvard Tömta between late 1995 and mid-1996. These enquiries consisted of witness interviews and visits to the scene where it was asserted the suspected acts had taken place. Second, and more importantly in terms of addressing the question of why forensic analysis was not used more extensively by the International Criminal Tribunal for Rwanda, the Tribunal considered forensic

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<sup>121</sup> *Ibid.*, at para. 3.

<sup>122</sup> *Ibid.*, at para. 4.

<sup>123</sup> "Rule 89: General Provisions:

(A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may request verification of the authenticity of evidence obtained out of court".

International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Adopted on 29 June 1995, as amended 01 October 2009.

<sup>124</sup> *Akayesu*, 'Decision on Forensic Analysis', (n 120), at para. 4. The Defence also submitted that national rules of evidence emanating from Canada and France supported this position, *ibid.*

<sup>125</sup> *Ibid.*, at para. 5.

examination of the site would be impractical due to the fact that the graves had been interfered with as a result of body recovery and reburial activity. As stated in the decision, evidence before the Chamber was “to the effect that many of the corpses buried in the original mass grave sites have been exhumed for reburial; hence the impracticality of carrying out further inspections and exhumations of the said sites”.<sup>126</sup> Therefore, the Tribunal found that an on-site inspection as requested by the Defence, although it would be informative, “would not be instrumental in the discovery of truth and determination of the matter before it”.<sup>127</sup>

The Chamber then considered the request for the forensic examination of three cadavers, brothers of an individual named Ephrem Karagwa. The Defence Counsel submitted the request in order to confirm that the death of three individuals occurred in or around the date of 19 April 1994 in Musambira Commune. Subject to the confirmation of these deaths the Defence also requested “that an exhumation be carried out by an expert of international repute so as to determine the conditions of death, including the circumstances under which they occurred, the date thereof, the burial site and the identities of the deceased”.<sup>128</sup> It was submitted that the Prosecutor was relying only on the written statements and oral testimony of witnesses in order to establish the alleged killings. Counsel for the Defence was of the opinion that such evidence was insufficient to prove these deaths and that “only a forensic analysis would establish the pertinent facts thereof”.<sup>129</sup> The Prosecutor contested this request, *inter alia*, on the grounds that it was erroneous as there were no inconsistencies as to the identity of those killed, as to the cause of death and as to when they were allegedly killed and, further, that the request for an exhumation was not timely due to the advanced stage of the proceedings.<sup>130</sup> The Tribunal gave consideration to a provision in Rule 89 which provides that “a Chamber may request verification of the authenticity of evidence obtained out of court”<sup>131</sup> and determined that were it deemed necessary the Tribunal was within its power to order an exhumation and forensic analysis “so as to prove or disprove a contentious piece of evidence”.<sup>132</sup>

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<sup>126</sup> *Ibid.*, at para. 7.

<sup>127</sup> *Ibid.*, at para. 8.

<sup>128</sup> *Ibid.*, at para. 9.

<sup>129</sup> *Ibid.*, at para. 10.

<sup>130</sup> *Ibid.*, at para. 11.

<sup>131</sup> In the decision, this provision is incorrectly referred to as Rule 89(c). The correct reference should be to Rule 89(d).

<sup>132</sup> *Akayesu*, ‘Decision on Forensic Analysis’, (n 120), at para. 12.

However, the request was dismissed by the Tribunal due to the time interval between the alleged events and the application, and the fact that a number of suspected mass grave sites had been subject to exhumation and reburial; the Tribunal considered such examinations would be inappropriate and unnecessary. As stated in the decision:

However, considering the ancientness of the acts which allegedly occurred four years ago, and in light of the fact that a number of the purported mass grave, including, without a doubt, those supposedly in the vicinity of the Taba 'bureau communal,' have been the subject of previous exhumations and reburials, the Tribunal finds that a new forensic analysis would not be appropriate nor, in any case, instrumental in the discovery of the truth.<sup>133</sup>

### **(5) Murders were not Clandestine**

Another important factor to bear in mind when considering why medico-legal evidence from mass grave exhumations was not relied upon in more than two trials at the Rwandan Tribunal is that, in contrast with many of the mass executions and subsequent burial of bodies associated with the conflict in the former Yugoslavia, most of the killings in Rwanda were not committed in a clandestine manner. As Richard Karegyesa pointed out during an interview conducted with this author, one of the peculiar things about the Rwandan genocide was that none of the mass killings happened at night; victims were massacred in broad daylight.<sup>134</sup> An objective central to the accomplishment of genocide and the total annihilation of the Tutsis was the mobilisation of the entire Hutu population to undertake this 'work'. In many ways the killings were the opposite of clandestine as killers were trained prior to the outbreak of the genocide and propaganda and incitement to commit genocide was transmitted through the print media and over the airwaves. The worst massacres

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<sup>133</sup> *Ibid*, at para. 13.

<sup>134</sup> Philip Gourevitch illustrates this point well when he recounts the killings that took place at a church at Nyarubuye in the eastern Rwandan province of Kibungo in mid-April 1994:

"The killers killed all day at Nyarubuye. At night they cut the Achilles tendons of survivors and went off to feast behind the church, roasting cattle looted from their victims in big fires, and drinking beer...And in the morning, still drunk after whatever sleep they could find beneath the cries of their prey, the killers at Nyarubuye went back and killed again. Day after day, minute to minute, Tutsi by Tutsi: all across Rwanda, they worked like that".

Gourevitch, (n 14), p18, 19.

were carried out “in broad daylight and in many communities they left the dead in full view”.<sup>135</sup>

In addition to eye witnesses to the events, many perpetrators confessed to their part in the genocide. Furthermore, journalists who gained access to Rwanda whilst the genocide was on-going recorded documentary footage of the mass killings including a documentary by Fergal Keane broadcast on BBC’s Panorama in June of 1994. The prosecution were able to use such footage as evidence and Fergal Keane testified as a prosecution witness.<sup>136</sup>

## **E. Conclusion**

Forensic exhumations were performed on behalf of the International Criminal Tribunal for Rwanda by Physicians for Human Rights at two locations in Rwanda, in Kibuye and Kigali, yielding forensic evidence that was presented in two of the trials at the Rwandan Tribunal. The modus operandi of the excavations and details of the evidence extracted from these exhumations has been provided in this chapter. The paucity of forensic exhumations carried out by the Rwandan Tribunal, relative to the volume of people murdered during the genocide, is striking, particularly when comparisons are made with the level of activity sustained by its European counterpart, the International Criminal Tribunal for the former Yugoslavia. This does beg the question: why were no more exhumations performed?

Were prosecutorial orientations the primary reason or were other, more political factors at play? Is this an example of where we witness the nexus of politics and law in war crime trials? A number of possible explanations as to why forensic evidence did not feature more prominently in the work of the Rwandan Tribunal have been examined in this chapter. Whilst several of the reasons outlined appear plausible and, indeed, perhaps it was not down to one cause in particular but due to a combination of factors that the forensic programme was curtailed, the most convincing explanation pertains to prosecutorial strategy. It would seem that as forensic

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<sup>135</sup> Deforges *Leave None to Tell the Story*, (n 94), p.589.

<sup>136</sup> Personal interview with Mr. Richard Karegyesa, Chief of Prosecution, International Criminal Tribunal for Rwanda, Arusha, Tanzania, 15 April 2010.

evidence was not critical to secure convictions, it was deemed unnecessary to continue with the forensic programme. In addition, as many of the genocide sites and mass graves had been disturbed due to reburial activity by survivors and by the State, many of the sites became contaminated and could no longer be considered forensically viable.

However, the fact that forensic evidence was not a prevailing feature of the Rwandan Tribunal should not be grounds to dismiss the significance of the role it has played at this institution. On the contrary, the importance of forensic evidence for the Tribunal should be underscored. The expert witness testimony and presentation of forensic evidence during one of the early trials, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, was pivotal in determining that thousands of individuals had been killed or injured in the massacre at the Home St. Jean Catholic Church and Complex. This is highlighted in the Trial Chamber judgement:

Paragraph 29 of the Indictment alleges that the Complex attacks left thousands dead or injured. The Trial Chamber finds, beyond a reasonable doubt, that the single day of the major scale attack, as well as the smaller-scale sporadic attacks upon the Complex, resulted in the death of thousands of Tutsis whilst numerous others suffered injuries. This Chamber bases this finding primarily on the testimony of Dr. Haglund and Dr. Nizam Peerwani, Prosecution expert witnesses. Thus, the Prosecution has proved the facts alleged in paragraph 29.<sup>137</sup>

The findings of Dr. William Haglund and Dr. Nizam Peerwani, the forensic anthropologist and forensic pathologist respectively, employed on behalf of the prosecution, testified as to the demographics of the victims, and the cause of death.<sup>138</sup> Furthermore, material evidence recovered from an exhumed grave was one

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<sup>137</sup> *Kayishema and Ruzindana*, (n 10), Trial Judgement of 21 May 1999, at para. 353.

<sup>138</sup> “Dr. Haglund’s written report confirms that many people, men, women and children were killed at the Complex. Of the 493 dead examined by Dr. Haglund, only found one gunshot injury. He estimated that 36% of people in the grave had died from force trauma whereas 33% of the people died from an undetermined cause. Dr. Haglund selected an individual as an example who he identified as a fifty year old man. The man’s fibula had been completely severed by some sharp object, which ‘would have severed the achilles’ tendon rendering this individual partially crippled. On the neck region ‘all the soft tissue from the right side of the neck towards the back would have been cut through’ and ‘a sharp cut mark in the tibia body, and in the inferior border of the scapular shoulder blade, another trauma caused by a blow of a sharp object’. Dr. Haglund concluded that the fifty-year old man was trying to protect himself by presenting different body aspects to the armed assailant. Dr. Peerwani found stab wounds indicating the use of sharp force instruments and confirmed that many of

of the factors considered by the Trial Chamber in determining the ethnicity of the victims – one of the elements required to support a charge of genocide. In order to prove the commission of the crime of genocide, it was necessary for the Prosecution to “prove beyond a reasonable doubt, that the criminal acts were committed with the intent to destroy in whole or in part a national, ethnical, racial or religious group, as such”.<sup>139</sup> The Chamber, therefore, examined various components of “specific intent”.<sup>140</sup> One such component was “the targeted group”,<sup>141</sup> and in support of this fact the prosecution tendered evidence pertaining to the identification card system that had been in place in Rwanda to specify a person’s ethnicity. In this vein, the prosecution presented, *inter alia*, “[i]dentification cards identifying the victims as Tutsis [that] were found on those exhumed from mass graves in Kibuye”.<sup>142</sup> From the above points it can be concluded that the forensic programme of mass grave exhumations as undertaken at the International Criminal Tribunal for Rwanda, whilst not notable for its longevity, was in actual fact an important feature of this court. Forensic evidence garnered from the excavations played a significant role in establishing, for judicial purposes, that the crimes committed in Kibuye, as alleged in the indictment, constituted genocide.

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the victims were young children and the old”. *Ibid*, at para. 326, references omitted. See, also para. 325.

<sup>139</sup> *Ibid*, at para. 521.

<sup>140</sup> *Ibid*, at 6.2.1, paras.521-545.

<sup>141</sup> *Ibid*, paras. 522-526.

<sup>142</sup> *Ibid*, para. 524.

## Conclusion

In April 2010 I travelled to Rwanda. During this short field trip I visited a number of memorial sites. Some, such as the Genocide Memorial in Kigali, created by a joint partnership between the Aegis Trust<sup>1</sup> and Kigali City Council,<sup>2</sup> are rather sophisticated, and it was apparent that much thought had gone into its design. Others are smaller, but no less poignant, and in truth are more disturbing. Many have been created at massacre sites, where the physical evidence of the genocidal violence,<sup>3</sup> and the dead themselves, form an integral part of the memorials. It was whilst visiting one such site of remembrance outside of Kigali that a question was posed to me by one of the guides who worked at the memorial. We were discussing various aspects of my research and my trip to Rwanda when he turned to me and asked, ‘how does our genocide compare with other genocides?’ Taken aback by this question, I was uncertain of what to say. How does one answer such a candid question? It was worse? It was better? Can one even compare one mass killing with another? Unsure of how to answer without saying something inappropriate or appearing insensitive, I gave some tactful response. That question has remained in my mind and I have thought about it from time to time whilst completing this research. It strikes me that although it brings a sense of unease to compare one tragedy with another, as scholars of genocide and conflict this is something we often do. This thesis has been no exception as I have placed the genocide and war crimes of the Second World War, alongside the enforced disappearances associated with the ‘dirty war’ in Argentina. Description of the investigation of some of the atrocious acts that occurred in Europe in the 1990s as the former Yugoslavia fell asunder follows, and in the final chapter I have written about the 1994 Rwandan genocide.

These events are in one sense incomparable, but it is possible to identify parallels. One similarity is the significant loss of life associated with these offences. Further,

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<sup>1</sup> The Aegis Trust is a non-governmental organisation, based in the United Kingdom.

<sup>2</sup> Kigali Memorial Centre webpage, available at <http://www.kigalimemorialcentre.org/old/index.html> (last accessed 27 October 2011).

<sup>3</sup> For example, in one memorial, a church, the ceiling is heavily stained with the blood of the victims. In another, a site composed of a small church and several outer building, part of the wall of one of the out-houses, which had formerly been used as a Sunday School, is thick with the blood, human tissue and brain matter of children who had been killed by being flung against the wall.

the crime of enforced disappearance bears a similarity to other manifestations of mass killings, such as the Holocaust, ethnic cleansing in Srebrenica and the Rwandan genocide - a central aim of these crimes is the obliteration of the target groups' very existence, not just of their physical presence but also in the ontological sense. People are killed and their bodies made to disappear as if they *never* existed. Todd Samuel Presner, exploring the spectacle of death in the advent of modernity and mass death<sup>4</sup> in the Nazi death camps, as understood by Hannah Arendt, Martin Heidegger and other prominent philosophers such as Giorgio Agamben and Edith Wyschogrod, underscores this rationale in the process of mass killings.

[T]he perpetrators of mass death desire the consummation of nothingness such that future generations will not even know that there was a Holocaust. Not only were there no Jews, Armenians, or Tutsis, but there never were any. They did not exist. The most final and absolute annihilation aims to accomplish even more than killing every member of the targeted group. It ultimately desires to annihilate all memory of that group, the very existence and being, the very traces, histories, and remains of a people.<sup>5</sup>

The author draws attention to conclusions made by Arendt in her seminal work *The Origins of Totalitarianism* on “the phenomenon of mass death, the origins of the totalitarian mentality, and its human consequences”.<sup>6</sup> Arendt recognised “the potentiality of absolute annihilation without a trace. Totalitarianism not only exacted the ‘complete disappearance of its victims’ but created the conditions of possibility for their oblivion, the fact that they ‘ceased ever to have lived’”.<sup>7</sup>

Many perpetrators, who bear responsibility for atrocity crime, have carried out mass killings with impunity. However, the advent of a cohesive system of international criminal justice, which encompasses international human rights law, international humanitarian law and international criminal law, and within that framework the emergence of international forensic investigations as a tool of analysis, has opened the possibility to oppose the progression of mass and anonymous death. Claims of

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<sup>4</sup> Presner, following Edith Wyschogrod, uses the term ‘mass death’ to “refer to anonymous death suffered in great numbers. It is a general concept that includes the Holocaust and embraces other instances of extermination and mass murder”, Todd Samuel Presner, “‘The Fabrication of Corpses’ Heidegger, Arendt, and the Modernity of Mass Death”, (2006) 135 *Telos*, 84, 87, n11.

<sup>5</sup> *Ibid*, 106. Presner draws our attention to the fact that Heidegger’s remarks about “the fabrication of corpses” misses this point, *ibid*.

<sup>6</sup> *Ibid*, 107.

<sup>7</sup> *Ibid*, citing Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, 1979), at p.434.

innocence by perpetrators can be contradicted by the visceral reality of the crime that the dead body represents. In addition, forensic science proffers a largely objective process through which the identity of decedents can be restored and unlawful activity documented. The process of recovering the remains of the dead and the reinstatement of identity becomes all the more important when we consider it as a means of resistance against the animus of mass killing and the ideology of annihilation.

If we view the project of the forensic excavation of a mass grave in its entirety, taking into account the various actors and processes involved in recovering the bodies and subjecting them to post-mortem examination, it may be seen as an instrument that can be used by criminal justice or transitional justice mechanisms. Like any instrument, it can be used well, or used badly. A desired model of forensic investigations for criminal justice purposes would entail this instrument being one that can simultaneously fulfil the needs of the justice system – through the documentation of forensic evidence – and the needs of the families and communities of the dead – through assistance in the recovery, positive identification and repatriation of remains. The exhumation process is important from a criminal justice perspective. Excavating bodies from mass graves can yield forensic evidence that can be very persuasive when presented in a court of law. The corroboration provided by the physical evidence recovered from graves can assist in securing convictions of the perpetrators responsible for the death of these individuals. However, it is essential that the potential utilitarian value of the remains, as forensic evidence, does not override the humanitarian needs associated with the dead. The recovery of dead bodies serves an essential reparative function for societies in transition after conflict. Moreover, a number of obligations towards the dead in war have been enshrined in international humanitarian law. The adequate application of these rules is essential, not only from the point of view of fulfilling legal duties, but because they alleviate some of the destructive consequences that the victims' deaths bring to bear on their families. In striking a balance between the two sets of interests, mass grave exhumations conducted by international criminal tribunals can transcend a tension that lurks at the heart of the process of excavations.

The application of medical and forensic sciences to the investigation of atrocity crimes will continue into the future, and the synergy between science and law in an

international legal context should continue to grow and strengthen. Sadly, there will undoubtedly be no shortage of work for the professionals concerned. Forensic investigations will continue to be a feature of international criminal justice mechanisms, including the International Criminal Court. The desirability of maintaining a forensic programme that simultaneously can contribute to humanitarian obligations towards the deceased, and their families, has been observed by the International Committee of the Red Cross in the context of the work of this court. In a statement submitted at the Review Conference of the Assembly of State Parties, the Committee highlighted the importance of:

[..]the role of justice mechanisms – including the ICC – in the effective realisation of the “Right to know” what has happened to one’s loved ones. Many victims of armed conflicts tell the ICRC that what they want to know, above all, is the fate and whereabouts of their loved ones who have disappeared. The work carried out by judicial mechanisms, including forensics activities such as exhumations, can be particularly valuable and relevant in this regard.<sup>8</sup>

In these concluding remarks it is important to remember the human element that underlines this nature of work and to emphasise once more that the cadavers subject to forensic analysis are not mere samples of physical evidence to be exploited in a war crimes trial, but rather are the human remains of people who have lost their lives under tragic circumstances. Throughout the process of researching and writing this thesis I have given much thought to the subject of the dead, from a legal, philosophical, psycho-social and forensic perspective. The horrors endured, in the last moments of their lives, by the victims of the crimes described in this thesis are unimaginable. I realise, of course, that I could never comprehend the suffering of victims without standing in their shoes. It feels appropriate that the last words should not be mine.

Be happy, you who live in fine apartments, in ugly houses or in hovels. Be happy, you who have your loved ones, and you also who sit alone and dream and can weep. Be happy, you who torture yourselves over

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<sup>8</sup> ‘The impact of the Rome Statute system on victims and affected communities’, *Statement submitted by the International Committee of the Red Cross*, 1 June 2010, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/RC2010/Stocktaking/RC-StocktakingVictims-ICRC-statement-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-StocktakingVictims-ICRC-statement-ENG.pdf) (last accessed 27 October 2011).

metaphysical problems, and you who suffer because of money worries. Be happy, you the sick who are being cared for, and you who care for them, and be happy, oh how happy, you who die a death as normal as life, in hospital beds or in your homes. Be happy, all of you: millions of people envy you.

MICHELINE MAUREL, a survivor of the Nazi camp, *Ravensbrück*.<sup>9</sup>

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<sup>9</sup> Tr. Margaret S. Summers, cited in D. J. Enright (ed.), *The Oxford Book of Death* (Oxford: Oxford University Press, 1983), reissued 2008, p.242

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