

# The missing

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Whereas the relatives of deceased persons can mourn the death of their loved ones, uncertainty about the fate of missing persons is a harsh reality for countless families affected by armed conflicts or internal violence. Across the world parents, spouses and children are desperately trying to find lost relatives. Their anxiety can remain with them for years after the fighting has subsided and peace has returned. Many are unable to move on with their lives or begin the process of recovery, sometimes passing on feelings of injustice and resentment to future generations and thus undermining relations between groups and nations even several decades after the actual events.

The phenomenon of missing persons occurs in almost every situation of armed conflict or internal violence. There are a variety of reasons for which persons may be unaccounted for. Violations of international humanitarian law and/or human rights account for most cases of missing persons. But especially the dangers inherent in wars lead to separation and disappearances of soldiers and civilians alike.

## **Missing in action...**

In earlier centuries, soldiers were often considered as “cannon-fodder” and their disappearance or death went mostly unnoticed by their army corps. In the mid-nineteenth century, the American Civil War helped pave the way for the individual identification of deceased and missing persons. Each soldier received an identity disc on which their name was marked, together with their company, regiment, division and army corps. The issuing of such discs was generalized and standardized after the First World War, at the International Red Cross Conference in 1925. These were the first steps

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taken to reduce the phenomenon of soldiers “missing in action”. It has, however, remained a major issue in recent and contemporary conflicts and the hostilities, for example, between Armenia, Azerbaijan and Nagorny Karabakh and between Ethiopia and Eritrea left thousands of families without information about the fate of their relatives.

### **... and civilians unaccounted for**

The disappearance of hundreds of thousands of civilians in camps and the large numbers of women, children and elderly persons missing after heavy air raids during the Second World War highlighted the fact that the missing persons problem is far greater than that of soldiers “missing in action”. Graves of unknown soldiers bear witness to the recognition of nations for their heroes. Lengthy lists of persons missing in recent conflicts and political turmoil are a reminder, however, that the majority of missing persons were civilians who were separated from their families by the effects of war, or who disappeared while in detention or were killed in massacres and thrown into mass graves. Pictures of unaccompanied children separated from their families whilst fleeing the fighting or violence and searching for their parents have been published around the world.

“Missing persons” are those persons whose families are without news of them as a result of armed conflict or internal violence. This rather formal definition does not reflect the fact that families are desperately searching for information as to the whereabouts of family members, neither knowing whether their relatives are alive or dead nor able to have closure after the violent events that disrupted their lives. That is the first question raised by the missing persons problem: Is the missing person alive or dead?

### **The right to know the fate of their relative**

The fear that a loved one’s death will be confirmed is countered by the intense longing for any news that will put an end to uncertainty. If they are alive, the missing persons may be in detention or separated from their families by front lines or borders. The frequent severance of lines of communication and the numerous population shifts in times of armed conflict can be overcome by restoring family links, possibly through the ICRC’s Central Tracing Agency, if the warring parties respect their obligation to facilitate the exchange of family news and the reunification of families.

Existing international rules are designed to prevent persons from becoming unaccounted for and to ensure that missing persons do not remain missing. Notification of capture, arrest or detention, the right of detained or separated persons to correspond with their families and the authorities' obligation to answer inquiries about missing persons should ensure that detained persons are not missing for long. Quick ICRC access to prisoners of war and other persons deprived of their liberty in armed conflicts or situations of internal violence contributes considerably to the protection of these people and helps to comfort families desperately searching for their relatives.

The repatriation of unregistered soldiers over twenty years after their capture and more than a decade after the end of hostilities, and the reunification of families after thirty years without news of their missing relatives, demonstrate that for a person to be missing does not necessarily mean that he or she is dead. Moreover, very recent examples from Angola, the Iran-Iraq war of the 1980s or the hostilities between Morocco and Western Sahara show that uncertainty about the fate of relatives often lasts throughout the entire duration of a war.

### **Respect for the dead and their families**

Unfortunately, in situations of internal violence and in most recent armed conflicts, the authorities or contenders have shown little concern or respect for the dead or their families and evidence confirming death has mostly not been preserved. The bodies of victims are either left unattended or buried in mass graves. Bodies may even be destroyed as possible evidence of extra-judicial killings in order to avoid accountability for crimes committed.

Families are therefore often not informed when a relative has died, and humanitarian organizations dealing with the aftermath of armed conflicts or internal violence must increasingly cope with the discovery of bodies and burial sites. Tensions between the families' need for information and the requirements of judicial procedures have to be overcome. Humanitarian organizations and investigation teams have to perform their complementary role and learn how to break bad news to the families.

At the very least, when all else fails and it proves impossible to clarify the fate and whereabouts of the missing, their families must, for their own sake and that of the communities, be allowed to honour the memory of their missing relative in a dignified manner.

### **The ICRC's expectations**

The ICRC has for many years sought to forestall disappearances, to restore family links when they have been broken and to ascertain the whereabouts of missing persons. Yet in many contexts it has been unable to fulfil its mandate for lack of sufficient political will on the part of the parties concerned, or simply because of the general confusion and disruption prevailing in societies affected by armed conflict or internal violence. Other international, governmental and non-governmental organizations come up against similar obstacles.

This situation, in particular the tragedy for the families, the scale of the phenomenon, the emergence of international tribunals and the progress of science in identifying human remains, has induced the ICRC to review internally and with all players involved — governments, international and national governmental and non-governmental organizations and experts in various fields of activity — all methods that could be used to prevent disappearances during armed conflict or internal violence and respond more effectively to the needs of families that have lost contact with their relatives, and to agree on common and complementary recommendations and operational practices.

## **Résumé**

### ***Les personnes portées disparues***

*Sophie Martin*

*L'incertitude sur le sort des personnes disparues est une dure réalité pour d'innombrables familles victimes de conflits armés ou de violences internes. Des règles internationales permettent de garder une trace des personnes qui pourraient potentiellement disparaître, mais ces normes ne sont souvent pas appliquées.*

*Ce bref article introductif décrit les moyens employés pour restreindre le nombre de personnes disparues et les réponses apportées aux familles qui s'inquiètent du sort de leurs proches.*

## The ICRC and the missing

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Conflict-related disappearances are a highly emotional issue. They involve death, love and family links, phenomena central to every culture and religion and which in this context are overshadowed by uncertainty, something more and more difficult for contemporary human beings to accept. Families, authorities and staff of humanitarian organizations are affected by those emotions, leading to attitudes which cannot be rationally explained (e.g. reticence to handle mortal remains) and which may be amplified by the increased tendency, at least in the Western world, to view problems from a psychological perspective.

Humanitarian players furthermore do not like to give bad news, yet in the large majority of cases of missing persons the news is bad. As confidence in authorities declines worldwide, ICRC staff hesitate to tell the family, without “scientific evidence”, that their missing relative is dead. They may feel as though by doing so, they themselves have taken the decision that the missing person is dead and have thus indirectly sentenced him or her to death. To keep the family informed in full transparency on how small the chance is to find their loved one alive or even dead may be perceived as a lack of compassion. We believe, however, that the ICRC should objectively evaluate what is best in the long run for the families concerned. It then must help its staff to cope with the emotional stress caused by the implementation of this policy.

Belligerents and former belligerents manipulate and exploit the missing persons issue to perpetuate hate, national or ethnic mobilization and exclusion of the “others”, to conceal the extent of a defeat and to gain or

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maintain international support against the enemy. International players, too, take advantage of the families' plight to rally support for the form of conflict-resolution they favour, or in inter-agency competition for visibility, money and influence, or to promote costly and unrealistic solutions (such as systematic identification of mortal remains through DNA testing).

### **Humanitarian issues and dilemmas**

In many contexts the ICRC knows soon after the war that nearly all the missing are dead. It would be in the family's objective interest for it to accept this fact as early as possible and to start the mourning process. However, such acceptance implies great pain and destruction of the hope that the loved one will be found alive. Families want to believe that their lost relatives are alive and therefore try to avoid (or find reasons for doubting) all news hinting at death, and even feel anger towards the messenger rather than the message. Should a humanitarian organization like the ICRC destroy hope when it is often impossible to be absolutely certain that a missing person is dead? May the ICRC conversely perpetuate suffering, if only by omission, simply because absolute certainty does not exist? Should the ICRC leave it to the families to decide what they want? Their first choice, to cling to the hope that their loved one is alive, is not in their genuine interest if there is a high probability that the person is dead. Their second choice, to insist upon absolute proof of death, likewise prolongs their suffering in the many cases where such proof will never be available.

The ICRC wants to save lives, to protect and assist living people, to enable families to be reunited. It will therefore often work on the assumption that a missing person is alive and detained. Through their contact with ICRC staff the families will feel that their hopes are confirmed, which in turn prevents the mourning process from beginning. Many forms of support to the family may be possible independently of whether the missing person must be presumed dead or alive. Yet the information needed, the methods used and the steps to be taken vis-à-vis belligerents are fundamentally different when the search is for detainees or for mortal remains. In every situation the ICRC should therefore, in our opinion, quickly reach a well-informed internal decision as to whether it may realistically hope to find many missing persons alive — and then develop its activities accordingly. As a humanitarian organization it is, however, understandably reluctant to take such decisions. Moreover, it is difficult to define objective criteria on which such an assessment can be based. But once it is made, the elements of it (or, if that

information cannot be revealed for reasons of confidentiality or neutrality, at least the conclusion) should be shared with the families concerned.

As an organization with worldwide activities and a universal mandate, guided by principles such as humanity, impartiality and neutrality, the ICRC faces a difficult dilemma if it wants to expand its activities on behalf of missing persons and their families. The world is subject to profound deep inequalities. Public opinion and donors apply double standards to armed conflicts and their victims. May the ICRC offer certain services where the problem is highly publicized, where the families and/or authorities are demanding and funds are available, while not offering those services or even trying to mobilize public opinion, families and donors where such pressure does not exist?

Armed conflicts, human suffering and the disruption of traditional structures and values continue seemingly without end in many parts of the developing world. Families can understandably lose hope in finding their relatives alive and fatalism can set in. In developed countries, people are also more accustomed to remaining in contact through modern means of communication with relatives from whom they are geographically separated. Such differences do exist. In some contexts, the families do not complain about their uncertainty. Does this imply that the wish to clarify the fate of a relative would then be a need created by the ICRC?<sup>1</sup>

Many past and present differences in the ICRC's approach to the missing persons problem in various countries are not based on double standards, but are due to difficulties of access, the sheer size of the problem and/or the country concerned, the complete lack of any prospects of success, and overwhelming priorities of protecting and assisting those who are alive. Some may consider it morally untenable to invest huge resources, with little chance of success, in attempts to clarify the fate of persons who can reasonably be presumed to be dead, if those same resources would save thousands of people from starving to death. Were this argument to be applied to our planet as a whole, it might reduce the priority given to the missing persons problem.

The question therefore remains whether the ICRC would be ready everywhere to deploy the same efforts and to mobilize public opinion and donors. This dilemma is particularly acute if the ICRC decides to provide more than its traditional services and to deploy new activities, which may

<sup>1</sup> During our interviews with ICRC staff no one tried to persuade us that disappearances are found less distressing in some non-Western cultures.

entail a considerable investment in terms of money, staff and technology. It must be prepared to explain to victims, authorities and public opinion why it chooses to offer some services in one context and not in others.

### **International humanitarian law and conflict-related disappearances**

One of the distinctive features of the ICRC is that its activities and mandate are based on international law, which is an expression of the experience of the international community. The main consideration of the specific rules of international humanitarian law — primarily the four Geneva Conventions of 1949 and the two 1977 Additional Protocols thereto — concerning the missing and the dead is “the right of families to know the fate of their relatives”.<sup>2</sup> Each party to a conflict has an obligation to search for persons who have been reported as missing by the adverse party.<sup>3</sup>

Missing persons are either dead or alive. If they are alive, they are either detained by the enemy or free, but separated from their families by front lines or borders. In both cases they are entitled to the protection offered by international humanitarian law to the category (civilians, prisoners of war, wounded and sick, etc.) to which they belong. In addition international humanitarian law ensures that most of them do not remain considered as missing.

If a person is missing because of the usual interruption of postal services and frequent population moves in times of armed conflict, family contact should soon be restored so long as the parties to the conflict respect their obligation to facilitate the exchange of family news and the reunification of families.<sup>4</sup> If persons are missing because of detention or hospitalization by the enemy, international humanitarian law prescribes that their families and authorities must be rapidly informed through three channels: notification of hospitalization, capture or arrest;<sup>5</sup> transmission of capture or internment cards;<sup>6</sup> and by virtue of their right to correspond with their family.<sup>7</sup> Detaining authorities are also under an obligation to answer inquiries about protected persons.<sup>8</sup>

<sup>2</sup> Art. 32 of Protocol I.

<sup>3</sup> Art. 33 (1) of Protocol I.

<sup>4</sup> Arts 25 and 26 of the Fourth Convention.

<sup>5</sup> Art. 16 of the First Convention, Art. 19 of the Second Convention, Articles 122 and 123 of the Third Convention, Arts. 136 and 140 of the Fourth Convention, and Art. 33 (2) of Protocol I.

<sup>6</sup> Art. 70 of the Third Convention and Art. 106 of the Fourth Convention.

<sup>7</sup> Art. 71 of the Third Convention and Art. 107 of the Fourth Convention.

<sup>8</sup> Art. 122 (7) of the Third Convention and Art. 137 (1) of the Fourth Convention.



If the missing person is dead, it is more difficult to inform the family. There can be no obligation for each party to identify every dead body found. It simply has to try and collect information that helps in the identification of the dead;<sup>9</sup> this includes agreeing to set up search teams.<sup>10</sup> Existing international humanitarian law does not establish a right for families to receive the mortal remains of their relatives, either for burial or for certainty of identification. The dead must, however, be respected and given decent burial, and gravesites must be marked.<sup>11</sup> Relatives can then be given access to such gravesites and mortal remains can be returned to them under an agreement between the parties concerned, which can generally only be concluded at the end of the conflict.<sup>12</sup>

Besides the aforesaid specific rules, all basic rules of international humanitarian law would, if duly respected, reduce the number of missing persons. If civilians and persons *hors de combat*, i.e. those no longer able to take part in hostilities because of injury, sickness or detention, were respected and treated in conformity with international humanitarian law, and if the ICRC was given access to war victims as prescribed by international humanitarian law, few protected persons could disappear. Those who remained unaccounted for would be combatants missing in action. Their number would, however, also be reduced if their side provided them identity tags<sup>13</sup> and if both sides complied with their obligation to collect and record information on the dead who fall into their hands. Compliance by belligerents with their obligation to provide answers about the fate of missing persons comes up against some particular obstacles.

Parties frequently do not want to provide such answers. Humanitarian issues are intermingled with political considerations. The demand for reciprocity, often the bane of respect for international humanitarian law, prevents the first step from being taken, and unfortunately the families (whether manipulated or not) of each side even approve in many cases of this behaviour by “their” side’s authorities.

Belligerents withhold information in order to leave the “enemy” population in ignorance and distress, to put pressure upon the enemy or to avoid criticism from their own population for losses suffered. Leaders whose power

<sup>9</sup> Art. 16 of the First Convention and Art. 33 (2) of Protocol I.

<sup>10</sup> Art. 33 (4) of Protocol I.

<sup>11</sup> Art. 17 of the First Convention and Art. 34 (1) of Protocol I.

<sup>12</sup> Art. 34 (2)-(4) of Protocol I.

<sup>13</sup> Art. 17(3) of the Third Convention.

is based on hatred of another community have an interest in perpetuating the missing persons issue, as it will consolidate their power.

Many disappearances are the result of violations of international humanitarian law. Recent progress in ending impunity for war crimes is important to increase respect for international humanitarian law and therefore to reduce the number of missing persons. The negative side-effect is a decrease in prospects of obtaining information about the fate of missing persons through the channel provided for by international humanitarian law, i.e. from the responsible authorities, because those same authorities fear criminal prosecution. The ICRC is caught between its recognition of the importance of criminal prosecution for war crimes and the need to guarantee confidential handling of information it receives from belligerents if it wants to keep that source.<sup>14</sup>

In many cases, in particular when disappearances result from massacres of or attacks on civilians, belligerents will be genuinely unable to provide the answers requested, partly because they did not comply with their duties during the conflict. Belligerents may, however, be expected to at least have information about the location of military operations and places of burial. If they do not, they could in most cases obtain such information.

A further problem has emerged in recent years. In some regions families are not satisfied with the information they are entitled to receive under international humanitarian law. They mistrust death certificates issued by the (former) enemy and want to be given the mortal remains of their loved ones. It remains to be seen how far such attitudes are due to manipulations by authorities wanting to keep their missing persons file open in order to gain or retain international support against the (former) enemy, to international players who have created unrealistic expectations, to the reluctance of families to accept the sad truth, to their desire to see those responsible punished, or to a combination of all those elements. But possibly the emphasis of international humanitarian law on providing answers rather than the bodies of the relatives concerned does neglect some psychological factors. To start the mourning process, families need to be certain that their relative is dead.<sup>15</sup> In the absence of mortal remains, such certainty depends on the extent to which they trust the source of information. They generally do not trust the

<sup>14</sup> See G. Rona, "The ICRC's privilege not to testify: Confidentiality in action", *International Review of the Red Cross*, Vol. 84, No. 845, March 2002, p. 207 ff.

<sup>15</sup> Marie Ireland, *Apprivoiser le deuil*, Presses du Châtelet, Paris, 2001, p. 238.

former enemy. Also, in many religions and cultures the dead body is the object of rituals which the relatives believe are necessary to ensure peace in the afterlife for those who have passed away.<sup>16</sup>

### **Traditional ICRC activities to address the missing persons issue**

#### Dissemination of international humanitarian law

The rules of international humanitarian law, including those to prevent the disappearance of war victims, cannot be respected if they are not known. They must in particular be part of the normal training of every combatant so that, for example, identification of the dead after an engagement becomes a reflex action. While dissemination is the responsibility of States and of the parties to armed conflicts, the ICRC often has to initiate it by training the trainers, or even has to carry out such dissemination duties itself.

#### Visits to detained persons

In international armed conflicts the ICRC has the right to visit prisoners of war and civilians deprived of their freedom in their places of detention and to interview them privately.<sup>17</sup> In non-international armed conflicts, parties are encouraged to accept an ICRC offer to make such visits.<sup>18</sup> Once a detainee is visited, he or she is registered and enabled to inform his or her family, can therefore no longer be considered as missing and has the best chance of not going missing later. During the interview in private, ICRC delegates systematically enquire whether there are co-detainees to whom they have no access or about whom they have no information and, where appropriate as a further lead, they also collect allegations of joint capture or joint arrest. On the basis of such information they can subsequently ask the parties about the fate of other persons who have fallen into their power.

#### General protection of civilians affected by conflict

International humanitarian law protects civilians from attack and from arbitrary and inhumane treatment. Wherever possible, the ICRC maintains a regular presence in areas where individuals or entire communities are at

<sup>16</sup> Philippe Ariès, *The Hour of Our Death*, Oxford University Press, New York, 1991; Louis-Vincent Thomas, *Rites de mort, pour la paix des vivants*, Fayard, Paris, 1985.

<sup>17</sup> Respectively Art. 124 of the Third Convention and Art. 143 of the Fourth Convention.

<sup>18</sup> Art. 3 common to the four Geneva Conventions of 1949.

risk, gathers information in the field and informs authorities or opposition leaders of unlawful acts committed against the local population. It keeps in close contact with all potential perpetrators of violence. ICRC staff take immediate steps in the field (e.g. relief operations) and draw up confidential reports over a period of time in order to bring violations of international humanitarian law to a halt and to trigger appropriate remedial action. In an emergency, and when all other possibilities have been exhausted, the ICRC may even take the initiative of evacuating particularly vulnerable individuals from a dangerous area, thus preventing their disappearance.<sup>19</sup>

The success of such activities depends upon the receptiveness of the parties to conflict, which will be non-existent where they aim to eliminate an ethnic group, and on the presence of a minimum structure of authority. In recent years, such activities have more and more frequently entailed a disproportionate risk for the lives of ICRC staff involved.

### Restoring family links

The restoration of family links between victims of armed conflict is one of the most long-standing activities of the ICRC and the network of National Red Cross and Red Crescent Societies. Hostilities, front lines and security imperatives dictated by the warring parties generally lead to a breakdown in traditional means of communication and simultaneously restrict people's freedom of movement. The ICRC tries to restore contact between family members who live on opposite sides of the front line, have fled their homes, been displaced or sought refuge in another country, or have been captured or arrested on account of the conflict. Visits to detained persons enable ICRC delegates to reassure families about the fate of their relatives and, by means of the Red Cross/Red Crescent network, allow the prisoners and their families to correspond. All these activities take place both in areas directly affected by the conflict and in those receiving displaced people and refugees. They constitute a tracing service, as the distribution of family messages, for example, involves locating addressees who have fled. Because of the particular vulnerability of unaccompanied children, who are by definition considered as missing by their relatives, the ICRC undertakes specific interventions and activities on their behalf.<sup>20</sup>

<sup>19</sup> See e.g. *ICRC Annual Report 2001*, ICRC, Geneva, p. 265 (Macedonia).

<sup>20</sup> See e.g. *ICRC Annual Report 2001*, p. 82 (Congo), p. 98 (Guinea), p. 106 (Rwanda) and p. 112 (Sierra Leone).

Red Cross messages are the most frequently used medium for family news. As they are unsealed, they are in general not held up by front lines or security problems; their content can be censored by the parties to a conflict at any time. Whenever possible, other more modern means of communication such as mobile phones, radio broadcasts or the Internet are used to establish the first contact.<sup>21</sup>

### Compilation and processing of tracing requests

When an enquirer has been unable to resume contact with a close relative through the Red Cross and Red Crescent Family News Network, the ICRC compiles a tracing request with as many details as possible about the missing person and the circumstances of his or her disappearance. This information is then cross-checked with ICRC databases. If they contain no information, two methods are used. First, in some cases ICRC staff themselves start an enquiry in the field. Second, alternatively or in addition, the requests are submitted to the responsible authorities, which are not necessarily those that could be presumed to have caused the disappearance, but those which can be presumed to have or be able to obtain information, for instance because they control the territory where the person disappeared. This latter method is used in particular in international armed conflicts. However, in many contemporary conflicts responsible authorities in this sense cannot be identified or are too unstructured for any hope that the submission of tracing requests will lead to results. Whenever it is possible to submit tracing requests, the ICRC regularly follows up and transmits to the enquirer any information it obtains from official or private sources, as long as that information is considered reliable.

While the principle of tracing missing persons is well established, the decision when and whether tracing requests are accepted in a given conflict depends upon many factors, not all of which are objective. It admittedly also depends upon personal preferences and — sometimes contradictory — decisions of those in charge in the field and at headquarters in Geneva.

In some conflicts tracing requests are accepted during the ongoing conflict, and in others only when active hostilities have ended and the prisoners have been released and repatriated. In some situations, tracing requests are refused when there is no current or subsequent prospect of submitting

<sup>21</sup> See e.g. *ICRC Annual Report 1995*, p. 179 ff. (former Yugoslavia); *ICRC Annual Report 2000*, p. 115 ff. (East Timor); *ICRC Annual Report 2001*, p. 255 (Albania).

them to authorities willing to process them or to engage in field tracing. In others, requests are systematically collected even if the way to obtain answers can only be discerned later. The latter solution enables the ICRC to gauge the scale of the problem, to collect a considerable number of tracing requests which exerts pressure on the authorities, and to gather useful information (*inter alia* for protection purposes) which would otherwise be lost. Once requests are submitted, a serious follow-up is essential. Sometimes requests carefully collected by ICRC staff on one side are submitted without enthusiasm by those representing the ICRC on the other side. On several occasions we had the impression that the submission is made merely “for the record”.

### **Systematize and develop ICRC activities to forestall disappearances**

In an effort to mainstream its concern for the missing persons problem, the ICRC could expand many traditional activities taking into account the missing persons issue. Some practices described in this chapter, which we found to have been applied in some contexts,<sup>22</sup> could be applied everywhere. A few new responses can also be envisaged.

#### **Dissemination**

In ICRC dissemination activities additional emphasis could be placed on sensitizing those who bear weapons, hold people in detention or are in positions of authority to the plight of families uncertain about the fate of their relatives. They must learn that easy measures which in no way hinder military success, such as systematic registration of persons captured, arrested or detained and systematic identification of mortal remains, are prescribed by international humanitarian law and can in most cases prevent much suffering. While dissemination normally consists of spreading knowledge of the humane measures that must be taken vis-à-vis an actual or potential enemy, dissemination of those rules also concerns measures to be taken by a belligerent for the benefit of its own soldiers. ICRC dissemination materials should systematically contain sections about the missing and the dead and explain what the ICRC can — and cannot — do to solve this problem. Dissemination could even lower the unrealistic expectations placed by families in ICRC activities in this field.

<sup>22</sup> ICRC practice in a recent conflict is described in Thierry Schreyer, “L’action de l’Agence centrale de recherches du CICR dans les Balkans durant la crise des réfugiés kosovars”, *International Review of the Red Cross*, Vol. 82, No. 837, March 2000, pp. 49-65.

### Support for practical preventive measures

To effectively reduce the number of missing persons in wartime, all States must take practical measures in advance, i.e. in peacetime. In particular, they must provide all combatants with identity tags. They might wish to register the personal data of members of their armed forces, which may assist in a later identification of mortal remains. They should in particular establish National Information Bureaux.<sup>23</sup>

To carry out all these practical measures, the ICRC could offer advice and training and serve as a forum to exchange experience between government authorities, e.g. between armed forces of developed and developing countries. In the aftermath of a conflict, ICRC advice can be given for the adoption of specific legislation to address the missing persons issue.

### Preventive diplomatic representations at the outbreak of hostilities

At the outset of each conflict, the ICRC contacts the belligerents orally and in writing to remind them of their obligations under international humanitarian law and to offer its services. As far as we could find out, most such representations have until now recalled the obligation to register and give notification of any protected persons in their hands, but the need to wear identity tags was not mentioned. The specific obligations to identify mortal remains or to answer enquiries about missing persons appear only in memoranda addressed to the parties at the end of hostilities. It would, however, be important to remind belligerents of the missing persons issue from the very beginning of every conflict. Reminders of the corresponding obligations should also be included in confidential or solemn appeals to third States to persuade belligerents to respect international humanitarian law, in accordance with their obligation to “ensure respect” as laid down in Article 1 common to the four Geneva Conventions.<sup>24</sup>

### Collecting allegations while visiting detainees of death before capture

At least in conflicts where a large number of missing persons can be expected, the ICRC should take advantage of its visits to captured combatants

<sup>23</sup> For details, see Marco Sassòli, “The National Information Bureau in aid of the victims of armed conflicts”, *International Review of the Red Cross*, No. 763, January/February 1987, pp. 6-24.

<sup>24</sup> See Laurence Boisson de Chazournes and Luigi Condorelli, “Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”, *International Review of the Red Cross*, Vol. 82, No. 837, March 2000, pp. 67-88.

and — if applicable — to civilians detained in connection with the conflict to enquire about the identity of people whose death they witnessed before their own capture or arrest and about events and places in which people were killed. When memories are still fresh, such information is easier to collect. It may be psychologically inappropriate to ask such questions during the first visit, when the persons visited are still in urgent need of protection and may not yet sufficiently understand and trust the ICRC. Later, however, such an enquiry should be the rule. The input required may in some contexts appear disproportionate to the number of missing persons. But any such proportionality analysis is possible only when the conflict has gone on for some time, whereas the collection of data should, for maximum efficiency, start at the very beginning. It might be feared that the detaining authorities could consider such questions as espionage. The reasons for them, their purpose and use could, however, be explained openly and frankly to the authorities.

#### Registration of civilians at risk

In the course of its activities to protect civilians affected by conflict, the ICRC sometimes concludes that a particular group of people, e.g. dispersed members of ethnic minorities, may be at risk of disappearing. Their systematic registration might, if made known, increase their chance of being respected by belligerents. On the other hand such singling out might place them in even greater jeopardy.

#### Use of data collected during assistance activities

Beneficiaries of ICRC assistance programmes or medical services are frequently registered, though their personal data is only rarely included. Such information could, however, be collected and kept, enabling it to be used at a later stage if the beneficiaries disappear.

#### Systematic collection of information on events and persons during conflicts

In most cases, the fate of a missing person who has not been found alive can be clarified only by assembling a mosaic of information on events and persons during the conflict. Although belligerents should possess such data, they are often unwilling to provide it. Some people might therefore suggest that during an armed conflict the ICRC should systematically collect information — in addition to that it collects anyway for protection purposes —



on events (such as battles, bombardments, massacres) which may later help in clarifying the fate of persons who went missing during those events. It is not easy, however, to do so, and may require considerable resources for a questionable result. Much wartime information is propaganda. The ICRC would thus be left with a lot of information that it cannot use, and belligerents may get the impression that the ICRC is spying on them.

#### Use of personal data obtained through the exchange of family news

In several contexts, senders and addressees of messages exchanged through the Family News Network have been systematically registered in ICRC databases so that subsequent tracing requests can be cross-checked with those data. This practice could be generalized. However, while this is relatively easy in the case of detained persons, it can be complex in that of civilians and may initially delay the restoration of family links. The reality of a conflict, the geography of the countries concerned or the logistical difficulties involved in registering millions of messages without delaying their delivery can make it practically impossible.

#### Systematic collection of tracing requests from the start of conflicts

From the start of a conflict, tracing requests should be collected from families who have not been able to contact a relative through the Family News Network. When no tracing requests or only very few are submitted by families, the ICRC should try to understand why and not simply assume that there is no need for tracing. The families may be afraid to contact the ICRC or do not know that it deals with that problem.

Admittedly, in the case of soldiers missing in action, families will generally not have the necessary information to substantiate their tracing requests. Some ICRC staff also contend that most of the information contained in such requests would be useless, that most of the persons sought reappear during the conflict and that to collect it would be a waste of time and energy which could be used for more urgent activities; that in some contexts, moreover, if the ICRC asked detailed questions about recently disappeared persons the safety of its staff could be threatened. While we recognize that genuine fears for staff safety, objective working conditions and other overwhelming priorities justify an exception to the systematic collection of tracing requests, all those involved should be aware that such a choice subsequently results in additional human suffering.

The inclusion of *ante-mortem* data, which could otherwise be lost, in tracing requests is a possibility. The advantage is that the enquirer remembers more details a short time after the disappearance. But questions of that nature may give families the impression that for the ICRC the missing person is already dead. The collection of such information should therefore be limited to *ante-mortem* data which may be easily lost and which does not obviously point to the possibility that the person concerned is dead.

### Support to families of missing persons

When persons disappear, their families are affected too and have rights under international humanitarian law. The ICRC's first objective is to give them an answer about the fate of the missing relative. In some situations, however, it also tries to support the family in other ways before an answer can be provided. This is possible only where the ICRC is allowed to have direct contact with the families, a right on which it should always insist.

The starting point for any services to be offered to families is a genuine dialogue with them. Before a dialogue can begin, the ICRC has to decide with whom to speak. It is easier to listen to a few representatives than to the wives and mothers of the missing, who understandably are deeply distressed and are unable to cope with their new situation. Representatives, on the other hand, may be politically manipulated and influenced at least by the fact that they have found a new livelihood and purpose thanks to the missing persons issue, whereas those they represent have to overcome its traumatic effects. The mechanisms of democracy and accountability within family associations are difficult to monitor, yet the creation of such associations should be encouraged, if only because solidarity among the victims is an important therapy — especially if it evolves from the bottom up and not from the top down. In our view the ICRC should, however, avoid channelling its contacts with families exclusively through associations, in particular if the latter receive financial support from it. The ICRC's tracing activities give it a unique opportunity to establish direct relations with the families.

In a genuine dialogue the ICRC should inform the families, let them know the prospects and advise them with regard to their wishes, not simply register their answers. But is it acceptable for a humanitarian organization to take the paternalistic decision, after a genuine dialogue, that what the families really do want is not in their best interest? The answer to this question raises fundamental ethical questions and goes beyond the scope of our study.

If the ICRC systematically collects tracing requests, it must avoid being perceived, both by families and by the parties, as being “in charge of

the missing” to such an extent that the parties feel relieved of their responsibilities and the families have false expectations. It would therefore be advisable to keep families who file tracing requests regularly informed about the legal provisions applicable, the ICRC’s tracing methods, the channels used, the role of the ICRC in relation to other organizations and to family associations, the authorities’ receptiveness and the chances of success. This very often means dampening the families’ hopes. The families may express anger during such meetings, but this should not be sufficient reason to discontinue them if they help the families in their mourning process. In conformity with international humanitarian law the reply to the tracing request itself, especially if it is a death certificate, should be given by the relevant authorities.

Families of missing persons have particular psychological, material and administrative needs. Programmes to meet those needs have been developed by the ICRC only in certain contexts and mainly to ease pressure from families, authorities or other international players. In our opinion, the provision of certain services to families of missing persons is justified only to help cope with the specific problems created by the uncertainty about their relative’s fate. Even then they should not delay the return to normal life and integration into the larger group of war survivors.

The ICRC must decide whether it wants to establish and run support programmes itself or orientate families towards other organizations or government authorities. Such a choice is obviously only possible where alternatives exist, where programmes can be established or where governmental authorities can be encouraged or supported to create them. The question whether the ICRC sees its action as subsidiary or not to what others do goes beyond the missing persons issue. It carries implications for interpretation of the ICRC’s mandate, its visibility, fundraising and comparative advantages in terms of costs and know-how. To encourage and support government action instead of the ICRC taking such action itself may contribute to sustainable development and good governance, while enabling local authorities to set their priorities and be accountable for those policy decisions.

If the families so wish and the belligerents agree but need a neutral intermediary, the ICRC could facilitate the handover of mortal remains to the families.

### Field tracing

In several contexts, the ICRC has done more than submit cases of missing persons to the authorities and cross-check them with data it had already

collected. Such field tracing, sometimes called “active tracing”, is the only solution where no sufficiently structured authority exists. It consists of corroborating and supplementing a tracing request and possibly finding the reply by going to the places mentioned in the request, visiting and interviewing possible witnesses and following up on any new information received during this process. In some situations this merely enables a more serious file to be submitted to the authorities, while in others it leads to clarification of the fate of the person concerned.

Initiatives such as publishing the names of all missing persons in catalogues and on the Internet, publishing and distributing a book with photographs of personal belongings found with mortal remains, or systematically searching through the judicial files of international criminal tribunals for information about the identity of confirmed victims, may have had a positive impact on the families by showing them that they are not forgotten.<sup>25</sup> They may also have helped to highlight the ICRC’s activities and relieved the organization from some pressure by the families. The results in terms of cases of missing persons resolved for their families were, however, well nigh zero.

Active searches for individual persons are conditioned by access to the field for ICRC staff, which is sometimes denied by authorities and sometimes impossible for security reasons. They involve considerable resources and police-like methods of enquiry, for which the ICRC may lack the necessary know-how and which may be detrimental to its image. As many disappearances result from violations of international humanitarian law, active tracing may also jeopardize the security of ICRC staff. During a conflict, it may furthermore put the missing person and anyone providing information at risk. If at all possible, such searches should be made, but in cooperation with other international and local humanitarian and human rights organizations, wherever this is acceptable to the local authorities.

### Follow-up to allegations of hidden detention

One principle of the ICRC’s traditional visits to persons detained in connection with a conflict is to gain access to all such persons. It therefore follows up any allegation of detention it deems reliable. Such efforts may result in finding a missing person alive. Sometimes the ICRC has organized surprise visits to alleged places of detention although it doubted that the

<sup>25</sup> See *ICRC Annual Report 1996*, p. 173 ff.

allegations were justified. This was seen as an effort to succour the families. In our view, such well-meant action is counter-productive for the families and could reignite mutual distrust between former belligerents and populations. It could also strengthen the families' belief that their relatives are alive and impedes the necessary start of a mourning process. The relevant authorities may in addition use the surprise visits as an alibi for not providing answers to tracing requests.

#### Collection of information on the dead and transfers of mortal remains

At least in international conflicts, the ICRC seeks to obtain information on the dead from the warring parties. It sometimes does so in other situations as well. As a neutral intermediary, the ICRC is at times involved in the evacuation of mortal remains from the battlefield to hospitals where families can identify and recover them, or in the transfer of mortal remains across borders or front lines to return them to the families either directly or via the authorities. It might also take part in the interment of mortal remains not returned to families. In such circumstances all information on the dead should whenever possible be collected and duly managed. However, this is not always the case. The ICRC should also insist that mortal remains transferred under its auspices to authorities be identified by the latter and handed over to the relatives concerned.

#### Exhumations and forensic identification

In some cases an answer can only be obtained by means of exhumations and forensic identification. Exhumations also enable the mortal remains to be recovered and given a decent (re)burial. Forensic identification may lead to greater certainty about the relative's fate than other methods, although in many contexts, including those in developed countries, families have no doubt about the accuracy of answers provided by the ICRC.

The wish expressed by families in some contexts to be given their relatives' mortal remains may be due to manipulation by parties (hoping that answers from their former enemies which may relieve the latter of their responsibilities will not be available) or by international players; it may correspond to a cultural or emotional need, or to a desire for a higher degree of certainty or to delay the bad news. Many families will, however, never be able to receive the mortal remains, and even fewer families will benefit from the luxury of a forensic identification confirmed by DNA analysis.

In exceptional circumstances only, the ICRC has hired forensic specialists to identify mortal remains.<sup>26</sup> Should the ICRC itself be systematically involved in exhumations and forensic identification? If it refuses, invoking the considerable doubts which exist as to whether the majority of families will be able to obtain a result through this process, it may be perceived as promoting an institutional agenda in favour of the traditional services it provides and not being responsive to the families' wishes. If it does become involved, it may thereby give its endorsement to a process which has not yet shown convincing results and appear to be in competition with other international players.

Under international humanitarian law exhumations are the responsibility of the (former) belligerents, and they should not be relieved of their responsibilities. Except in areas administered by international entities, the parties' consent and cooperation will in any event be necessary for exhumations. Only government authorities can provide the necessary permits and security for exhumations, allow the collection of full *ante-mortem* information, decide on the disposal of mortal remains, and draw the delicate distinction between forensic information useful for identification and that useful for prosecution purposes. In many parts of the world, and in particular during ongoing conflicts, the authorities have not allowed the ICRC to collect such sensitive information. The advantage for the ICRC of carrying out exhumations and identification would be that it could become a reference organization for exhumation issues and be able to ensure that exhumations lead whenever possible to identification. Unlike other humanitarian players, it currently has no particular know-how in this field. It can, however, acquire that knowledge. Some would add that if the ICRC wants to be the lead agency for missing persons issues, it also has to be the reference for exhumations and forensic identification.

Forensic identification must be based on *ante-mortem* data. The ICRC could collect such data, as it is in contact with the families. When it has no control over the use of those data, it may prefer the entity in charge of identification to collect them and simply put that entity in contact with the families. If DNA matching is appropriate and necessary for forensic identification, the ICRC could be in charge of obtaining or organizing the collection of DNA samples from the families. In view of the present controversies

<sup>26</sup> See e.g. *ICRC Annual Report 1996*, p. 175, and *ICRC Annual Report 1997*, p. 187 (former Yugoslavia).

on whether and how DNA matching may be used in forensic identification, the ICRC may not wish to endorse this method in the eyes of the families before being sure that the necessary political will, financial means and technical conditions for a successful matching for most of them are present.

When a forensic identification is made, the forensic expert knows the cause of death. If it was an ICRC forensic expert, the evidence would be lost for a possible trial.<sup>27</sup> In our opinion the ICRC should, in situations entailing criminal prosecution, mainly make sure that the need to identify mortal remains on behalf of the families concerned is taken into account.

The ICRC, as a neutral intermediary in humanitarian matters, could facilitate joint exhumations by the parties; these have shown the best results in terms of numbers of persons identified. With the necessary expertise, the ICRC could advise and train government officials in the most suitable methods and offer an agreed framework to other entities willing to engage in exhumations, including international tribunals. In both roles, the ICRC could also ensure that the families, whose presence is necessary for traditional identification methods to work, are treated appropriately before, during and after exhumations, and that their interests with regard to individual identification, procedural information and the mortal remains themselves are respected.

In terms of general advocacy, the ICRC might wish to promote the establishment of good practices for exhumations and identifications, which could take the form of an international agreement or resolution, in order to ensure that basic rules and humanitarian needs are respected.<sup>28</sup> Such a document would provide (former) belligerents with a legal and technical framework for joint exhumations and avoid discussions about the standards applicable.

### Ensuring that the missing persons problem is taken into account in conflict settlements

When peace or other settlements are negotiated by the parties to a conflict, often with a strong involvement of international players, the ICRC should continue to advocate the inclusion in them of provisions on the missing and the dead, together with realistic implementing mechanisms. In every case,

<sup>27</sup> See Rona, *op.cit.* (note 14).

<sup>28</sup> The ICRC has already recommended that an international network of forensic scientists be established to work on behalf of missing persons. See *The Missing: ICRC Report (Summary of the conclusions arising from events held prior to the international conference of governmental and non-governmental experts)*, 19-21 February 2003, p. 65.

the role of the ICRC in clarifying the fate of persons unaccounted for should be recognized in such arrangements; where appropriate, it should also be recognized as a neutral intermediary in this field between the former warring parties. Each party could pledge to cooperate with it to clarify the matter, but the ICRC must be careful to avoid being drawn as a witness into political disputes between the parties about their respect for post-conflict arrangements, e.g. if it is expected to submit regular reports on their compliance. Such compulsory reporting to peace implementation mechanisms or international bodies is not only contrary to the traditional confidential, bilateral and cooperation-oriented approach of the ICRC, but experience also shows that it does not enhance the readiness of parties to genuinely cooperate and instead leads to sterile and politicized mutual accusations and negative consequences for other ICRC activities.

### **Multilateral or tripartite mechanisms**

Multilateral or tripartite mechanisms have been used, mainly after hostilities have ceased, to deal with conflict-related disappearances. Often they have been created as part of an overall agreement on humanitarian issues at the end of hostilities.<sup>29</sup>

#### **Advantages**

By distinguishing for procedural purposes between alleged hidden prisoners and ICRC-registered prisoners, such mechanisms have enabled the latter to be rapidly released and repatriated. They have ensured that the humanitarian problem of missing persons is dealt with separately from political issues. They can provide warring parties with a forum to discuss humanitarian matters and thus contribute to the restoration of peace. They prevent bilateral deals between the parties which might not take the interests of the war victims into account. In suggesting that such mechanisms be set up, the ICRC ensures that it keeps a certain control over the handling of the missing persons issue.

Recent experience has shown, however, that hardly any individual cases of missing persons are resolved via such mechanisms. As long as the former belligerents still regard each other as enemies, and as long as the wartime rulers remain in power, the transparency vis-à-vis the former enemy implied by such mechanisms favours politicization used by parties to continue the war, while

<sup>29</sup> See *ICRC Annual Report 1991*, p. 102 (after the 1990-91 Gulf War) and *ICRC Annual Report 1997*, p. 185 ff. (following the Dayton-Paris Agreement).



endless procedural debates conceal their unwillingness to provide information. Once the mechanism is established, it becomes quasi-permanent, as neither the parties nor the ICRC dare be responsible for its formal termination even if several years pass without any tangible results in terms of cases of missing persons resolved.

### Role of the ICRC

The role of the ICRC in such a mechanism has to be clear from the start. It may be a neutral intermediary, the advocate of the war victims, the operational arm, or all these things. The first function corresponds to its traditional role and may be compatible with the second. There may, however, be conflicting interests between the ICRC as a neutral intermediary and chairing such a mechanism, and that of the ICRC as an operational agency. In order to preserve the independence of the ICRC and to avoid acting contrary to the war victims' interests, its operational role should not be subject to the mechanism's authority. The parties should understand that the ICRC simultaneously continues to perform its traditional role in issues concerning missing persons. The ICRC should also ensure that it is able at any time to quit a mechanism which no longer yields results.

### Tasks

Such mechanisms have been used in practice to submit requests for information to the parties and to receive their answers. We cannot help wondering why a party should be more willing to provide answers in the presence of the former enemy, which may immediately exploit them, than bilaterally to the ICRC. To build up a minimum of mutual trust, the parties should perhaps have an obligation to explain how they search for answers. A more promising role for such a mechanism may be to centralize information on cases on which two or more sides have information to provide. The idea that technical sub-groups should discuss events where people went missing was equally promising, but did not lead to results in practice. Lastly, such a mechanism could serve as a forum to negotiate and plan joint exhumations. To go even further, the most promising task in our opinion is to discuss policy instead of answering individual tracing requests.

### Involvement of other players

The involvement of other international players can exert additional pressure on the (former) belligerents to address missing persons issues. The

disadvantage is that it often makes negotiations even more complex in that it enables (former) belligerents to exploit the competition between international players and allows the latter to boost their institutional agenda. In our view, coordination between international humanitarian and political players is crucial, but should not take place in the presence of the (former) belligerents.

To involve families' representatives in the deliberations of such mechanisms allows them to feel a part of the process and helps to ensure that their needs are taken into account. But meetings will inevitably become highly emotional, making compromises more difficult. Furthermore, experience shows that families' representatives do not use such a forum to put pressure on "their" side to provide answers to the families of the opposite side.

However, if the mechanism is a genuine forum to negotiate and plan joint exhumations or support for the families, it is appropriate to invite — on an *ad hoc* basis — experts, families' representatives or national or international players involved.

### Overall assessment

The best mechanism cannot replace the political will of the parties to resolve cases of missing persons and to cooperate for that purpose. While a certain amount of positive thinking is indispensable for a humanitarian player, the ICRC should thoroughly evaluate the parties' willingness to cooperate with each other before suggesting the establishment of tripartite mechanisms. Experience seems to show that the simple fact of working together in such a mechanism is not sufficient to create the necessary political will. To test that will it may sometimes be possible to insist that some well-documented cases be resolved by each party before the mechanism is set up. It is, however, not sure that the best documented cases are the easiest to resolve.

### The need for uniform operational guidelines

Outside its traditional activities, the ICRC has no general operational procedures systematically applied worldwide to address the missing persons problem. Whether the additional activities described above are undertaken seems to depend on the possibility of accomplishing them successfully, the amount of public and family pressure, the availability of staff not needed for activities considered as a priority and the sensitivity of the decision-makers concerned.

These findings corroborate the decision already taken by the ICRC to draw up uniform operational guidelines. Such guidelines will ensure that ICRC activities in this field are more transparent and credible for families, belligerents and other humanitarian players. They will in turn oblige the ICRC to make sure that it has the means to apply them equally to similar situations around the world and to sensitize the international community accordingly. Their content will have to be incorporated in the training of ICRC staff at all levels. They will facilitate better coordination between ICRC delegations on both sides of a conflict. They cannot be expected to be uniformly applied worldwide, as the context of armed conflicts varies. But all decision-makers could be expected to give reasons for applying a different policy.

Such guidelines may make the missing persons problem look as though it should be dealt with separately from other ICRC activities, whereas the concern for missing persons should on the contrary be integrated, mainstreamed, into all other activities. Basic procedural, staff management and communication requirements make it necessary, however, to formulate the new, more systematic policy initially as new guidelines, stressing the need for mainstreaming. Over the years, those guidelines will then become part of ICRC policies for visits to detainees, dissemination, assistance, the restoration of family links, etc., and — hopefully — of operational reality worldwide.

The fundamental policy decision which should be the basis of such guidelines is that the missing persons problem should no longer be dealt with only when hostilities have ended, other protection activities have decreased and all known prisoners have been released and repatriated, but in parallel with other problems before, during and after a conflict. This does not necessarily imply that all measures suggested in this study must always be implemented simultaneously. Frequently, a certain sequence appears to be more appropriate. But the missing persons issue is a steadily growing long-term problem which can best be tackled by immediate action. This new policy would in no way prevent the ICRC from continuing to insist on the need to address cases of missing persons separately from those of prisoners registered by or otherwise known to it. Indeed, such a strict separation is necessary to avoid ICRC access to prisoners and their release and repatriation being delayed by belligerents, for reasons or claims of reciprocity, until the fate of missing persons is clarified.

## Résumé

### ***Le CICR et les personnes portées disparues***

*Marco Sassòli et Marie-Louise Tougas*

*Cet article décrit les problèmes et les dilemmes humanitaires auxquels est confronté le CICR dans le cas des personnes portées disparues pendant et après un conflit armé. Il donne un bref aperçu des règles pertinentes du droit international humanitaire et souligne que le respect des obligations juridiques permet tant de prévenir les disparitions et la séparation, que d'alléger les souffrances des familles des disparus. Respecter le droit serait la meilleure pratique en ce qui concerne les disparitions liées à un conflit armé. Faire mieux connaître le droit international humanitaire, coopérer avec les belligérants, les aider à respecter leurs obligations et agir en qualité d'intermédiaire neutre pour faciliter le respect du droit, telles sont les principales fonctions du CICR en la matière. Souvent, les belligérants ne respectent pas leurs obligations, parfois, ils les dénaturent. L'institution est donc fréquemment appelée à se substituer à eux pour remplir les obligations qui leur incombent. L'article donne des exemples pratiques et propose que les activités du CICR en faveur des personnes portées disparues soient systématisées et développées.*

## Du numéro matricule au code génétique: la manipulation du corps des tués de la guerre en quête d'identité

LUC CAPDEVILA ET DANIÈLE VOLDMAN\*

En raison de la masse des tués qu'elles ont produit, les guerres du XX<sup>e</sup> siècle ont inventé une nouvelle manière d'honorer les morts militaires. À partir du début des années 1920, en Europe et aux États-Unis, sont apparues des tombes contenant des restes non identifiés, pleurés sous le nom de «soldats inconnus». Alors que cette pratique s'est peu à peu codifiée à l'occasion de chaque nouveau conflit, c'est un soldat inconnu retrouvant son identité qui a clos le siècle. Tombé au nord de Saïgon le 11 mai 1972, le pilote Michael J. Blassie, avait été porté disparu. Sa famille n'eut de cesse de retrouver sa dépouille. Persuadée qu'il était le soldat inconnu de la guerre du Viet-nam enterré au cimetière d'Arlington, elle obtint, le 13 mai 1998, l'autorisation du Pentagone de faire pratiquer un test ADN sur les restes abrités par le monument national. En effet, identifiés comme ceux du lieutenant Blassie, ils furent rendus à la famille<sup>1</sup>.

Au cours du Premier conflit mondial, les pouvoirs publics de tous les belligérants avaient accompli un immense effort pour permettre aux parents des tués du champ de bataille de pouvoir accomplir leur travail de deuil. Ils avaient construit et entretenu d'immenses cimetières militaires, et même – au moins pour la France et les États-Unis – restitué les corps aux familles qui en avaient exprimé le souhait. Mais beaucoup de cadavres n'avaient pas été retrouvés, ou n'étaient pas identifiables. Le culte du soldat inconnu répondait au chagrin des centaines de milliers d'endeuillés privés des dépouilles de leurs proches. Douze ans après l'inauguration de la tombe du soldat inconnu de la Grande Guerre à l'Arc de Triomphe, le général Weygand rappelait les sentiments qui avaient amené à concevoir ce lieu du

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souvenir : « Donner une tombe insigne à un soldat inconnu qui serait « le Fils de toutes les Mères qui n'ont pas retrouvé leur Fils » [...] donner à ces familles [des disparus] une tombe où elles pourraient prier [...]. Cette idée d'honorer les plus modestes et les plus obscurs de nos héros faisant porter l'hommage sur un soldat inconnu répondait à un sentiment universel<sup>1</sup>. » À Londres, la tombe du *Tommy* inconnu côtoie les caveaux des rois et des reines au sein de l'Abbaye de Westminster. D'autres tombes symboliques furent édifiées dans des mémoriaux en 1921 à Rome, Washington, Lisbonne, Bruxelles, en 1922 à Prague et à Belgrade; puis à Budapest, Varsovie et Bucarest. Puis, chaque guerre a été généralement ponctuée par l'inauguration de la tombe de son soldat inconnu.

La Première Guerre mondiale a ainsi marqué une étape majeure dans l'histoire des tués de la guerre. Au moment où des moyens de destruction sans précédent étaient utilisés pour battre l'adversaire en distribuant la mort de masse, des trésors d'intelligence et d'énergie furent mobilisés pour assurer, dans toute la mesure du possible, un traitement individualisé des corps des morts. L'innovation était portée par trois courants convergents. Le premier venait des autorités civiles et militaires, qui depuis le début du XIX<sup>e</sup> siècle avaient entrepris de systématiser le suivi de l'état civil pour les militaires tombés en campagne. Le second émanait de la société tout entière, attentive à ce que les rites funéraires soient assurés pour les victimes de la bataille. Il est vrai que la possibilité technique de leur rapatriement et une sensibilité accrue à l'égard du cadavre, faisaient que depuis la seconde moitié du XIX<sup>e</sup> siècle, des familles avaient commencé ça et là à récupérer leurs morts au champ d'honneur. Enfin, à partir des années 1850, divers mouvements humanitaires se retrouvèrent au sein de la société internationale pour codifier les coutumes de la guerre, amenant à penser le droit dans les relations entre ennemis.

L'idée de restituer leur identité à des cadavres que la puissance de destruction empêchait désormais d'être identifiés au premier coup d'œil s'est affirmée progressivement au XIX<sup>e</sup> siècle. Le besoin s'en faisait d'autant plus sentir que parmi les masses de conscrits engagés dans les conflits, de nombreux trépassés étaient désormais inconnus du reste de la troupe. Par ailleurs, contrairement aux troupes de l'âge classique, dans les armées nationales les

1 Laurent Zecchini, « Le soldat inconnu de la guerre du Viet-nam porte désormais un nom », *Le Monde*, 2 juillet 1998.

2 Général Weygand, *Le 11 novembre*, Flammarion, Paris, 1932, pp. 131-132.

enveloppes mortelles était celles d'ex-citoyens. On se préoccupa alors d'inventer une méthode pour identifier tous les corps et pour les traiter comme on le faisait avec les civils en temps de paix. Les dispositifs élaborés par les armées pour les militaires furent étendus aux civils puisque en élargissant le champ de bataille à la société tout entière, les moyens de mort de masse ne discriminaient plus les populations en fonction d'objectifs étroitement militaires.

### L'état civil sans le corps

La première étape significative du traitement des tués de la guerre remonte aux guerres napoléoniennes en Europe, à la guerre d'Indépendance en Amérique du nord. Le traitement des cadavres, en particulier de ceux de la troupe, avait peu évolué depuis l'Ancien régime, où les fosses creusées sur le site même de la bataille en marquaient le terme, heureux ou malheureux<sup>3</sup>. Dès la fin des combats, l'armée victorieuse était censée prendre à sa charge les opérations d'inhumation. Cependant, comme il s'agissait généralement de guerres de mouvement, les armées n'avaient pas toujours le temps de s'occuper des morts. C'était donc aux populations civiles qu'était dévolu le soin d'ensevelir les cadavres dans les cimetières communaux. S'ils étaient vraiment trop nombreux, les consignes étaient de les enfouir dans une fosse creusée sur les lieux du combat et de les couvrir de chaux par mesure d'assainissement<sup>4</sup>. La mort militaire restait donc en deçà de la mort civile, dans la mesure où, en France, depuis le décret du 23 prairial an XII (12 juin 1804) qui réglementait les cimetières, était préconisée la sépulture individuelle et faite l'obligation du cercueil. Depuis cette date, même si les indigents étaient encore inhumés dans une fosse, ils étaient placés côte à côte et non plus entassés, le cercueil demeurant obligatoire, même pour eux<sup>5</sup>.

Néanmoins, depuis la période napoléonienne, l'État devait prendre à sa charge les funérailles de tout individu mort sur le champ de bataille, ou, dans les trois mois, des suites des blessures qu'il avait reçues au combat<sup>6</sup>. Par ailleurs, aux autorités civiles et militaires incombait la responsabilité

3 André Corvisier, «La mort du soldat depuis la fin du Moyen Âge», *Revue historique*, juillet 1975, pp. 3-30.

4 Un officier supérieur en retraite, *Les Devoirs des maires en cas de mobilisation générale*, Paul Dupont, Paris, 1889, pp. 64-66.

5 Philippe Ariès, *L'Homme devant la mort*, Seuil, Paris, 1977, p. 510.

6 *Instruction provisoire pour le service des troupes en campagne*. Imprimé par ordre du ministre de la Guerre, F. G. Levrault, Paris, 1823.

d'enregistrer les morts. Au début du XIX<sup>e</sup> siècle, l'officier chargé de l'état civil tenait les matricules de l'unité. Après chaque bataille, il dénombrait les disparus et les mentionnait sur son registre en s'aidant des trois témoins prévus par la loi. On précisait les causes du décès : mort au combat, à la suite des blessures reçues sur le champ de bataille, « de maladie provenant des fatigues de la guerre », de maladies « ordinaires ». En aucun cas ne devaient être relatées les morts infamantes telles les suicides et les duels. Puis, s'il était connu, l'officier prévenait les services d'état civil du domicile. De même, les officiers publics mentionnaient sur leurs registres les décès des prisonniers de guerre morts en captivité dans leur ressort territorial ou administratif.

À partir du milieu du XIX<sup>e</sup> siècle, les grands principes du traitement des cadavres et d'une comptabilité des morts du champ de bataille étaient donc inscrits dans les codes militaires réglementant les armées en campagne. Mais au-delà des consignes, il y a les pratiques et les usages. En 1870-1871, les militaires français ne portaient pas encore de plaque individuelle permettant de les identifier ; les corps étaient entassés et enfouis dans des fosses avec leurs effets, officiers et troupiers mêlés, parfois sans distinction de nationalité. La priorité était d'assainir la zone des combats, où les feux de la mitraille et les tirs nourris de l'artillerie avaient empilé des monceaux de cadavres sur un espace restreint. Comme durant la guerre de Crimée, lors des batailles du mois d'août 1870, la puissance de l'artillerie avait pris de court les états-majors et entraîné des massacres lors des charges de cavalerie et des assauts de la troupe. Des milliers de corps devaient rapidement être inhumés, de crainte que ces amas de chairs inertes n'entraînent la propagation des épidémies opportunistes, propres aux grands moments de désorganisation et de déplacement de troupes.

Pourtant, et cela n'est pas propre à « l'année terrible », mais à la règle des temps de guerre, les morts étendus attendaient une sépulture, le temps que s'organisent les survivants ou que se taisent provisoirement les armes. Avec le traitement des cadavres, la principale inquiétude des autorités restait le pillage des dépouilles. Les autorités militaires et civiles essayèrent d'empêcher l'arrivée des « dévaliseurs de morts et de blessés », en surveillant les agissements des « brocanteurs » près des champs de bataille. Elles veillaient à la collecte officielle des effets des morts et à leur enregistrement<sup>7</sup>.

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<sup>7</sup> Un officier supérieur en retraite, *Les Devoirs des maires en cas de mobilisation générale*, Paul Dupont, Paris, 1889, pp. 65-66.



Le conflit de 1870-1871 marque une autre rupture dans cette histoire des tués de la guerre. Le traité de Francfort, signé le 10 mai 1871, précisait dans son article 16: «Les gouvernements français et allemand s'engagent à entretenir les tombes des militaires ensevelis sur leurs territoires respectifs.» Le texte fut suivi d'effet. En Allemagne, la loi du 2 février 1872 régla l'organisation des tombes des deux armées, en Alsace et dans l'ancien département mosellan. Ces mesures permirent l'aménagement des lieux d'inhumation français: Metz (7 636 corps en ossuaire, 178 tombes individuelles), Forbach, Gravelotte, Haguenau, Woerth. En France, à la suite de la loi du 4 avril 1873, l'État prit à sa charge les sépultures franco-allemandes en achetant des parcelles dans les cimetières communaux ou en expropriant les terrains non clos où se trouvaient des tombes. Ces achats s'échelonnèrent de 1873 à 1878. Les tombes furent aménagées, garnies d'un entourage en fonte d'un modèle homologué. Au total, l'État s'était occupé de 87 396 sépultures, la majorité des braves gisant en morceaux, anonymes, dans des ossuaires.

En fait, le premier grand cimetière militaire français avait été créé à l'étranger pour réunir les restes des morts de l'armée d'Orient qui avait assiégé Sébastopol. Terminé dans les années 1880, il constituait un ensemble de chapelles funéraires érigées sur dix-sept caveaux contenant les ossements des officiers et soldats qui avaient péri en Crimée entre 1854 et 1856. Ceint de hauts murs, avec un monument commémoratif érigé en son centre, il aurait servi de modèle à la réalisation des ossuaires commémoratifs de la guerre de 1870-1871. Par ailleurs, des sépultures des morts de la campagne de 1859 étaient également entretenues par les colonies françaises en Italie<sup>8</sup>.

Malgré des différences avec le vieux continent, la chronologie est parallèle aux États-Unis. À partir de la guerre d'Indépendance, puis après celle de 1812, apparurent les premières fosses signalées par une marque sommaire mise à la hâte, suivies de sépultures personnelles, surmontées d'un monument commémoratif, souvent un obélisque symbole d'éternité, inspiré de l'Égypte pharaonique. Le premier cimetière militaire fut créé en 1847 par l'État du Kentucky. Il y fit rassembler les restes de ses ressortissants morts au cours de la guerre du Mexique, après qu'il eut organisé le rapatriement de leurs corps à ses frais. Quelques années plus tard, l'État fédéral établissait un cimetière militaire permanent dans la ville de Mexico pour ses soldats tombés en 1845-1847. Les ossements des officiers et des soldats furent collectés

<sup>8</sup> Le Souvenir Français, «Allocution du général Cosseron de Villenoisy», *Rapports de l'assemblée générale du 24 mai 1896*, Paris, 1896, p. 2.

dans les environs et rassemblés dans les sépultures perpétuelles d'un cimetière ceint d'un mur. Au cours de la guerre de Sécession, des cimetières militaires furent construits pour les soldats de l'Union. En 1862, le Maryland en ouvrit un pour les tuniques bleues tombées à la bataille de Antietam; en 1863, ce fut la Pennsylvanie à la suite de la bataille de Gettysburg. En fait, depuis 1862, le Congrès avait pris des mesures qui reconnaissaient à l'État fédéral le pouvoir d'ouvrir des cimetières militaires perpétuels pour les soldats de l'Union<sup>9</sup>.

Le modèle individualiste s'affirma donc d'une manière plus précoce aux États-Unis qu'en Europe, où jusqu'à la fin du XIX<sup>e</sup> siècle la règle pour la troupe resta les fosses communes, les tombes collectives et les ossuaires enfermant des restes humains non identifiés. Peu nombreuses, les sépultures individuelles n'étaient pas nécessairement réservées aux seuls officiers supérieurs, mais elles restèrent minoritaires. En France, les ossuaires militaires sont demeurés la sépulture privilégiée où ont été déposés les restes des morts de la guerre de 1870-1871, ainsi que ceux des soldats tombés au cours des guerres coloniales, ou simplement morts en garnison, à la fin du XIX<sup>e</sup> siècle et au début du XX<sup>e</sup> siècle. Mais si des consignes strictes existaient pour tenir l'état civil des tués sur le champ de bataille, l'improvisation était fréquente quant à l'inhumation des corps, et pour ce qui était de l'identification des cadavres on commençait à peine à envisager des procédures.

### Donner une identité aux tués en uniforme

Comme elle le fit dans d'autres domaines, la guerre de Sécession américaine a ouvert la voie à la reconnaissance individuelle des défunts<sup>10</sup>. Pour se prémunir du méconnaissable, avant la bataille, les soldats écrivaient sur un morceau de papier ou de parchemin leur nom précédé de *I am*, avec le numéro de leur unité. Certains se procuraient des plaques d'identification en métal précisant parfois la ville dont ils étaient originaires. Mais cette pratique n'était pas systématique, près de la moitié des tombes des cimetières de la guerre civile portèrent la mention « inconnu »<sup>11</sup>.

Un peu plus tard, au cours de la guerre de 1870-1871, l'armée prussienne

9 G. Kurt Piehler, *Remembering War. The American Way*, Smithsonian Institution Press, Washington et Londres, 1995, pp. 40-49.

10 Service historique de l'armée de terre, Centre interarmées de documentation militaire, trad. n° 7166, Lt Cnel Francisco Trigueros Penalver, « La placa militar de identidad », *Ejercito*, octobre 1959, pp. 29-34.

11 H. Wayne Elliot, « Identification », in Roy Gutman et David Rieff (dir.), *Crimes de guerre. Ce que nous devons savoir*, Autrement, Paris, 2002, pp. 235-236.

a distribué des plaques d'identification, imposant aux troupiers qu'ils portent sur eux une carte d'identité surnommée *Grabstein* (tombe). En France, la décision fut prise en 1881 de munir les militaires de plaques d'identité en maillechort (alliage inoxydable de nickel, de cuivre et de zinc) afin d'assurer la tenue de leur état civil en cas de décès et de garantir leur succession. En 1883, le modèle français était fixé. On décida dans les années 1890 d'en munir aussi les soldats coloniaux<sup>12</sup>. À la veille du premier conflit mondial, tout soldat sous les drapeaux devait réglementairement être muni d'une plaque<sup>13</sup>. À son apparition, celle-ci était volontiers suspendue en médaillon autour du cou des soldats. Cependant, par superstition ou négligence, beaucoup de militaires ne la portaient pas, voire s'en débarrassaient<sup>14</sup>. Par ailleurs, même si depuis 1884 les directives indiquaient que les plaques des soldats décédés devaient suivre leur livret militaire, en pratique, l'improvisation resta de mise sur les champs de bataille, entre ceux qui retiraient effectivement la plaque pour la remettre à l'officier d'état civil, et ceux qui la laissaient sur le cadavre afin de permettre son identification ultérieure. Deux logiques s'affrontaient dans cette différence de pratique : l'institution militaire se souciait d'assurer la tenue de l'état civil, les camarades de combat tentaient de préserver l'identité du corps.

Au cours de la guerre de 1914-1918, la plupart des pays européens eurent leur propre modèle de plaques, tantôt gravées sur une pièce de métal, tantôt écrites à l'encre sur de la cellulose ou du cuir bouilli. L'Angleterre a ainsi utilisé jusqu'à neuf types différents de plaques identitaires. Quant à l'Allemagne, dès 1916, elle décida d'utiliser un modèle sécable qui permettait d'assurer le suivi de l'état civil tout en garantissant l'identité du cadavre<sup>15</sup>. En France, pour faciliter l'identification, le docteur Leclerc, professeur à la faculté de médecine de Lille, proposa dès février 1915 un système dit de la double plaque, l'une en pendentif, l'autre en bracelet ; tandis que en 1917 un nouveau type vit le jour : la plaque en deux parties se fixant au poignet, l'une restant fixée à la chaîne devait garantir l'identité des restes en cas

<sup>12</sup> Journal militaire officiel de 1881 à 1909.

<sup>13</sup> Lieutenant A. Froment, *La Mobilisation et la préparation à la guerre*, La Librairie illustrée, Paris, sd (fin XIX<sup>e</sup>, début XX<sup>e</sup> siècle).

<sup>14</sup> Franc-Nohain, Paul Delay, *Histoire anecdotique de la guerre de 1914-1915*, P. Lethielleux, Paris, 1915, p. 143.

<sup>15</sup> Thierry Hardier et Jean-François Jagielski, *Combattre et mourir pendant la Grande Guerre (1914-1925)*, Imago, Paris, 2001, p. 187.

d'exhumation, l'autre, détachée, permettant d'établir l'acte de décès<sup>16</sup>. Dans la mesure où une politique d'ensemble de codification des lois de la guerre se mettait en place, cette absence d'uniformité était préjudiciable à l'identification des corps, surtout dans des conflits mobiles aux fronts instables et avec des combats acharnés pour des terrains constamment pris et perdus. En effet, les conférences de La Haye de 1899 et de 1907 et celle de Genève en 1906 recommandaient aux belligérants de s'informer mutuellement des décès des prisonniers et de l'identification des morts adverses trouvés dans la zone sous leur contrôle. Pourtant, en France, le 18 juin 1915, préoccupée par l'assainissement du champ de bataille, la chambre des députés vota un projet de loi sur l'incinération des cadavres ennemis et ceux des Français et de leurs alliés qui n'avaient pas été identifiés. Le texte tomba devant le Sénat en janvier 1916, certains parlementaires objectant qu'il fallait permettre les identifications ultérieures.

L'intérêt de la plaque d'identité était si évident que les administrations militaires s'efforcèrent d'en améliorer l'usage, en particulier par la précision des renseignements qu'elle comportait et la façon de la porter. En dépit de ces efforts, une grande quantité de morts restait non identifiée à la fin de la Première Guerre mondiale. En France, parmi les 1 400 000 combattants « tués à l'ennemi », on comptait 252 900 soldats portés disparus ou non identifiés. Aux États-Unis, les pouvoirs publics se voulaient rassurants : sur les 116 000 morts de cette guerre, seuls 2 896 n'auraient pas été identifiés. Mais l'identification des corps se faisait selon des méthodes empiriques, et les contemporains, lucides, s'inquiétèrent de l'authenticité des restes. Les vétérans n'étaient pas optimistes. Selon un soldat accompagnant le retour au pays d'une cargaison de dépouilles mortelles venues des tranchées, un cercueil sur dix seulement avait une chance de contenir des restes véritablement identifiés. Les autres n'enfermaient qu'une « approximation de squelettes<sup>17</sup> ». Dans ces conditions, les pouvoirs publics ne pouvaient s'en tenir à des discours lénifiants. Il fallait trouver des moyens de faciliter les identifications.

Lors de la XII<sup>e</sup> conférence de la Croix-Rouge, en 1925, le Comité international de la Croix-Rouge prit l'initiative d'achever de normaliser les plaques, moyen nécessaire bien que non suffisant d'identifier les blessés et les

<sup>16</sup> Jean-Yves Le Naour, *Le soldat inconnu vivant*, Hachette, Paris, 2002, p. 47.

<sup>17</sup> Mervyn Burke, *Journal inédit*, Carlisle Barracks, Pennsylvanie, cité par Mark Meigs, « La mort et ses enjeux : l'utilisation des corps des soldats américains lors de la Première Guerre mondiale », *Guerres mondiales et conflits contemporains*, n° 175, 1994, p. 144.

morts. Une Commission « de standardisation du matériel sanitaire » se mit au travail en liaison avec les états-majors des États signataires des Conventions de Genève et de La Haye, sous la direction du Colonel Rouppert, chef du Département sanitaire de l'armée polonaise. Une résolution prête à l'automne 1927 fut adoptée dans l'article 4 de la nouvelle Convention de Genève signée en juillet 1929. Bien que chaque État gardât la liberté de la réaliser selon son génie propre, désormais, les soldats devaient porter autour du cou une plaque métallique dont une partie sécable pouvait être facilement transmise aux autorités adverses ou amies.

Outre les essais concernant la solidité et la forme du signe identitaire, on retiendra des travaux de la commission de standardisation son souci d'y inscrire la religion. Cette proposition destinée à faciliter l'organisation des obsèques, finalement non retenue par la plupart des armées, n'en témoignait pas moins de l'importance grandissante du sentiment des devoirs à accomplir vis-à-vis des défunts.

Plus encore, désormais, la Convention de Genève de 1929 rendait chaque belligérant responsable des soins pour tous les tués restés sur le champ de bataille. Les corps devaient être recherchés, identifiés, protégés des pillages et des mauvais traitements. Plus qu'une information réciproque, il s'agissait d'une gestion commune des morts ennemis par des États adverses. Non seulement ceux-ci devaient se transmettre mutuellement les moitiés des plaques d'identité prélevées sur les cadavres, mais ils étaient tenus de les enterrer « honorablement ». Cela impliquait l'enregistrement des tombes pour permettre à tout moment leur localisation précise ainsi que l'intervention obligatoire d'un médecin pour s'assurer du décès avant d'autoriser l'inhumation. L'article 17 précisait qu'à « cet effet et au début des hostilités, [les belligérants] organiseront officiellement un Service des tombes afin de permettre des exhumations éventuelles, d'assurer l'identification des cadavres, quel que soit l'emplacement successif des tombes (...) ». La deuxième Convention de Genève de 1929 étendait les mêmes devoirs aux prisonniers décédés en captivité et leur garantissait même le droit de pouvoir rédiger un testament et de le faire parvenir à leurs ayants droit.

De ce fait, à partir de l'entre-deux-guerres, tous les soldats portèrent en principe leur signalement. En France, par exemple, la médaille d'identité, comprenait des renseignements différents pour les officiers et les hommes de troupe. Pour les premiers, figuraient au recto le patronyme et le prénom usuel avec la mention « officier » et au verso la date et le lieu de naissance. Pour les seconds, étaient indiqués au recto, le nom, le premier prénom et la classe, au

verso la subdivision de région et le numéro du matricule du recrutement. Par ailleurs, le livret individuel devait être réglementairement rangé dans la poche intérieure de la vareuse. Surtout, une méthode était donnée pour garantir de retrouver les corps des tués et de les assurer de leur bonne identité. En effet, en 1939, les consignes officielles pour l'inhumation et l'assainissement du champ de bataille étaient strictes. Certes, elles préconisaient un enterrement des morts le plus rapide possible. Sans précipitation cependant, pour laisser aux médecins militaires le temps de s'assurer scientifiquement du décès et aux officiers d'administration des formations sanitaires de dresser les actes d'état civil, désormais guidés pour les identifications par le port systématique de la plaque<sup>18</sup>. Lorsque le cadavre n'était pas identifié, on devait relever une description détaillée de l'endroit où il reposait, de tous les objets trouvés sur et autour de lui, des vêtements qu'il portait avec leurs caractéristiques, des armes disposées alentour. Les noms des cadavres identifiés à proximité devaient être recensés ainsi que les numéros de régiments auxquels ces hommes appartenaient. Enfin, le décès devait être signalé aux services de comptabilité et de renseignements.

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On ne dispose d'aucune statistique d'ensemble sur le nombre de personnes civiles et militaires non identifiées pour la Seconde Guerre mondiale. Les recherches se poursuivent de nos jours. Les services des Armées estiment qu'en France, 10 à 15% des soldats tombés entre 1939 et 1945 seraient encore portés disparus ou n'auraient pas été identifiés. Les progrès furent néanmoins considérables d'une guerre à l'autre en raison de la volonté politique que les armées en campagne soient organisées de telle sorte qu'elles enregistrent les morts militaires et qu'elles suivent le devenir des corps. L'identification était donc d'abord une affaire d'organisation. En effet, jusqu'à la fin du XX<sup>e</sup> siècle, les systèmes d'identification sont restés aléatoires, empiriques, principalement fondés sur des recoupements d'informations: la tenue du journal de marche de l'unité en opération et du livret militaire, l'emplacement de la tombe, les objets entourant le mort. Mais la fréquence des corps mêlés dans les fosses et les charniers ont rendu toute perspective d'authentification ultérieure des restes illusoire. Les 90% d'inconnus de la Première Guerre mondiale sont, en fait, ceux qui, tombés en 1914, ont été

<sup>18</sup> Service de santé en campagne, *Notices. Volume à jour au 24 juillet 1939*, Charles-Lavauzelle, Paris, 1939, Notice n° 9, "Inhumations - assainissement des champs de bataille", pp. 123-128.

inhumés dans des ossuaires. Seules la volonté de suivre des procédures d'identification et la généralisation des tombes individuelles, dont la réalisation était loin d'être toujours possible, garantissaient la possibilité d'une réelle reconnaissance des morts.

Au cours de la Seconde Guerre mondiale, les États-Unis accomplirent un effort supplémentaire en matière d'organisation pour suivre leurs propres tués. Lors de ce conflit, en plus du bracelet d'identité que les soldats surnommaient le « collier à chien » (Dog Tag), l'armée nord-américaine avait donné la consigne d'enfourer conjointement au cadavre, à une trentaine de centimètres environ sous la croix, une bouteille hermétiquement fermée contenant le compte-rendu d'inhumation ou ROB (*Report of Burial*)<sup>19</sup>. Mais la première sépulture était souvent le fruit de l'urgence et de l'improvisation. Il arrivait fréquemment que les terrassiers enterrent dans une fosse commune tout l'équipage d'un char, ou celui d'un avion. Après la guerre, en découvrant ces fosses, les services d'exhumation prenaient alors les dispositions pour identifier les ossements, en les regroupant par individu, les experts pouvant estimer l'âge et la taille de l'inconnu. Depuis Washington, les renseignements donnés permettaient de limiter à quelques-uns les équipages qui avaient été inhumés dans la zone. Surtout, les fiches spéciales établies par le AGRC (*American Graves Registration Command*) qui étaient fournies aux équipes d'exhumation, contenaient entre autres renseignements le croquis de la dentition de chaque soldat au moment de sa mobilisation. L'identification d'un corps permettait ainsi de reconnaître les autres soldats enfouis dans la fosse. Aussi, comme a pu l'écrire un employé français d'une des équipes d'exhumation : « si le cadavre identifié coûte cher au contribuable américain, le cadavre inconnu est hors de prix <sup>20</sup>. »

### Reconnaître aussi les civils

Ainsi se poursuivait l'énorme effort pour l'identification des soldats tués au combat et dans les zones d'opérations.

La littérature et le cinéma ont popularisé la douloureuse quête des familles à la recherche de leurs disparus<sup>21</sup>. Tâtonnante au début de la période, l'organisation de l'identification est devenue systématique et plus efficace

<sup>19</sup> Claude Sudry, « L'exode des cadavres », *La Nouvelle Équipe Française*, n° 59, novembre 1949, p. 35.

<sup>20</sup> *Ibid.*, p. 43.

<sup>21</sup> Parmi bien d'autres exemples, Claude Simon, *L'Acacia*, Minuit, Paris, 1989; Bertrand Tavernier, *La Vie et rien d'autre*, 1989.

tout au long du XX<sup>e</sup> siècle. Pour l'ensemble des belligérants et de façon similaire, les procédures lentement mises en place par les autorités militaires étaient rodées peu à peu et étendues au civil. En 1942 à Paris, par exemple, les circulaires administratives concernant les démarches à accomplir après un bombardement auprès des populations civiles distinguaient tout naturellement les questions administratives du domaine technique des déblaiements et de l'aménagement d'abris provisoires. Dans le premier domaine, avant même les mesures d'assistance d'urgence ainsi que celles d'assistance immobilière, d'ordre public, de récupération et d'organisation du travail, étaient énoncés « les devoirs envers les morts » : recherches, identification, mise en bière et obsèques<sup>22</sup>.

Tout était mis en œuvre pour tirer les victimes de l'anonymat. Dans son rapport sur le bombardement allié du 3 mars 1942 qui fit 316 morts, le préfet de police pouvait ainsi se féliciter. Après avoir expliqué comment les corps étaient retirés des décombres, fouillés pour sauvegarder les effets personnels, mis en bière et présentés aux familles en quête de leurs proches disparus, il concluait : « Grâce à la diligence du personnel, en trois jours la plupart des corps ont pu ainsi être identifiés, vingt-huit seulement ne le sont pas encore. Ces derniers ont été photographiés par le Service de l'Identité judiciaire qui a en outre pris les empreintes digitales et le signalement descriptif pour faciliter à bref délai leur reconnaissance définitive<sup>23</sup>. » Les familles des disparus pouvaient alors identifier leurs morts à partir des photographies conservées à l'Hôtel de ville.

En effet, les enjeux de l'identification des morts non militaires étaient tout à la fois administratifs, médico-légaux et psychologiques. En 1941, à la suite d'un bombardement sur Rennes, Émile Dupont, originaire de Bezons dans la région parisienne, se trouvait dans une situation administrative inextricable : le cadavre de sa fille n'ayant pas été identifié, son état civil ne pouvait être modifié<sup>24</sup>. « En mars 1943, après un autre bombardement, une jeune femme dut aller à la morgue reconnaître sa mère dont on lui avait annoncé le décès. Le cadavre était celui d'une autre défunte ! L'enquête diligentée par le maire n'ayant pas permis de retrouver le corps, le commissaire de police

<sup>22</sup> Circulaire du préfet de la Seine aux maires des arrondissements de Paris et des communes de la Seine, 30 mars 1942, Archives de la Préfecture de police de Paris, BA 1756. On trouve des circulaires semblables pour différentes autres villes (archives départementales du Calvados, du Loiret, de l'Indre, dossiers « Bombardements »).

<sup>23</sup> Raid du 3 mars 1942, Archives de la Préfecture de police de Paris, B<sup>a</sup> 1756.

<sup>24</sup> Lettre d'Émile Dupont de Bezons au préfet d'Ille-et-Vilaine, transmise au maire de Rennes le 6 décembre 1940, Archives municipales de Rennes, 6H23.



conclut son rapport en considérant que ou bien le corps de cette dame avait été inhumé comme « non identifié », ou bien « ce qui serait plus grave » qu'elle avait été inhumée sous un autre nom<sup>25</sup>. »

La Seconde Guerre mondiale a fait beaucoup plus de victimes civiles que de morts militaires, ce qui a amené à accélérer le débat amorcé dans les années 1930 sur l'extension des conventions sur les droits et les coutumes de la guerre aux populations civiles, alors qu'il avait été jusque-là restreint aux militaires. La quatrième Convention de Genève de 1949 a étendu les mesures concernant les morts du champ de bataille aux populations civiles : les belligérants signataires s'engageaient à rechercher les tués de leur ressort, qu'ils soient civils ou militaires, et à organiser le dispositif nécessaire à l'identification des civils internés décédés sous leur autorité et à la localisation exacte de leur tombe. Enfin, les Protocoles additionnels de 1977 ont élargi ces droits aux victimes des « conflits armés non internationaux ».

Certes, les systèmes d'organisation mis en œuvre par les armées pour suivre leurs morts ne sont pas de la même nature que ceux qui pourraient garantir l'identification des civils. Néanmoins, ponctuellement des moyens lourds sont désormais mobilisés par les États, par les organisations internationales ou par les associations pour redonner aux cadavres leur identité après la guerre, en utilisant les outils de la médecine légale et de l'anthropologie. Aujourd'hui dans les Balkans, ou en Argentine, des fosses sont ouvertes, des restes sont exhumés, des anthropologues et des médecins examinent corps, restes et ossements, afin d'établir les conditions du décès. Lorsque le corps est identifié par des recoupements, par la carte dentaire, par des traces sur les os, il est restitué aux familles qui le réclament. En Argentine, dans les Balkans, au Rwanda et ailleurs, au nombre des enjeux de l'identification des « disparus » est aussi la volonté de riposter à la tentation de l'oubli : ouvrir les fosses, identifier les corps, établir les conditions de la mise à mort, rétablir les faits et transmettre la mémoire du massacre, tous ces gestes dramatiques sont une étape nécessaire pour permettre aux familles d'accomplir leur travail de deuil, aux victimes d'obtenir réparation par la justice, et à terme, aux peuples d'apaiser leur rapport au passé.

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Depuis les années 1990, les recherches par ADN, permettent d'authentifier avec une quasi certitude l'identité des cadavres retrouvés mais restés

<sup>25</sup> Procès-verbal du commissaire de police de Rennes, 26 mars 1943, Archives municipales de Rennes, 6H23.

anonymes. Utilisées d'abord ponctuellement à cause de leurs procédures lourdes et coûteuses, elles sont de plus en plus sollicitées en raison de leur fiabilité. Elles ont ainsi été utilisées pour identifier les restes des 2823 victimes ensevelies sous les décombres à la suite de l'attentat perpétré contre les tours jumelles du *World Trade Center*, à New York, le 11 septembre 2001. De même, depuis l'année 2000, un mouvement s'est affirmé en Espagne pour faire ouvrir les fosses de la guerre civile et engager une procédure d'identification des ossements, désormais possible plus de soixante années après le décès grâce à ces techniques. Pour certains descendants de républicains, c'est le moyen d'établir les conditions du décès et de clore un deuil interminable. Il en est ainsi, d'Emilio Silva, le président de l'Association pour la récupération de la mémoire historique (ARMH), qui voulait récupérer les restes de son grand-père pour les faire reposer à côté de ceux de sa grand-mère dans le cimetière communal; ce qu'il fit en octobre 2000<sup>26</sup>. D'autres associations pour la mémoire se sont créées autour des fosses de la guerre civile. Mais les avis divergent sur leur sort ultérieur. L'AFAFC (*Asociación de Familiares y Amigos de la Fosa común de Oviedo*) par exemple, milite pour que la fosse d'Oviedo, où sont enfouis 1500 corps, ne soit pas ouverte et reste un lieu de mémoire<sup>27</sup>. Parmi les questions soulevées par l'AFAFC, il y a le devenir des restes qui ne seraient pas réclamés par des familles, et le coût d'une telle opération, même si elle ne touchait que quelques fosses, mieux connues ou symboliques. Aujourd'hui, une seule preuve ADN coûte 3000 Euros. Les charniers de Républicains massacrés par les Franquistes feraient-ils désormais partie du patrimoine espagnol de la guerre civile?

Ce qui est devenu possible aux États-Unis et en Espagne, l'est moins en Argentine et moins encore au Rwanda. Désormais, les conventions internationales exigent que les soldats, les combattants « légaux », soient identifiés. Dans un futur proche, les militaires des États-Unis seront probablement équipés de disques électroniques mémorisant leur identité, dont leur formule d'ADN. Les « soldats inconnus » qui font le lien entre les disparus de toutes les guerres sont ainsi amenés à disparaître. Il en va tout autrement pour les civils entraînés dans les opérations meurtrières qui n'ont pas toutes le nom de guerres, bien trop nombreux, bien moins recensés. Les tombeaux des soldats inconnus seront-ils remplacés par les monuments à la mémoire des civils non identifiés?

26 <<http://www.culturadearchivo.ua.es/html>>.

27 <<http://www.iespana.es/fosa/reunion/reunion.htm>>.

## Abstract

### ***From regimental number to genetic code: The handling of bodies of war victims in the search for identity***

*by Luc Capdevila and Danièle Voldman*

Starting from the middle of the nineteenth century, the principles governing the processing of corpses and the accounting of those deceased on the battlefield were inscribed in military codes. The military and civil authorities carried out the official collection and recording of the effects of the dead: the bodies were to be searched for, identified, and protected from plundering and ill treatment. In Europe and in the United States, tombs were constructed containing non-identified remains under the name of “unknown soldiers”. Gradually, intelligence services and resources were mobilized to ensure as far as possible an individualized processing of the bodies of those killed in war. These procedures were extended little by little to civilian victims. Today in the Balkans, or in Argentina, pits are being opened, human remains are exhumed, and anthropologists and physicians examine bodies, remains and bones in order to establish the identity of the dead and the circumstances of the death. In this regard, the tombs of unknown soldiers are likely to be replaced by monuments to the memory of non-identified civilian victims of war.

## ‘Denial and silence’ or ‘acknowledgement and disclosure’

MARGRIET BLAAUW AND VIRPI LÄHTEENMÄKI \*

“One has to remember to be able to forget”<sup>1</sup>

Disappearances are a worldwide problem. Over the last few decades the world has been shocked by accounts of tens of thousands of people who are known to have disappeared in Cambodia, Latin America, Iraq, Rwanda, the former Yugoslavia, Chechnya, etc. Many more stories of disappearances exist that will never reach the international community. While enforced disappearance is probably dealt with most effectively at the national level, the fight against disappearances should nevertheless also be an international effort. It requires solidarity among people and organizations, and across borders.<sup>2</sup>

The International Rehabilitation Council for Torture Victims collaborates with rehabilitation centres worldwide to promote and support the rehabilitation of torture victims and their families. Most rehabilitation centres for torture victims offer support for family members of disappeared persons, since torture, arbitrary killings and forced disappearances<sup>3</sup> often go hand in hand in times of serious political repression.

Forced disappearances have an effect on the individual, his/her family and the community as a whole. The problems that family members of disappeared persons face are complex and can be overwhelming. Besides the uncertainty about the fate of their relatives, they usually have to cope with economic, social and legal problems as well. Many relatives have searched in vain for their loved ones, year after year. We know mothers of disappeared children who, after almost thirty years, are still hoping for their missing child to appear. It is normal for relatives to have difficulties in accepting the death of a disappeared family member. In many cases, family members of disappeared persons suffer from symptoms of complicated grief, such as intrusive

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images or severe emotional attacks, or from denial of the effects of loss. As a result, they often find it hard to cope with necessary activities at work and at home.<sup>4</sup> There is a need for an official disclosure of what has happened to the disappeared person and an acknowledgement of the consequences of disappearances for families.

Forced disappearances are surrounded by silence and fear. In a society dominated by organized violence, serious mistrust is created between people.<sup>5</sup> Neighbours, classmates and other community members sometimes avoid the families of missing people. In the following article, we shall review some of the difficulties that family members of disappeared persons, and the persons providing support to them, may encounter. We shall describe how the lack of culturally appropriate farewell ceremonies can complicate the grieving process of family members of disappeared persons. However, there is still little systematic knowledge of how to address the massive psycho-social consequences of violence, armed conflicts and human rights violations.<sup>6</sup> We recognize that the probable effects of the increase in grief reactions on the mental and physical health of individuals and the population as a whole should be further evaluated.<sup>7</sup>

### Grief and mourning

Grief is the sorrow, suffering and mental distress caused by the death or loss of a loved one. Mourning is the process of responding to loss and death,

1 N. Sveaas, "The psychological effects of impunity", in N. Lavik, M. Nygård, N. Sveaas and E. Fannemel (eds), *Pain and Survival: Human Rights Violations and Mental Health*, Scandinavian University Press, 1994.

2 C. Jimenez, *International Standards: Fighting Involuntary Disappearance*, paper presented by the Association for the Prevention of Torture (APT) during the "Asian and Latin American Lawyers' Meeting on Involuntary Disappearance: Between Memory and Impunity", sponsored by the Asian Federation against Involuntary Disappearances (AFAD), Jakarta, 27 November - 2 December 2000.

3 Definition of "enforced disappearance of persons" according to Article 7 (Crimes against humanity) of the Rome Statute of the International Criminal Court, 17 July 1998: "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons...

4 M. Horowitz *et al.*, "Diagnostic criteria for complicated grief disorder", *The American Journal of Psychiatry*, July 1997.

5 Sveaas, *op. cit.* (note 1).

6 T. Joop de Jong, "Public mental health, traumatic stress and human rights violations in low-income countries: A culturally appropriate model in times of conflict, disaster and peace", in Joop de Jong (ed.), *Trauma, War and Violence: Public Mental Health in Socio-Cultural Context*, Kluwer Academic, 2002, p. 1.

7 Sveaas, *op. cit.* (note 1); E. Lindemann, "Symptomatology and management of acute grief", in J. Mardi Horowitz (ed.), *Essential Papers on Post-traumatic Stress Disorder*, New York University Press, 1999, pp. 136-148.

the culturally defined acts that are performed when someone dies in a community.<sup>8</sup> This includes memorial services, funerals, wakes, mourning apparel, etc. These ritualized approaches are important in organizing and focusing the grief reaction in the period directly after the death.<sup>9</sup> A culturally appropriate leave-taking ceremony, which includes the possibility to say goodbye and to express love, normally has a positive effect on the process of grief. It will help a grieving person by lessening his or her later feelings of anger and guilt.<sup>10</sup>

“The disappeared are denied a place among the living and also denied a place among the dead.”<sup>11</sup>

Circumstances can hinder the grieving process, especially when a family member has disappeared. In that case a farewell ceremony will normally not have been performed, as the whereabouts of the loved one are uncertain. Often the family has to contend with the economic, legal and social problems that may accompany a disappearance. For example, many of the disappeared persons have been breadwinners and their families have faced a loss of income. When there is no official acknowledgement of the missing person's status, the family might not be given the support that family members normally receive in cases of death. In some cultures, the law forbids women to remarry until several years have passed since their husbands went missing.<sup>12</sup> Legal advice can also be hard to obtain. Some families spend up whatever money they have on legal advice, but most families cannot afford it, do not know where and how to get it, or dare not seek it.

### Complicated grief

There are certain characteristics that describe the grieving person. Typical are somatic sensations of distress, such as a feeling of tightness in the throat, shortness of breath, and being extremely tense and exhausted. Preoccupation with the image of the lost loved one and strong feelings of

<sup>8</sup> J. Boehnlein, “Clinical relevance of grief and mourning among Cambodian refugees”, *Soc. Sci. Med.*, Vol. 25, No. 7, 1987, pp. 765-772.

<sup>9</sup> K. Anasarias and B. Escalante, “Healing traumatic wounds of war”, *Balitung Balay*, Vol. 9, Nos 2-3, 2001.

<sup>10</sup> M. Eisenbruch, “The cultural bereavement interview: A new clinical research approach for refugees”, *The Psychiatric Clinics of North America*, Vol. 13, No. 4, 1990.

<sup>11</sup> Quote from Shari Eppel, Amani Trust Zimbabwe, “Healing the dead to transform the living: Exhumation and reburial in Zimbabwe”, *Regional and Human Rights' Contexts and DNA*, University of California, Berkeley, 26-27 April 2001.

<sup>12</sup> *Genocide in Iraq: The Anfal Campaign Against the Kurds. A Middle East Watch Report*, Human Rights Watch, New York, 1993, p. 337.

guilt are also very common. In addition, the grieving person has sometimes lost warmth in relationships with other people and experiences feelings of hostility. The behaviour of a person in profound grief likewise shows notable changes. He or she may seem hyperactive and restless, yet at the same time is unable to initiate or maintain any organized activity. It is also very common for grieving persons to avoid situations that would remind them of the person they have lost. The duration of these grief reactions depends upon how successfully a person is able to work through the grief. This includes readjustment to the environment in which the lost loved one is missing, and the formation of new meaningful relationships.<sup>13</sup> Pathological grief is often a very intense or out-of-control experience of the feelings and behaviour that are normal during mourning. It can also, especially in the case of missing persons, be a failure to mourn or move forward in the grieving process.<sup>14</sup> Recent studies show that the process of working through one's grief is particularly difficult when the circumstances of the death represent a threat to one's world view or when there is only little social support.<sup>15</sup>

Family members of missing persons experience grief differently from those grieving for deceased loved ones. An appropriate leave-taking ceremony is often not performed for missing persons. Many mental health professionals have noted that if family members choose to accept the death of the disappeared loved one, they feel that they are "killing" him or her.<sup>16</sup> Or they may have fantasies about their loved ones living in some faraway place and not returning home because they are not allowed to do so, or that they might be in prison. For example, during the Anfal campaign in Kurdistan (1987-1989), mass executions and mass disappearances of many tens of thousands of non-combatants (including women and children) took place. Sometimes the entire population of villages was killed. The people knew of the stories told about firing squads. Still, hopes were kept alive by rumours of Kurds being held in secret jails in the desert for future negotiations, and of Kurdish guerrilla fighters being used as slaves.<sup>17</sup> However, the hopes of family

<sup>13</sup> *Ibid.*, pp. 136-273.

<sup>14</sup> M. Horowitz, "A model of mourning: Change in schemas of self and other", in M. Horowitz (ed.), *Essential Papers on Post-Traumatic Stress Disorder*, New York University Press, 1999, pp. 252-273.

<sup>15</sup> D. Becvar, *In the presence of grief: Helping family members resolve death, dying and bereavement issues*, The Guildford Press, London, p. 39.

<sup>16</sup> Boehnlein, *op. cit.* (note 8), pp. 765-772; D. Becker *et. al.*, "Therapy with victims of political repression in Chile: The challenge of social repatriation", *Journal of Social Issues*, Vol. 46, No. 3, 1990, pp. 133-149.

<sup>17</sup> Human Rights Watch, *op. cit.* (note 12), p. 337.

members finding their loved ones alive cannot be considered entirely unrealistic, because many Kurds have found asylum elsewhere.<sup>18</sup>

People deprived of proper mourning may not be able to grieve effectively and may suffer arrested grief or atypical reactions.<sup>19</sup> Continued disbelief in the death of a loved one prevents a person from starting the normal grieving process and there is a high risk of complicated grief. It has been found that the family members of missing persons have more anxiety and post-traumatic stress disorders<sup>20</sup> (PTSD) than family members of dead persons.<sup>21</sup> They may suffer from insomnia, preoccupation with thoughts of the deceased, and unpredictable periods of anger, anxiety, survivor guilt, numbing of emotions and withdrawal from other people. These symptoms are typical for both chronic, unresolved grief and PTSD.<sup>22</sup>

Diagnostic criteria for complicated grief are often insufficient, and patients suffering from prolonged and complicated grief have been diagnosed as having a depressive disorder. There is a risk of underestimating the frequency of psychological problems after the death or disappearance of a loved one and mistakenly diagnosing a depressive disorder in many people suffering in fact from complicated grief. Complicated and prolonged grief should be clearly distinguished in classifications of mental disorders.<sup>23</sup>

Many family members of disappeared people have feelings of guilt. People differ in the extent to which they feel they are to blame. In order to overcome that sense of guilt, it needs to be expressed clearly. Therefore it is not

<sup>18</sup> UNHCR, "Background paper on Iraqi refugees and asylum seekers", UNHCR Centre for Documentation on Refugees, Geneva, November 1994.

<sup>19</sup> Becker *et al.*, *op. cit.* (note 16), pp. 133-149.

<sup>20</sup> Criteria for the diagnosis of Post-Traumatic Stress Disorder (PTSD) are: (1) exposure to an extreme event outside the range of normal human experience; (2) persistent re-experience of the event; (3) avoidance of stimuli associated with the traumatic experience and numbing of general responsiveness; and (4) persistent symptoms of increased arousal. At least two of the following symptoms: sleeping problems, irritability, angry outbursts, concentration problems or hypervigilance. *Manual on the Effective Investigation and Documentation of Torture and Other Degrading Treatment or Punishment, The Istanbul Protocol*, submitted to the United Nations High Commissioner for Human Rights, 9 August 1999.

<sup>21</sup> Boehnlein, *op. cit.* (note 8), pp. 765-772; Libby Tata Arcel's interviews with Bosnian and Croatian war survivors, non-published data, IRCT Denmark (hereafter IRCT interviews); G. Quirk and L. Casco, "Stress disorders of families of the disappeared: A controlled study in Honduras", *Soc. Sci. Med.*, Vol. 39, No. 12, 1994, pp. 1675-1679.

<sup>22</sup> Boehnlein, *op. cit.* (note 8), pp. 765-772.

<sup>23</sup> M. Horowitz *et al.*, *op. cit.* (note 4); H. Prigerson *et al.*, "Complicated grief and bereavement-related depression as distinct disorders: Preliminary empirical validation in elderly bereaved spouses", *The American Journal of Psychiatry*, 1995.



appropriate to try to take it away by explaining to family members that they could not have done anything to help the victims. It is better to acknowledge the feelings of guilt and tell the family members that they are a normal reaction. Such an approach can help a person to change from feelings of complete helplessness to having some sense of control over the situation. This may also explain why people often fantasize about scenarios in which they could have saved their loved ones, but did not do so. These fantasies give rise to a strong sense of guilt, but at the same time have an important function of protecting self-esteem and self-determination. Feelings of guilt can have the purpose of helping to cope better with retraumatization; especially for children, it is easier to express them through drawings. Naturally there is a need to evaluate how deep those feelings go: an excessive sense of guilt creates depression and PTSD, both of which need appropriate treatment.<sup>24</sup>

### **Differences in mourning**

#### **Allowance of bereavement**

Acceptance of sorrow as a normal process after death differs significantly from culture to culture. In many cultures of Western Europe, it is not acceptable to grieve for a prolonged period. For example, in Finland and Denmark only one day of leave is allowed after the death of a close family member. In Greece, the mourning period is one week, and in Israel forty days. In Israel, the bereaved person is not left alone to grieve, but is kept company for the whole period of mourning. In some parts of Ghana, the person who has lost a loved one is accompanied by a close friend or relative literally by tying a rope between them. Wherever the grieving person goes, the other one follows.<sup>25</sup> The ways in which these non-Western cultures deal with dying include many elements that give solace to relatives and close friends. In Western countries, the events surrounding death and dying are often suppressed, with old and sick people being taken care of by professionals in institutions instead of by their families.<sup>26</sup>

#### **Death rituals in different cultures**

Death rituals enable individuals or groups to deal with loss and death. In all cultures death is followed by ceremonies both for the deceased and for

<sup>24</sup> IRCT interviews, *op. cit.* (note 22).

<sup>25</sup> B. Kurfah, Oral presentation for Master's Programme of International Health 2000, University of Copenhagen, Denmark.

<sup>26</sup> B. Harrel-Bond and K. Wilson, "Dealing with dying: Some anthropological reflections on the need for assistance by refugee relief programmes for bereavement and burial", *Journal for Refugee Studies*, Vol. 3, 1990, pp. 228-243.

the relatives. Rituals help the grieving person to realize that life must go on and help them to reintegrate into society.<sup>27</sup> One of the primary functions of funerals in any culture is to acknowledge the life and achievements of the deceased persons in a public setting, to honour them and remember what was best about them in their lifetime, before sending them on to whatever spiritual world the community believes in. Children should be involved in the rituals following the death of a family member. This helps them to understand what has happened, and to cope with the death of a loved one. It can also be helpful for the children to view the relative's dead body. Several factors should, however, be considered, i.e. the age of the child, the relationship to the deceased and the degree of physical injury to the dead person.<sup>28</sup>

Rituals differ significantly between cultures. For example, in Buddhist tradition funerals have not been occasions for demonstrating grief because of the belief in reincarnation. Symbols of rebirth, such as rice, are commonly used. On the other hand, it can be especially difficult for Buddhists to reconcile themselves to the violent deaths of relatives, since it is believed to be impossible for a person to have a good reincarnation if his mind is filled with evil thoughts as the results of a violent death.<sup>29</sup>

Ghosts are a feature of bereavement in many cultures. Ghosts and spirits are the common medium through which the dead can communicate with the living or ask the living to join them. It is not unusual for a grieving person to feel possessed by spirits, hear ancestors' voices and feel that he or she is being punished for having survived. In Zimbabwe, ancestral spirits play an essential role in the lives of many families, guiding and nurturing them. In order for an ancestral spirit to fulfil this task it needs an honourable funeral and a special traditional ritual. A spirit that has not been honoured becomes angry and restless, bringing bad luck to the family and the whole community.<sup>30</sup> Thus normal signs of bereavement can mislead a clinician who is not aware of the cultural influences.<sup>31</sup>

**27** Boehnlein, *op. cit.* (note 8), pp. 765-777.

**28** A. Dyregrov, "Telling the truth or hiding the fact: An evaluation of current strategies for assisting children following adverse events", *ACCP Occasional Papers: Child Mental Health in Europe*, No. 17, 2001.

**29** Boehnlein, *op. cit.* (note 8), pp. 765-772.

**30** Eppel, *op. cit.* (note 11).

**31** Eisenbruch, *op. cit.* (note 10).

### Mourning in times of war, political violence or State repression

Collective terror brings out a shared denial in a population: knowing what not to know. Emotions are suppressed and repressed.<sup>32</sup> From the rehabilitation centre in Aceh, Indonesia, we know that the dead bodies of relatives killed during violent clashes have been collected by people in the dark, hoping nobody will see them. In Zimbabwe, funerals of people killed during political unrest often take place in secret, involving only a few family members. This is in contrast to a normal traditional funeral, which would involve the extended family and the community at large.<sup>33</sup> A controlled study in Honduras showed how families of disappeared persons had twice as many stress-related symptoms compared to families in which no one had died during the previous ten years and families who had lost a family member in an accident. The atmosphere of fear and isolation to which families of the disappeared are subjected may be an important factor.<sup>34</sup> A group of mental health workers working in Guatemala with children who lost a parent through terror attacks noticed that they are often isolated from the community because their fathers were considered to be "the enemy". They mention that traditional Western medical concepts, which describe selected symptoms and behaviour indices as evidence of "post-traumatic stress disorder", fail to apprehend the trauma these children have survived and continue to experience.<sup>35</sup>

### Special problems for refugees

Mourning and making arrangements for a burial are generally problematic for refugees. Many of them have relatives who have been executed and buried in mass graves without funerals or cremation. In numerous African countries, people traditionally bury their loved ones around the family home, and in some cultures it is important that the bodies be returned to their homeland for burial.<sup>36</sup>

When cultural rituals are not performed in a proper way, it may contribute to chronic grief and clinical symptoms of PTSD. People may have

<sup>32</sup> J. Zur, "The psychological impact of impunity", *Anthropology Today*, Vol. 10, No. 3, June 1994.

<sup>33</sup> Eppel, *op. cit.* (note 11).

<sup>34</sup> Quirk and Casco, *op. cit.* (note 22), pp. 1675-1679.

<sup>35</sup> B. Lykes and M. Terror, "Silencing and children: International multidisciplinary collaboration with Guatemalan Maya communities", *Soc. Sci. Med.*, Vol. 38, No. 4, 1994, pp. 543-552.

<sup>36</sup> Harrel-Bond and Wilson, *op. cit.* (note 27), pp. 228-243.

intrusive thoughts and sometimes feel that supernatural forces are visiting them while they are asleep or awake. They feel that the spirits of their deceased loved ones are visiting them. Mozambican refugees told that when people “have died in trouble, their spirits remain in trouble”. A spirit should be settled through a proper burial, followed by a ceremony, since the loss of a family member may otherwise lead to psychological problems, such as serious survivor guilt.<sup>37</sup> If these symptoms are not recognized as being part of the cultural bereavement, the refugees risk being wrongly labelled as having psychiatric disorders.<sup>38</sup>

Refugee communities should be encouraged to re-establish traditional institutions, such as places to worship the dead. These can be places in which the grieving persons can communicate appropriately with the dead and resolve issues of guilt. Immigrant groups often have burial societies or committees, which organize the mobilization of resources for funerals among members.<sup>39</sup> For successful recovery from a loss or trauma, it is crucial to find the symbolic systems, cultural beliefs and healing rituals that are acceptable both in the original culture and in the surrounding society.<sup>40</sup>

### Community bereavement

Traditional ceremonies have a broader purpose than only to treat individual grief. The destruction of community values is felt differently in cultures where individuals see themselves primarily as members of communities, rather than as discreet individuals in the Western sense. Assistance at the individual level can be useless if the person returns to a local community that is in a state of collective grief. For example, in Zimbabwe the family of one exhumed victim strongly expressed the opinion that it was not only they themselves but the whole community that had been offended by their relative’s murder, and thus the community also needed to be included in the process and be healed.<sup>41</sup> Community bereavement helps the grieving persons to become reincorporated into their social community and fulfil their need for acceptable social support.<sup>42</sup>

<sup>37</sup> *Ibid.*

<sup>38</sup> M. Eisenbruch, “Toward a culturally sensitive DSM: Cultural bereavement in Cambodian refugees and the traditional healer as a taxonomist”, *The Journal of Nervous and Mental Disease*, Vol. 180, No. 1, 1992.

<sup>39</sup> Harrel-Bond and Wilson, *op. cit.* (note 27), pp. 228-243.

<sup>40</sup> Boehnlein, *op. cit.* (note 8), pp. 765-772.

<sup>41</sup> Eppel, *op. cit.* (note 11).

<sup>42</sup> Eisenbruch, *op. cit.* (note 10).

## Disclosure

### The meaning of disclosure

The disappearance of a relative is a loss that cannot be mourned appropriately. The lack of a funeral is traumatic both in cases of disappearances and when people have been brutally massacred.<sup>43</sup> Only an official statement of the death of the relative can enable family members to start the normal process of bereavement. They have a right to know what has happened to the disappeared person. The truth, however, is often horrifying, especially if there is evidence of suffering. Special care should be taken as to how to reveal the truth. Unfortunately circumstances are often far from ideal, and for a variety of economic and political reasons it is not possible to provide adequate assistance. In times of organized violence and political repression, killings are shrouded in secrecy, silence and fear.

Ideally, the family situation and the cultural, religious and social context should be carefully assessed before delivering information about a death. Families should be given all information about the death of their relative. The best way is to provide as many concrete details as possible.<sup>44</sup> It should be carefully considered who should give the information, for instance an official who has been trained for this task, such as a counsellor. The most appropriate way would be to provide the information at a place where the family feels secure. It should be given first to the closest adult relative(s), to give them an opportunity to react. The officials should inform the children as well, because there is a general tendency for adults to hide the truth from children in order to protect them.<sup>45</sup>

Children need special attention. The events should be explained to them, and they should be included in the mourning process following the death or disappearance of a family member. If we try to make children forget, we are simply doing them a great disservice. To forget is not the solution.<sup>46</sup> Hiding the truth from children can have serious consequences later in their lives.<sup>47</sup> It is important that the children know what has happened to their

<sup>43</sup> Minugua, Misión de Verificación de las Naciones Unidas en Guatemala. Procedimientos de Exhumación en Guatemala (1997-2000).

<sup>44</sup> Dyregrov, *op. cit.* (note 29).

<sup>45</sup> IRCT interviews, (note 21); A. Dyregrov, "Early intervention: A family perspective", *Advances in Mind-Body Medicine*, No. 17, 2001, p. 170.

<sup>46</sup> Lykes and Terror, *op. cit.* (note 36), pp. 543-552.

<sup>47</sup> Dyregrov, *op. cit.* (note 29), pp. 28-29.

relatives, in addition to how and why, especially because children themselves will ask.<sup>48</sup> A person who has experienced traumatic events as a child and has not dealt with them can react strongly, even many years later, when something less traumatic happens to him or her. It has also been observed that a person may create a traumatic response to an earlier, unresolved loss exactly when he or she is as old as the person who died.<sup>49</sup>

We know from rehabilitation centres in Latin America that some children of disappeared persons seek psychological support for the first time when they have reached the age of their disappeared parent.<sup>50</sup>

Recent examples from Argentina show how disclosure of the truth can become very complicated. Between 1976 and 1983, the children of women who gave birth in secret detention centres were taken away. Some of them were given to childless couples connected to the armed forces or police to raise as their own. Attempts have been made by relatives to find and identify these children with the goal of restoring their personal and familial identity. Although the well-being and best interest of the children is a priority for those involved, it must surely create a psychological trauma for a child to learn that the only parents he/she has ever known are not his/her parents. Or even worse: to learn, as in some cases, that the adoptive parents might have known of, or even participated in, the murder of his/her biological parents.<sup>51</sup>

### Risk of retraumatization and how to minimize it

Giving concrete information about what has happened to a missing relative, such as showing pictures or the body of the deceased person, always carries a risk of retraumatization. The question has therefore often been raised whether it is beneficial for the family to see the remains of their loved ones, especially when there is evidence of suffering, e.g. after torture. However, it has been found conducive to the normal process of bereavement that the remains of the victim are seen.<sup>52</sup> The following should be considered before offering to show the remains.

<sup>48</sup> Lykes and Terror, *op. cit.* (note 36), pp. 543-552.

<sup>49</sup> Lindemann, *op. cit.* (note 7), pp. 136-273.

<sup>50</sup> Personal communications to M. Blaauw during her visit to the Southern Cone of Latin America in March 2001 and March 2002.

<sup>51</sup> V. Penschaszadeh, "Genetic identification of children of the disappeared in Argentina", *Journal of the American Medical Women's Association*, Vol. 52, No. 1, 1997.

<sup>52</sup> Dyregrov, *op. cit.* (note 29), pp. 31-32.

**Ask:** Family members should be asked if they want to see the body, and should be informed about the risk of retraumatization. For some relatives, to see it might be too hard to bear.

**Prepare:** Before being given the opportunity to see the body, the family needs to be informed about its condition: e.g. if it is mutilated or badly wounded. Such information should be given only after careful preparation.

**Support:** Psycho-social support is needed before, during and after the disclosure.

**Treat:** A follow-up is needed to evaluate how the family is coping. In the event of retraumatization, psychological treatment should be offered. Wherever possible, the treatment should first be individual, and then, if the person is willing to participate, in a group. When forming groups, it is important that people participating in the group have had similar experiences. It is beneficial if the participants are at different levels of the grieving process.<sup>53</sup>

### Exhumations

Several teams exist worldwide who specialize in the exhumation, identification and investigation of the cause and manner of death of individuals buried in mass or single, unmarked graves. Exhumations can provide information as to what happened to victims of extra-legal killings. They can yield objective and scientific evidence of crimes committed. Through forensic documentation, governments can be held responsible. This knowledge may prevent future crimes.

An important reason for exhumations is that they can give families information about the fate of their loved ones. They can make it possible for relatives to honour the dead in the way appropriate to their culture.<sup>54</sup> For example, in Guatemala the main reason why communities ask for an exhumation is to find the remains of their family members. People are rarely willing to prosecute those responsible owing to fear, as they often live in the same community as the perpetrator or distrust a judicial system in which the ex-military still has power or because of economic constraints.<sup>55</sup> In 1988, when a clandestine grave was exhumed in a small village in Guatemala, the fear was so great that not one relative came forward to identify the remains.<sup>56</sup>

<sup>53</sup> IRCT interviews, *op. cit.* (note 21).

<sup>54</sup> *Unquiet Graves: The Search for the Disappeared in Iraqi Kurdistan*, Human Rights Watch and Physicians for Human Rights, 1992, p. 3.

<sup>55</sup> Minugua, *Misión de Verificación*, *op. cit.* (note 43).

<sup>56</sup> Zur, *op. cit.* (note 33).

The process of exhumation can retraumatize relatives or members of the community. Individual and collective mental health support is therefore prerequisite for an exhumation process. All the above points on how to minimize retraumatization before offering the possibility to see the remains of a loved one should be taken into account. Support is needed, before, during and after the exhumation.

**Before:** The team should visit the community and give family members the chance to tell their story. It must be explained why the exhumation will take place, how it works, how bones are identified, etc.

**During:** To see the remains of their loved ones with signs of suffering can lead to serious emotional reactions. The mental health team should be there to support family members, to talk with them, to help them recall and dignify the victim's history, his/her qualities, etc.

**After:** Help is needed to prevent possible conflicts in the area between victims and possible perpetrators. Help may be offered with the planning of funerals, commemorative and/or religious ceremonies, and in trying to create an orientation towards the future.<sup>57</sup>

Although exhumations can play an important role in the coping process of relatives, there are also potential dangers. Viewing the remains of relatives forces family members to accept the reality of death. They may think that they are prepared for this, but often they are not. It is, of course, especially painful if there is evidence of great suffering prior to death. The finding of an empty grave can also be very distressing for a family who have prepared themselves to be able, at last, to bury their relatives' remains.<sup>58</sup>

According to the *Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*,<sup>59</sup> families and their legal representatives should be informed of all information relevant to the investigation. It is also recommended that the families and dependants of victims of extra-legal, arbitrary and summary executions should be entitled to a fair and adequate compensation within a reasonable period of time.

<sup>57</sup> Minugua, Misión de Verificación, *op. cit.* (note 44).

<sup>58</sup> Eppel, *op. cit.* (note 11).

<sup>59</sup> United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, United Nations, New York, 1991.



## Reparation

The United Nations Special Rapporteur on the question of torture states that:

“Any act of forced disappearances inflicts severe suffering onto the victims and their families. The working definition of ‘disappearances’ also refers to the refusal to disclose the fate or whereabouts of the person concerned or the refusal to acknowledge the deprivation of their liberty. This is an intentional act directly affecting close family members. Being fully aware they are hurling family members into a turmoil of uncertainty, fear and anguish regarding the fate of their loved one(s), public officials are said to maliciously lie to the family, with a view to punishing or intimidating them and others.”<sup>60</sup>

In the above statement, the Special Rapporteur acknowledges that suffering inflicted on the family of a missing relative can amount to torture, a serious abuse of human rights. Under international law<sup>61</sup> there exists the right entitling victims of human rights abuses to compensation for their losses and suffering.<sup>62</sup> However, we know very little about the needs of survivors of human rights violations. The NGO “REDRESS” has started a research programme focusing on the views of torture survivors and their families with regard to reparation: how do they perceive reparation, and what are their expectations of achieving it; what do they need?<sup>63</sup>

For the United Nations, Professor van Boven has drafted a set of basic principles and guidelines for reparation for victims of gross human rights violations.<sup>64</sup> Unfortunately, reparation is not a reality for many families of

<sup>60</sup> Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/56/156, 3 July 2001.

<sup>61</sup> Article 8 of the United Nations Declaration of Human Rights, GA Res. 217 A (II), 10 December 1948.

<sup>62</sup> S. Cullinan, “Torture survivors’ perceptions of reparation: Preliminary survey”, *The Redress Trust*, 2001, p. 12.

<sup>63</sup> *Ibid.*, p. 77.

<sup>64</sup> “The administration of justice and the human rights of detainees: Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law”, prepared by M. Theo van Boven pursuant to Sub-Comm. decision 1995/117, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996. He describes four main forms of reparation: *restitution* – designed to re-establish the situation which would have existed had the wrongful act not occurred; *compensation* – should be provided for any economically assessable damage which results from the act; *rehabilitation* – to include medical, psychological and other care and services, as well as measures to restore dignity and reputation; *satisfaction and guarantees of non-repetition* – including verification of facts and full public disclosure of the truth, a declaratory judgment (as to the illegality of the act), apology; judicial or administrative sanctions against the perpetrator(s), commemorations, and prevention of recurrence (through legal and administrative measures).

disappeared persons. For many victims and relatives, seeking reparation is fraught with difficulties, and applying for reparation can be a traumatic experience in itself.<sup>65</sup> It is well nigh impossible to restore the situation which existed before the family member disappeared. Even after years of democratic government, people have to fight for recognition and justice. Compensation has been refused and criticized as “blood money”.<sup>66</sup> On the other hand, compensation can have an importance that goes beyond its material value. It can mean an acknowledgement of the fact that serious damage has been caused.<sup>67</sup> However, reparation means more than compensation. From the rehabilitation centres with which the International Rehabilitation Council for Torture (IRCT) collaborates, we know that sometimes people come to seek psychological support many years after the disappearance of a relative. In many countries it is hard to mobilize resources for this support.

Disclosure of the truth is required in order to obtain justice and reconciliation, but, as pointed out by REDRESS, truth does justice to the people who have been victimized, but it does not administer justice over perpetrators.<sup>68</sup> Impunity after gross human rights violations may have several important social and psychological consequences. By accepting that gross criminal acts will not be prosecuted, the events are denied. There is no public or official acknowledgement of what has happened, and there is neither satisfaction nor guarantee of non-repetition. This creates a situation in which the sense of justice is violated.<sup>69</sup> Impunity may create a strong feeling of lack of control and powerlessness in individuals. It can also change human relations, and create fear as well as lack of confidence and serious mistrust between people.<sup>70</sup> A mother revealed how someone approached her while she stood at the memorial for the disappeared, almost thirty years after her son had been missing, and said: “Your son got exactly what he deserved.”<sup>71</sup>

<sup>65</sup> Cullinan, *op. cit.* (note 63), p. 55.

<sup>66</sup> *Ibid.*, p. 15.

<sup>67</sup> N. Sveaas and N. Lavik, “Psychological aspects of human rights violations: The importance of justice and reconciliation”, *Nordic Journal of International Law*, Vol. 69, No. 200, pp. 35-52, p. 50.

<sup>68</sup> *Ibid.*, p. 17.

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

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

<sup>71</sup> Personal communication by the mother of a disappeared son to M. Blaauw, during a visit to the Southern Cone of Latin America, March 2001.

## Conclusion

Family members of disappeared persons often spend years searching for their loved ones, while simultaneously having to face economic, legal and social problems. The disappearance of a relative is a loss that cannot be mourned appropriately. The lack of a culturally appropriate leave-taking ceremony is traumatic and can complicate the normal grieving process. While such ceremonies differ significantly between cultures, their meaning is similar, namely to acknowledge the life and achievements of the deceased. Rituals are an essential way of coping with a loss. It is important to understand and strengthen them when dealing with relatives of disappeared persons. Accepting the importance of these rituals may, for example, lessen the risk of refugees being perceived as having serious mental problems.

There should be careful preparation before providing information about missing persons; it should, if possible, be disclosed to families by a specially trained official. The cultural, religious and social context should be carefully assessed before delivering information. An official statement of death can make it possible for family members to start the normal process of mourning. However, the opportunity to see the remains may include a high risk of retraumatization.

The atmosphere of fear and isolation in which families of disappeared persons live is probably one of the reasons why so little is as yet known about their problems and needs. Although family members of disappeared persons are entitled to reparation, in practice it is not a reality for most of them owing to the many difficulties involved; these include the lack of political will and legal aid, and the possible trauma involved in applying for reparation.

Forced disappearances have an impact on individuals, families, and the community as a whole. To prevent disappearances and to provide support to relatives of the disappeared, a comprehensive understanding of this complex issue is required. It is crucial that such an understanding be promoted and reflected by international and national laws and policies concerning missing persons.

## Résumé

### **«Refus et silence» ou «reconnaissance et révélation»**

*Margrite Blaauw*

*Cet article est consacré aux problèmes que peuvent connaître les proches de victimes de disparitions forcées. La peur et le silence entourent les disparitions forcées. Les sentiments d'espoir, l'absence d'annonce officielle, et les problèmes économiques, sociaux et juridiques peuvent tous peser sur la vie quotidienne de ceux qui, des années durant, recherchent un proche disparu. Les cérémonies d'adieu et les rituels funéraires ont pour fonction essentielle d'honorer la vie et les réalisations d'une personne qui n'est plus. Aucune cérémonie d'adieu n'est tenue à la mémoire des personnes portées disparues parce que l'on ignore ce qu'il est advenu d'elles. Il est capital que ceux qui apportent un soutien aux proches de personnes disparues reconnaissent les différences dans les rites du deuil et les pratiques funéraires.*

*Les signes habituels du deuil peuvent tromper un clinicien qui n'est pas conscient des différences culturelles. L'article explique comment les circonstances complexes auxquelles sont confrontés les proches d'une personne portée disparue peuvent aggraver la souffrance. Les proches des victimes de disparitions forcées ont en principe droit à réparation. Tel n'est cependant pas le cas pour la plupart d'entre elles. Demander réparation soulève d'innombrables difficultés. Il est nécessaire de comprendre le problème complexe des disparitions pour apporter une assistance adéquate aux familles de personnes portées disparues.*

## L'humanitaire, le religieux et la mort

SYLVAIN FROIDEVAUX\*

Quand bien même ils fonctionnent et évoluent aujourd'hui séparément, selon des logiques et des objectifs qui leur sont propres, le monde humanitaire et celui de la charité religieuse continuent à partager un domaine d'action ou d'intervention: l'aide aux victimes, aux souffrants, aux plus démunis.

Il est précisément une réalité que les humanitaires et les religieux<sup>1</sup> ont en commun, un phénomène auquel ils sont constamment confrontés du fait même de la mission qui leur incombe: c'est la souffrance et la mort d'autrui.

En effet, pour les uns comme pour les autres, la mort (celle de l'autre, de la victime, du prochain) est une réalité incontournable. Elle est en quelque sorte liée à la fonction. Qu'ils se trouvent ou non en présence directe de la mort, celle-ci suppose un certain regard, un discours, une manière de l'appréhender, de la gérer, qui varient considérablement suivant les conceptions religieuses ou philosophiques auxquelles il est fait référence.

Envisager la mort et son sens dans la destinée humaine suppose de prendre en considération deux points de vue contradictoires. Le premier, qui est celui partagé par l'ensemble des religieux consultés, est de considérer que la mort n'est pas une fin, qu'elle suppose la continuation de quelque chose (individualité, âme, esprit) par-delà l'arrêt des fonctions vitales et le pourrissement du corps.

La seconde est de percevoir la mort comme un anéantissement, non seulement comme la fin de la vie terrestre et individuelle, mais aussi la disparition totale de l'être ou de la conscience. Cette vision, que l'on pourrait

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qualifier d'agnostique, peut conduire à penser que l'existence est absurde ou mener à une philosophie de vie pour laquelle «seul aujourd'hui compte». Mais elle est également à l'origine d'une révolte<sup>2</sup> contre tout ce qui peut atteindre à la vie humaine, à sa dignité, à son intégrité, réduire une personne en esclavage ou à l'infamie. Cette révolte est au fondement de la pensée humaniste, qui met l'homme et les valeurs humaines au-dessus de toutes les autres<sup>3</sup>, et de l'action humanitaire, qui recherche le bien de l'humanité et vise à améliorer la condition des hommes sur la terre<sup>4</sup>.

Par ailleurs, la mort, suivant dans quelles conditions, dans quel contexte culturel, social ou familial elle se produit, est à l'origine d'un ensemble d'attitudes, d'attentions ou de comportements caractéristiques de la part des personnes qui entourent le défunt de son vivant. Ces moments qui entourent la mort sont, dans la plupart des sociétés et des religions, ritualisés, sacralisés.

Le personnel humanitaire s'interroge sur la meilleure manière de procéder à l'annonce du décès aux familles ou aux proches de la victime. Les cas de disparitions (*missing*) dans les situations de conflits armés, de répression ou de catastrophes, constituent en eux-mêmes des cas limites que le personnel humanitaire doit gérer en fonction de la réaction souvent négative des familles qui n'acceptent pas volontiers la nouvelle de la mort d'un des leurs sans avoir vu sa dépouille, empêchant ainsi le déclenchement du processus deuil.

Dans quelles circonstances, par quels moyens et à partir de quand le processus de deuil peut-il être engagé, lorsque le corps est manquant? Quelles précautions faut-il prendre et quels gestes, quelles paroles faut-il envisager quand la mort est certifiée, mais que la dépouille ne peut être ramenée à la famille?

Dans toutes les religions, l'absence du cadavre, que ce soit en période de guerre ou de paix, suppose une adaptation des gestes et des rites qui accompagnent habituellement la mort. Selon les traditions, des délais sont

1 Par «religieux», nous entendons: une personne qui est membre d'un clergé, d'un ordre ou d'une congrégation, qui a été nommée, initiée ou ordonnée pour enseigner une doctrine, conduire une assemblée de fidèles ou présider à un rite.

2 Alain Destexhe, *L'humanitaire impossible ou deux siècles d'ambiguïtés*, Paris, Armand Colin, 1993, p. 213.

3 Guillaume d'Andlau, *L'action humanitaire*, Paris, Presses Universitaires de France, 1998, p. 13.

4 Philippe Ryfman, *La question humanitaire - Histoire, problématiques, acteurs et enjeux de l'aide humanitaire internationale*, Paris, Éditions Ellipses, 1999, pp. 16-17.

institués, au terme desquels la personne disparue peut être considérée comme morte. Quand tout espoir est perdu, il arrive que des rituels de substitution aient lieu ou que des obsèques soient tenues sans la présence du corps, afin de marquer symboliquement la séparation avec le défunt et de permettre à la famille d'entamer son deuil.

À mi-chemin entre une gestion rationnelle et profane du bon secours, et la réalité sacrée de la mort à laquelle ils sont confrontés, les humanitaires ont un regard qui les rapproche (par la fréquence du contact avec la mort de l'autre et par l'esprit de compassion qui les anime), mais qui aussi les distingue des religieux (par le discours, les attitudes et les gestes qu'ils adoptent face à la mort d'autrui).

### **La mort du point de vue des religions**

Les religions<sup>5</sup> ont entre autres caractéristiques de marquer et de ritualiser les moments importants de l'existence comme la naissance, l'entrée dans l'âge adulte, le mariage, la mort. Les religieux se distinguent eux-mêmes par tout un ensemble de gestes protocolaires, de codes comportementaux, de paroles, d'attitudes et de tenues vestimentaires, en principe, aisément reconnaissables.

Il n'est pas étonnant dès lors que chaque instant qui entoure la mort fasse l'objet, dans toutes les religions, d'une attention particulière, depuis l'accompagnement du mourant (quand cela est possible), jusqu'à l'inhumation du corps du défunt ou sa crémation, de même que durant toute la période de deuil. N'ayant pas le temps de retracer ici toutes ces étapes, nous avons inclus en annexe un tableau comparatif retraçant les rites et pratiques funéraires dans différentes religions<sup>6</sup>.

### **Le sens de la mort et des rites funéraires**

Les religieux donnent évidemment des réponses très variées sur les origines et le sens de la mort dans la destinée humaine. De même, l'après vie fait l'objet de descriptions et d'interprétations fort diverses sur lesquelles nous ne nous étendrons pas ici. Cependant tous les religieux rencontrés ont

<sup>5</sup> Douze représentants de différentes religions ont été interrogés au cours de cette enquête, soit un représentant de chacune des Églises ou communautés suivantes: Église protestante de Genève, Église catholique, Église chrétienne orthodoxe, Alliance évangélique, islam sunnite, islam chiite, judaïsme, bahaïsme, hindouïsme, bouddhisme theravada (Sri Lanka) et bouddhisme vajrayana (Tibet), vaudou haïtien.

<sup>6</sup> Voir Annexe I.

été unanimes sur au moins un point: la mort n'est jamais une fin en soi. Certes, la mort est bien la cessation de la vie ici-bas. Mais celle-ci n'est généralement qu'un passage. La mort apparaît comme une disparition momentanée ou une métamorphose qui permet à l'être ou à l'esprit de continuer son chemin dans l'au-delà, de ressusciter sous la forme d'un corps spirituel ou, dans les religions d'Asie, de se réincarner dans une autre vie, sous une autre forme, une autre identité.

Ces représentations de la mort influencent les différents moments qui l'entourent, et qu'il est possible de répartir comme suit:

- Les derniers instants ou l'accompagnement du mourant;
- La toilette du cadavre et la mise en bière;
- Les obsèques, qui se divisent elles-mêmes en trois parties:
  - la levée du corps;
  - la cérémonie religieuse ou service funèbre;
  - l'enterrement ou la crémation;
- Les anniversaires et commémorations funéraires.

Parallèlement aux rites funéraires, débute avec la mort et les obsèques une période de deuil pour la famille. Sa durée, les rites qui l'accompagnent sont très variables suivant les traditions religieuses, et aussi, selon les types de morts, leur caractère plus ou moins dramatique et le degré de parenté avec le défunt.

Les rites funéraires (dont font partie les rites de deuil) s'adressent de manière générale à deux catégories de personnes: les vivants et les morts. Selon les traditions religieuses, et parfois aussi selon les croyances locales auxquelles la liturgie officielle s'adapte avec plus ou moins de souplesse, le rituel s'adressera plutôt aux premiers ou plutôt aux seconds.

Les interdits, les obligations rituelles, les prières vont donc être le moyen pour les vivants de dire au revoir au défunt, de se recueillir en famille, de méditer sur sa propre condition de mortel.

Cependant, le défunt n'est pas totalement absent de ces instants partagés par la famille et l'entourage. La période du deuil dans son ensemble est l'occasion de se remémorer les moments passés avec le défunt, de rappeler les valeurs auxquelles il croyait. Nous sommes encore en lien avec lui tout en nous préparant à vivre sans lui.

Les rites funéraires permettent également d'exprimer et de circonscrire la douleur de la perte, et aussi de la transcender par des gestes symboliques, des prières, une ascèse.

La solidarité entre vivants et morts n'est jamais remise en cause. Les premiers ont des obligations à l'égard des seconds et peuvent même les aider



à réaliser une « bonne » mort ou une « bonne » réincarnation. À l'inverse, s'ils n'accomplissent pas les rites dans le respect de la tradition, le malheur ou la honte risque de retomber sur la famille tout entière.

Cependant, au-delà du lien qui unit vivants et morts, il est essentiel de réaffirmer la séparation de ces deux catégories de personnes, de rappeler que les vivants et les morts font partie de deux mondes distincts. Dans certaines religions (hindouisme), les rites funéraires peuvent avoir aussi pour effet de protéger les vivants de l'impureté qui entoure la mort.

Les rites funéraires qui encadrent, jalonnent et facilitent le deuil sont là pour affirmer la victoire de la vie sur la mort, la victoire de l'ordre moral et social sur la décomposition et le chaos, provoqué par le drame de la disparition d'un être cher, victoire que les libations qui accompagnent les funérailles ne font qu'affirmer et renforcer. Le rite funéraire est donc fondamentalement social et le deuil un processus collectif. La communauté (des croyants, la famille, le clan) réaffirme par là ses principes, ses liens, sa solidarité, son identité.

### **La sacralité du corps et du cadavre**

Dans toutes les religions, il est accordé une grande importance à la présence du corps du défunt dans les rites funéraires. L'attention qui est portée au cadavre, depuis la toilette funéraire jusqu'à l'inhumation ou la crémation, le montre clairement.

Cependant, les raisons invoquées pour justifier la toilette rituelle ne sont pas toujours d'ordre théologique ou dogmatique, le traitement du corps du défunt s'accordant généralement avec les habitudes culturelles du lieu. Il n'en reste pas moins que les pratiques de purification du cadavre restent liées à l'idée très ancienne que la mort est contagieuse et qu'il faut s'en protéger.

La question de la sacralité du corps est encore plus évidente lorsque les religieux abordent la question des mutilations de cadavres.

Autopsies, ablations d'organes, amputations sont en effet mal perçues, surtout dans les religions monothéistes qui prônent le dogme de la Résurrection. Il en va de même des exhumations, parfois considérées comme des profanations (islam). Elles peuvent toutefois être autorisées à des fins pénales ou humanitaires, après consultation des autorités religieuses.

Dans l'islam, où il est recommandé d'enterrer sans cercueil, on prend beaucoup de précautions pour que la terre qui recouvre le linceul n'écrase pas le corps du défunt, afin de permettre une bonne décomposition.

Dans le judaïsme, si un corps est mutilé (par exemple à la suite d'un attentat) on ne fait en principe pas de toilette funéraire. On l'enterre avec ses

vêtements, pour ne pas profaner à nouveau la personne et le corps. On procède de même pour les martyrs musulmans, morts au combat, durant un *djihad*, afin qu'ils puissent se présenter à Dieu «avec leur sang», ce qui leur assure d'office le pardon des péchés.

De manière générale, un corps mutilé sera enterré ou incinéré sans cérémonie particulière. Lorsqu'il ne reste qu'un morceau du corps, il est procédé de la même manière que si le corps était entier. En revanche, il est impératif de rassembler les parties d'un corps morcelé et de les enterrer ensemble, quand cela est possible.

Par ailleurs, dans toutes les religions, il est recommandé de ne pas présenter un corps mutilé en public ou de dissimuler au maximum les mutilations, en l'habillant ou en le recouvrant d'un linceul.

### Rites et pratiques dans les situations de disparition

La position des religieux à l'égard des personnes disparues doit être examinée à partir de deux situations distinctes :

- les rites spécifiques pour la personne disparue et sa famille, c'est-à-dire la personne dont on n'a plus de nouvelles depuis un certain temps, sans que l'on sache si elle est vivante ou morte ;
- les rites qui prennent place lorsque la mort de la personne est certifiée, mais que la dépouille n'a pu être retrouvée ou rapatriée.

La plupart des religions consultées se réfèrent au code civil avant de déclarer morte une personne disparue et de procéder à une cérémonie d'adieu. La situation est un peu particulière dans l'islam, en ce sens qu'il existe des règles de jurisprudence propres aux différentes traditions islamiques sur lesquelles le code civil des pays musulmans se fonde pour définir la notion de «disparu». De manière générale, le décès d'une personne dont on est sans nouvelle est déclaré après quatre ans d'absence dans l'islam sunnite, mais le délai est de sept ans en Iran (islam chiite), à moins que les autorités islamiques en décident autrement, par un décret (*fatwa*). Dans ce cas, il sera possible de raccourcir la durée de l'attente.

Dans le judaïsme, la décision de célébrer un rite funèbre et d'entamer le deuil, en cas de disparition, entre également dans le cadre de la loi civile, mais le rabbin est appelé à se prononcer. Dans les Églises chrétiennes, les fidèles peuvent dédier une messe ou une prière au souvenir du disparu, sans qu'il soit procédé à une cérémonie funéraire en particulier. Dans l'hindouisme, des prières sont dites en famille à la mémoire de la personne disparue, mais aucun rite funéraire n'est ordonné sans la présence du corps.

De façon générale, aucun rite n'intervient tant que la mort du disparu n'est pas certaine. Il est impératif que toutes les possibilités de recherche aient été épuisées et que les proches n'aient plus aucun espoir de revoir la personne vivante.

Dans l'islam (sunnite), quand la mort est certifiée, mais que le cadavre n'a pas été retrouvé, la famille endeuillée peut demander à ce que soit récitée la « prière de l'absent ». Dans le judaïsme, quand tout espoir de retrouver la personne disparue s'est envolé, il est procédé au rituel de la prise de deuil et des affligés. Dans les Églises chrétiennes, une cérémonie ou des prières à la mémoire du défunt peuvent être envisagées pour aider la famille à faire son deuil. Mais il ne s'agit pas d'obsèques à proprement parler.

Il n'y a pas non plus de funérailles sans cadavre dans l'hindouisme. Si, une personne meurt loin de son foyer et que son corps n'est pas rapporté à la famille, celle-ci récite des prières et se purifie au moyen d'un bain rituel. À Sri Lanka (bouddhisme theravada), le rite funéraire s'applique de la même manière que si le corps était présent, sauf en ce qui concerne l'incinération. Le cadavre est parfois remplacé symboliquement par une photo du défunt. Dans le bouddhisme vajrayana (Tibet), quand un décès a lieu à l'étranger et que le cadavre ne peut être rapatrié, des prières spécifiques permettent d'opérer une sorte d'« enterrement à distance ».

Pour conclure ce bref aperçu des rites funéraires dans les religions, nous pouvons avancer que les cérémonies qui entourent la mort, les différentes étapes et les interdits qui marquent l'évolution du deuil, ont, dans leur ensemble, pour vocation :

- de marquer une rupture avec la personne décédée (ou créer un cadre qui permette de prendre congé, de faire le deuil, de stigmatiser le manque, l'absence, la souffrance) ;
- de faciliter le départ de celle-ci, de préparer et soutenir son voyage dans l'au-delà (c'est-à-dire l'aider à se réincarner, à retourner à Dieu, suivant les conceptions eschatologiques) ;
- de raffermir les liens de la communauté des vivants/des croyants, en insistant sur la solidarité sociale, familiale (parfois aussi la solidarité avec les morts).

Par ailleurs, les situations de disparition et l'absence de dépouille mortelle font l'objet d'une adaptation des règles religieuses et des rites funéraires, permettant aux proches de faire leur deuil de la personne manquante, tout en célébrant sa mémoire par des prières et des cérémonies de commémoration.

Toutes les personnalités interrogées ont également confirmé le caractère sacré du cadavre, qui continue à symboliser la personne après la mort. Les gestes et paroles qui accompagnent le défunt à sa dernière demeure revêtent une grande importance, en particulier parce qu'ils lui assurent un « bon départ », une « bonne mort », et permettent aux proches de faire leur deuil, dans le cadre de la solidarité familiale ou communautaire.

### **La mort du point de vue du personnel humanitaire**

La relation qu'entretient le personnel humanitaire avec la mort et le deuil est très complexe et varie considérablement suivant le vécu des individus, les circonstances et les types de mort auxquelles ils sont confrontés, ainsi que l'identité de la ou des victime(s)<sup>7</sup>. Au-delà d'une certaine pratique, il n'existe donc pas, chez les humanitaires, de protocole, ni de codification ou de ritualisation des gestes et des attitudes à l'égard de la mort d'autrui, comme c'est le cas chez les religieux.

Sauf exception, les collaborateurs des agences humanitaires savent peu de choses sur les cultes et croyances qui ont cours dans les pays où ils sont envoyés en mission. Par ailleurs, ils n'assistent que très rarement aux obsèques des victimes (qu'ils les aient connues ou non de leur vivant) sauf s'ils y sont expressément invités par les autorités ou la famille. Organiser ou assister à des funérailles, accompagner les familles en deuil ne fait, en principe, pas partie de leur travail. Assister aux funérailles d'une personnalité ou d'un membre d'une faction en guerre, irait d'ailleurs à contresens du principe de neutralité propre à la fonction.

Cependant un certain nombre de préoccupations et de situations récurrentes, liées à la problématique de la mort et du deuil, sont apparues au fil des entretiens<sup>8</sup>.

<sup>7</sup> Cette étude n'a pas la prétention de faire le tour du problème. Pour des raisons de temps et de moyens mis en œuvre, l'enquête n'a été menée que sur la base de neuf entretiens d'environ deux heures chacun, réalisés entre avril et mai 2002, avec des personnes ayant toutes travaillé pour une ou plusieurs institution(s) humanitaire(s) dans des régions touchées par un conflit armé. Toutes sont des personnes très expérimentées ayant à leur actif plusieurs années de terrain. Les conclusions qui ressortent de cet article n'engagent ni ces personnes ni les institutions qui les emploient.

<sup>8</sup> Nous ne traiterons pas du cas particulier de la mort d'un proche, d'un collègue de travail, quand bien même cette situation a été évoquée au cours des entretiens. Elle est cependant trop spécifique pour être développée ici. Nous renvoyons donc au travail de recherche de Fabienne Bonjour qui aborde cette question : *Une lumière dans les ténèbres. Le deuil institutionnel suite au décès par faits de guerre de collaborateur(s), collaboratrice(s) au Comité international de la Croix-Rouge (CICR)*, Sion, Mémoire Institut Universitaire Kurt Bösch 2001.

- La première concerne le problème des disparus et l'annonce faite aux familles du décès d'un proche. Deux difficultés majeures se présentent au personnel humanitaire : comment transmettre cette information sans trop heurter la sensibilité des personnes ou des familles, et comment rendre cette information crédible, en l'absence de cadavre, sur la base du seul témoignage oral ou écrit.
- Un autre aspect du travail humanitaire, qui a été abordé, est l'échange et le transport de cadavres entre les différents camps ou parties en conflit (par exemple à Sri Lanka entre l'armée gouvernementale et les Tigres tamouls du LTTE). Au-delà des problèmes politiques ou techniques que pose ce type de transaction, a été soulevée la question du (mauvais) traitement des cadavres, des dégradations ou mutilations volontaires que certains belligérants faisaient subir aux dépouilles avant de les rendre à l'ennemi.

### Annoncer la mort

#### **Transmettre l'information**

L'un des objectifs opérationnels des organisations humanitaires dans les régions en guerre ou en situation d'après-conflit, est le « *tracing* », c'est-à-dire la recherche des disparus : établir des listes de disparus, prendre contact avec les belligérants, rechercher des informations et des témoignages, ainsi que transmettre des nouvelles aux familles et, quand il n'y a plus d'espoir de les retrouver vivants, d'annoncer le décès du proche.

Annoncer la mort d'un proche n'est jamais chose facile, qu'il y ait ou non présence du cadavre. Quand on est sûr de l'information (sur la base de plusieurs témoignages concordants ou d'un rapport officiel), mais que la dépouille ne peut être présentée, la mission est encore plus délicate. Tant que le cadavre n'est pas retrouvé, il restera toujours à la famille un infime espoir que l'information soit fautive. Dans ce cas, la nouvelle risque de ne pas être acceptée.

C'est un aspect qui est souvent revenu dans les entretiens : « *Tant qu'ils n'ont pas vu la dépouille, les gens ne nous croient pas* ».

Pourtant, il faut bien transmettre la nouvelle : « *On ne peut pas garder l'information pour nous* ».

#### **Trouver la manière juste**

Les comportements et les attitudes dans le monde, tant dans la manière d'annoncer la mort que de réagir à son annonce, sont extrêmement variés et subtiles. Il est donc difficile de toujours en comprendre le sens, d'autant

qu'elles peuvent changer selon les personnes en présence, les situations, le contexte culturel et politico-religieux, etc. Ainsi dans l'islam, il est déconseillé d'annoncer une mort de manière directe.

Dans certains pays d'Extrême-Orient, les proches ne montrent pas volontiers leurs sentiments et évitent d'exprimer ouvertement leur souffrance. Ce serait manquer de savoir-vivre et se déshonorer. Dans d'autres régions du monde, il faut au contraire hurler sa douleur, se rouler par terre, voire s'automutiler en public, sinon on risque de vous soupçonner de ne pas ressentir suffisamment de chagrin, peut-être même de vous réjouir secrètement de la mort de votre prochain.

Par conséquent, quelle est la manière « juste » d'annoncer la mort? Quelle est l'attitude à avoir, en toutes circonstances, face à la détresse d'une personne qui vient d'apprendre la mort d'un être cher? Sans doute n'y a-t-il pas de recette absolue, mais à écouter l'expérience des personnes rencontrées qui ont été confrontées à ce type de situations, il semble qu'il y ait un certain nombre de précautions à prendre, afin de ne pas trop heurter la sensibilité des familles endeuillées<sup>9</sup>:

- éviter d'avoir une attitude désinvolte ou provocatrice au moment de l'annonce du décès;
- si l'annonce se fait dans un camp ou dans une communauté, commencer par contacter le plus discrètement possible les personnes concernées et les prendre à l'écart – éviter la présence des curieux et des enfants au moment de l'annonce;
- dans certaines régions du monde (Islam, Afrique du Nord, Afrique subsaharienne) éviter d'annoncer la nouvelle du décès d'un proche de manière abrupte ou directe; éviter de s'adresser en premier à la mère ou à l'épouse du défunt, et contacter plutôt un homme de la famille, un parent pas trop éloigné ou une personne de confiance;
- être si possible accompagné par un(e) infirmier (ère) ou un(e) psychologue capable de gérer les crises et les traumatismes provoqués par l'annonce du décès;
- ne jamais fermer la porte aux demandes des familles, ni clore prématurément des dossiers quand les familles espèrent encore retrouver vivante la personne disparue.

<sup>9</sup> Cette liste n'est pas exhaustive et je renvoie le lecteur aux recommandations qui se trouvent dans le rapport *Processus de deuil et commémorations – Étude, rapport et recommandations*, CICR, Genève, juillet 2002.

Prendre du temps avec les gens, montrer de l'intérêt pour leurs problèmes est souvent la meilleure manière de les aider à supporter leur douleur et les sortir de la détresse. Comme me l'a dit une des personnes interviewées: «*Il n'y a rien de pire qu'une victime qui n'est pas reconnue* ()». Les familles ont d'abord besoin de se sentir entourées et soutenues.

Les soutiens locaux (*field officer*, religieux, chefs de village, policiers, instituteurs, collectivités, associations de familles de victimes ou de disparus, etc.) peuvent également apporter leur conseil ou leur appui dans les situations délicates, à condition évidemment qu'ils ne soient pas eux-mêmes impliqués dans des massacres ou parties prenantes du conflit.

### Les attestations de décès

La question des attestations de décès est beaucoup discutée par les collaborateurs des agences humanitaires. Dans certaines situations, comme en Bosnie, des centaines de lettres ont été remises par le CICR aux épouses, sœurs et mères des disparus, leur annonçant la mort d'un mari, d'un frère ou d'un fils. Les réactions de ces femmes ont parfois été très violentes, allant jusqu'au refus catégorique. Certaines d'entre elles revenaient cependant dans un deuxième temps réclamer le document, sans que l'on connaisse précisément la raison de ce revirement.

Sans doute, la remise d'une attestation de décès ne remplace-t-elle pas complètement la présence de la dépouille mortelle, mais elle peut éventuellement aider à faire admettre la mauvaise nouvelle. Encore faut-il que le document soit délivré et certifié par des autorités reconnues et légitimes, qui bénéficient de la confiance des familles de victimes. Par conséquent, l'annonce du décès, surtout dans les situations de drames collectifs, comme en Bosnie, n'a de sens que si elle se combine avec la mise en place d'une structure d'écoute et d'accompagnement des personnes endeuillées, une collaboration avec les collectivités locales, les associations de veuves ou de familles de disparus, qui sont associées aux discussions avec les autorités politiques ou militaires.

Quand bien même le cadavre n'est pas toujours indispensable aux rites funéraires, son absence suscite des adaptations, des précautions, une prise en charge particulière. Nous avons vu plus haut que les religieux ont des réponses assez précises en ce qui concerne la question des disparitions et la manière d'aborder le deuil en l'absence de cadavre. Il y a un certain délai à respecter, mais encore faut-il que la famille ait perdu tout espoir de revoir la personne vivante, qu'elle soit certaine que toutes les possibilités de recherche ont été épuisées.

Ensuite, seulement, un rite, une cérémonie funèbre viendront entériner la nouvelle de la mort, marquant du même coup le début du processus de deuil.

Toutefois, il n'y a pas que l'aspect religieux qui intervienne dans ces cas-là. Le type de mort (collective, individuelle, héroïque, etc.) joue également un rôle, de même que le contexte sociopolitique. La destruction du milieu communautaire en situation de guerre, l'éclatement des familles, l'exil sont des facteurs qui contribuent à empêcher le processus de deuil de se dérouler normalement. Les institutions humanitaires doivent prendre en compte tous ces facteurs afin de pouvoir répondre de manière judicieuse et respectueuse aux drames des familles. Des gestes symboliques, comme déposer une gerbe de fleurs, planter un arbre en un lieu symbolique, créer un mémorial avec les noms ou les photographies des disparus, peuvent bien souvent remplacer une cérémonie religieuse.

#### Le sort réservé au cadavre

Le risque est grand, pour le personnel humanitaire, confronté de manière fréquente à la mort d'autrui, de banaliser le rapport qu'il entretient avec le cadavre, souvent anonyme, de la victime.

Cependant, comme cela a été souligné par les religieux, le corps du défunt reste empreint de sacralité. Il ne peut être considéré comme une simple « chose ». Après la mort, le cadavre continue souvent à symboliser la personnalité de celui ou celle qui a quitté ce monde. De nombreuses tensions (angoisse, révolte, désir de vengeance) peuvent d'ailleurs se cristalliser autour du corps du défunt. Quand il est présenté de manière négligente ou inadéquate, quand son intégrité est profondément atteinte, des réactions violentes peuvent survenir de la part des proches, des membres de la communauté ou des compagnons d'armes.

D'un autre côté, il arrive que les belligérants « jouent » sur cette dimension sacrée du corps humain pour provoquer ou humilier l'ennemi, en négligeant ou en mutilant son cadavre, en l'exposant de manière indécente ou en l'exhibant au cours de parades macabres.

Dès lors, que faire quand un cadavre a été mutilé ou est rapporté en morceaux? Les humanitaires ont émis quelques recommandations à ce sujet :

- tout d'abord il convient de prendre conscience soi-même et de conscientiser les parties en conflit du caractère grave et inhumain de la maltraitance et des mutilations de cadavres ;
- en cas de mutilations volontaires de cadavres par l'une ou l'autre des parties en conflit, dissimuler le plus possible les mutilations en habillant les corps de manière décente, avant de les présenter aux familles ;



- éviter de présenter ou rapporter un cadavre dénudé; prendre garde à l'envelopper dans un linceul ou à le recouvrir d'un pagne.
- De plus, lors des exhumations à des fins d'identification :
- si la contribution des familles est requise (ne jamais les obliger à venir assister aux exhumations), ou si celles-ci en ont émis le souhait, les avertir du choc émotionnel qu'elles risquent de subir au cours de l'opération;
  - prendre soin d'entourer ces personnes pendant les opérations, si possible avec l'appui d'infirmiers(ères) et de psychologues;
  - éviter la présence des curieux et respecter l'intimité des familles qui souhaitent se recueillir.

### **Conclusion**

La question de la mort nous ramène inévitablement à la vie, au sens de l'existence, à notre propre condition de mortels, à la singularité de tout être humain, à la solidarité entre vivants et morts. Elle nous ramène à notre humanité et par conséquent au sens de la mission humanitaire.

Mais la mort est par définition une rupture dans la continuité de l'existence. En cela, elle est bien souvent un drame qui peut conduire à nous remettre en question, nous mener au découragement, au cynisme ou à la transcendance.

La mort, c'est aussi l'instant où, face à la menace du chaos, de la désintégration (individuelle, corporelle, relationnelle), les êtres humains, les familles ou les groupes, se sentant menacés dans leur devenir, ont besoin de manifester leur solidarité, de raffermir les liens communautaires, de réaffirmer les valeurs qui les unissent.

Parmi le personnel humanitaire, la question du rapport à la mort est complexe, voire ambiguë. D'une part, ils s'interrogent sur le pourquoi de la violence, de la haine, de l'injustice, de la souffrance causée à autrui. D'autre part, il y a toujours cette même difficulté à aborder la mort de l'autre et en particulier la détresse des personnes qui ont tout perdu.

De leur côté, les religieux, qui ne sont sans doute pas moins sensibles à la souffrance et à la mort d'autrui, s'appuient sur un ensemble d'attitudes, de paroles, de rites qui agissent comme des garde-fous contre la violence des émotions, des repères structurant les différents moments, plus ou moins douloureux, qui entourent la mort et le deuil.

D'ailleurs, même dans nos sociétés fortement laïcisées, où la vie tend à être désacralisée par l'omniprésence de la science et de la biomédecine, nombreux sont ceux qui ont encore recours au prêtre, au pasteur,

au rabbin, à l'imam ou au moine dans les moments difficiles comme la mort, que ce soit la sienne, celle d'un ami ou d'un parent. Bien des personnes non pratiquantes ou non croyantes ne voient de religieux que lorsqu'elles perdent un parent proche. Certaines recherchent parfois, dans ces instants cruciaux, un réconfort dans la spiritualité, renouent avec leur communauté religieuse d'origine et se plient à nouveaux aux rites sans forcément en comprendre le sens.

Or, les rites religieux, par-delà leur caractère complexe et parfois obscur pour les non-initiés, possèdent une « efficacité ». Du moins, ils sont censés agir, provoquer des effets concrets sur le mental des participants.<sup>10</sup>

C'est précisément au niveau du sens, de la symbolique des représentations, du caractère évocatoire des paroles et des gestes accomplis durant les cérémonies ou les sacrements qu'il faut chercher cette efficacité. Les rites funéraires sont là pour marquer, officialiser la rupture avec le défunt et faciliter son passage dans l'au-delà. Ils offrent un cadre qui permet aux proches de lui faire un dernier adieu et de libérer les émotions qu'ils gardent à l'intérieur d'eux-mêmes. Parfois, le déroulement des obsèques tend à la dramatisation de l'événement (cris, pleurs, discours, liturgie et musique solennelles) un peu comme dans une mise en scène théâtrale, pour ensuite opérer une dédramatisation par des libations à l'occasion desquelles se manifeste la solidarité familiale ou sociale.

Les humanitaires, qui s'interrogent sur la bonne manière d'annoncer la mort aux familles de disparus, pourraient s'inspirer de cette efficacité propre aux rites religieux. Certes, ils œuvrent selon les critères issus de la laïcité et n'ont pas à se mêler de religion. Mais ils doivent être conscients du caractère sacré de la mort ou l'importance de la transcendance. L'immense diversité des pratiques culturelles et religieuses dans le monde laisse penser que l'on peut presque tout faire en matière de rites funéraires, sauf banaliser l'événement, nier l'importance de la sacralité du corps et ne pas respecter la sensibilité et le chagrin des personnes ayant perdu un proche.

Le soutien communautaire, les marques de compassion, la ritualisation de l'événement, la présence d'une autorité reconnue comme légitime, qu'elle soit religieuse ou laïque, sont très importants pour rendre concret ce passage délicat d'une mort supposée ou refoulée, à une mort certifiée et acceptée.

<sup>10</sup> François Isambert : *Rite et efficacité symbolique. Essai d'anthropologie sociologique*, Paris, Éditions du Cerf, 1979, p. 24.

Le déclenchement du processus de deuil suppose donc une confiance réciproque, entre le personnel humanitaire et les familles de victimes, une reconnaissance nécessitant dialogue et coopération<sup>11</sup> avec les associations ou les institutions qui les représentent.

## Abstract

### ***Humanitarian action, religious ritual and death***

*Sylvain Froidevaux*

*Over and above their differences, humanitarian workers and clergy have one point in common: they both come into contact with death and suffering. In such circumstances, however, they each have their own approach. The religious approach is to provide solace for the dying and, later, for the bereaved, through a series of rituals. Humanitarian workers, for their part, are more concerned with tasks such as recovering bodies, informing families of the death of their loved ones and helping them to cope with the consequences. In cases where bodies cannot be recovered (missing persons), both humanitarian action and funeral rites must be adapted in such a way as to relieve the distress of families and enable them to start the grieving process.*

<sup>11</sup> Au sens de « gestion et partage des objectifs et des intérêts communs ».

	<b>Eglise protestante</b>	<b>Hindouisme (vedantisme)</b>	<b>Eglise catholique</b>	<b>Assemblée de Dieu</b>	<b>Communauté Bahá'íe</b>	<b>Eglise chrétienne orthodoxe</b>
<b>DÉFINITION DE LA MORT</b>	Le prix à payer de la vie, de la connaissance	Décomposition de l'être, Métamorphose	Porte d'entrée vers la «vraie vie»	Séparation de l'âme et du corps	Changement d'état	Séparation de l'âme et du corps
<b>DESTINÉE POST-MORTEM</b>	Retour au Père /Victoire de la vie sur la mort	Persistence momentanée du corps subtil, puis réincarnation	Purgatoire (purification) Jugement dernier, Résurrection	Vie éternelle pour les justes / jugement et enfer pour les impies	Proximité / éloignement de Dieu	Jugement dernier Résurrection âme et corps ; paradis / enfer
<b>LINCEUL/CERCUEIL TOILETTE DU MORT</b>	Cercueil – toilette du mort suivant les coutumes locales	Bain rituel (hommes) vêtements neufs (tissu blanc) cercueil, brancard	Cercueil, vêtements neufs ou récents, visage maquillé	Cercueil, toilette selon les habitudes locales	Corps enveloppé dans un linceul de tissu, puis déposé dans un cercueil	Toilette rituelle, parfois embaumement, habits propres, cercueil
<b>ENTERREMENT / CRÉMATION</b>	Selon les souhaits du défunt ou de la famille	Crémation, sauf moines immersion / enterrement	Selon les souhaits du défunt ou de la famille	Enterrement	Enterrement	Enterrement
<b>DURÉE DU DEUIL</b>	Variable, en principe 3 jours	Selon la caste, entre 10 et 30 jours	Variable selon la famille – 7 jours, 1 mois, 1 an	Variable, suivant les habitudes locales	Pas de règle particulière	40 jours à 1 an
<b>INTERDITS DURANT LE DEUIL / CHOSÉS À NE PAS FAIRE</b>	Pas d'interdits particuliers pour la famille – éviter les prières d'intercession pour l'âme du défunt	Ne pas se raser (hommes) porter un <i>dhôu</i> blanc, pas de viande, œufs, poisson, pas de rapports sexuels	Pas d'interdits particuliers – éviter de formaliser la cérémonie à l'extrême – ne pas omettre le prénom	Pas d'interdits particuliers – respect du cadavre – surtout ne rien imposer à la famille	Pas d'interdits particuliers – respect du cadavre, – simplicité des rites – pas de crémation	Habits noirs ou sombres – pas de sorties ou réjouissances – coiffures sobres
<b>MUTILATIONS</b>	Pas de rite spécial	Pas de rite spécial	Pas de rite spécial	Pas de rite spécial	Pas de prescription	Pas de rite spécial
<b>EXHUMATION</b>	Sur demande légale	Si enterrement au préalable	Sur demande légale	Sur demande légale	Pas de règle	Rituels d'exhumation
<b>DISPARUS/ REMARIAGE</b>	On suit la loi civile	Pas de prescription	On suit la loi civile	On suit la loi civile	Remariage possible après 9-12 mois	Divorce possible après 7- 10 ans, suivant le pays
<b>OBSÈQUES SANS CADAVRE</b>	Selon le désir de la famille	3 jours de deuil, bain rituel	Célébration sur demande	Cérémonie en mémoire	Pas de prescription	Pas de service funéraire
<b>CÉRÉMONIES COLLECTIVES</b>	Possibles (catastrophes, guerres), pas de rite spécial	En principe pas	Possibles, à côté des obsèques individuelles	Possibles à condition que les familles l'acceptent	Possibles si les prières bahá'íes sont récitées	Les prénoms doivent être mentionnés séparément
<b>COMMÉMORATIONS FUNÉRAIRES</b>	Non prescrites, mais possibles	Chaque année à l'anniversaire de la mort	Messe de requiem Jour des Morts (2 nov.) anniversaire de la mort	Pas de messe de requiem	Anniversaires du martyr du Bab, ascension de Baha'u' llah, décès d'Abdu'l-Baha	40 <sup>e</sup> jour, 6 <sup>e</sup> et 9 <sup>e</sup> mois, 1an, 3 ans + 2 samedi dans l'année

	<b>Bouddhisme theravada</b>	<b>Bouddhisme tibétain</b>	<b>Vaudou Haïti</b>	<b>Islam sunnite</b>	<b>Islam chiïte</b>	<b>Judaïsme</b>
<b>DÉFINITION DE LA MORT</b>	Séparation temporaire	Une étape dans la continuité de notre énergie de pensée	Passer de l'autre côté du pont, ou le «pays sans misère» ou le «pays sans chapeau»	Décret d'Allah, rappel à Dieu	Début de la vie éternelle	Un approfondissement de l'être; union profonde avec l'être
<b>DESTINÉE POST-MORTEM</b>	Renaissance selon son action karmique	Passage dans <i>le bardo</i> , puis réincarnation	Les morts restent autour des vivants sous forme d'esprits	Passage au <i>barzakh</i> , Jugement, Résurrection, paradis ou enfer éternels	Passage au <i>barzakh</i> , Jugement, Résurrection, paradis ou enfer éternels	Shéol, résurrection – réhabilitation du corps sanctifié par l'âme
<b>LINCEUL/CERCUEIL TOILETTE DU MORT</b>	Toilette du mort, habit blanc, cercueil	Toilette, habits neufs, cercueil en bois (caisse)	Toilette rituelle, habits blancs, cercueil	Toilette rituelle, linceul de coton blanc, pas de bijoux	Toilette (3 ablutions) linceul de coton (3 parties)	Toilette, linceul blanc ou cercueil, pas de bijoux, etc.
<b>ENTERREMENT / CRÉMATION</b>	Crémation	Crémation (enterrement dans les cas exceptionnels)	Enterrement	Enterrement ; tête du mort tournée vers la Mecque	Enterrement ; tête du mort tournée vers la Mecque	Enterrement, tombe dirigée vers Jérusalem
<b>DURÉE DU DEUIL</b>	3 mois à 1 an	49 jours	Variable, suivant la famille et les exigences du mort	3 jours – 4 mois et 10 jours pour l'époux (se)	3 jours, 7 jours, 40 jours	7 jours, 30 jours, 1 année
<b>INTERDITS DURANT LE DEUIL /CHOSÉS À NE PAS FAIRE</b>	Ne pas faire la cuisine, les photos sont retournées contre le mur	Eviter de toucher le corps 3,5 jours après la mort. Ne pas poser le cercueil à terre	Deuil: noir pour la famille blanc pour la maison – ne pas laisser le cadavre seul	Eviter de trop manifester sa douleur (cris, pleurs) – pas de nom sur la tombe	La famille porte le noir ; pas de travail pendant 7 jours, on ne va pas manger dans la famille pendant 3 jours	7 jours : pas de travail, ne pas changer de vêtements, pas de vin, ni viande, pas de rapports sexuels, etc.
<b>MUTILATIONS</b>	Le corps n'est pas exposé	Pas de rite spécial	Pratiquée dans certains cas	On enterre tel quel	On enterre tel quel	On enterre tel quel
<b>EXHUMATION</b>	Impossible	Cas très rare	Très mal vue (zombis)	Sur autorisation religieuse	Sur autorisation religieuse	Sur autorisation religieuse
<b>DISPARUS/ REMARIAGE</b>	Pas de rite / décision individuelle ou familiale	Selon le choix de l'époux (se)	En général, sur décision de la famille	Après divorce, sur décision juridique (1-4 ans)	Epouse libérée après 7 ans (sauf <i>fatwa</i> )	Epoux(se) autorisé(e) à se remarier si tout espoir est perdu – décision religieuse
<b>OBSÈQUES SANS CADAVRE</b>	Même rite, avec une photo	Prières-obsèques à distance	Impossible	Prière de l'absent	Prières + mémorial	Prières + mémorial
<b>CÉRÉMONIES COLLECTIVES</b>	Pas de différence	Pas de contradiction avec une cérémonie individuelle	Possible, mais toujours enterrer séparément	Même chose – une seule prière pour tous	Prière collective, mais Tombes séparées	Faire la prière pour chacun, nommer personne
<b>COMMÉMORATIONS FUNÉRAIRES</b>	7 <sup>e</sup> jour, 3 <sup>e</sup> mois, chaque année à la date anniversaire	Chaque année à l'anniversaire de la mort du défunt	Fête des Morts (2 nov.), cérémonies des <i>guédés</i> , anniversaires, fêtes des saints, jubilées	Pas de commémorations	3 <sup>e</sup> , 7 <sup>e</sup> , 40 <sup>e</sup> jour, anniversaires, commémoration des martyrs, chefs spirituels	7 <sup>e</sup> jour, 1 mois, 1 an, anniversaire du décès – prières pour les disparus à Kippour, jour du pardon

# Le Groupe de travail sur les disparitions forcées des Nations Unies

FEDERICO ANDREU-GUZMÁN\*

## Aperçu historique

La pratique des disparitions forcées a suscité l'inquiétude des Nations Unies, qui ont réagi. Bien que perçue comme une méthode répressive propre aux dictatures latino-américaines, elle avait cours aussi dans d'autres régions du monde<sup>1</sup>. Les travaux du Comité *ad hoc* sur la situation des droits de l'homme au Chili<sup>2</sup> contribuèrent largement à la mettre en lumière. Mais ce fut la situation en Argentine, où les disparitions forcées étaient une pratique largement répandue et systématique, qui mit en évidence la gravité de ce phénomène et l'urgence d'établir un mécanisme international. Cela était d'autant plus vrai que les mécanismes des Nations Unies étaient alors paralysés en raison de l'action diplomatique de la junte militaire argentine<sup>3</sup>.

C'est en 1978 que l'Assemblée générale des Nations Unies adopta sa première résolution sur la question des disparitions forcées<sup>4</sup>. Jusqu'à cette date, l'Assemblée générale n'avait abordé la question qu'en fonction de situations de pays<sup>5</sup>. Dans sa résolution de 1978, elle demandait aux États membres de coopérer avec les Nations Unies dans la recherche et la localisation des personnes portées disparues et chargeait la Commission des droits de l'homme (ci-après dénommée la « Commission ») d'examiner la question des disparitions forcées. Néanmoins, la Commission n'aborda pas le sujet en 1979 et le Conseil économique et social des Nations Unies renouvela la demande de l'Assemblée générale, avec caractère prioritaire. En outre, il donna pour mandat à la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités (ci-après dénommée la « Sous-Commission ») de se saisir de la question et de formuler des recommandations à l'intention de la Commission<sup>6</sup>. La Sous-Commission proposa de créer en son sein un groupe d'experts chargés, à travers un dialogue avec les États

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concernés et les familles des victimes, de collecter les informations nécessaires en vue de la localisation des disparus<sup>7</sup>.

En 1980, la Commission des droits de l'homme décida d'établir un Groupe de travail sur les disparitions forcées ou involontaires (ci-après dénommé le «Groupe»<sup>8</sup>), mais ne retint pas la proposition que le Groupe fût partie de la Sous-Commission. Dans sa résolution, elle décida «de créer, pour une durée d'un an, un groupe de travail composé de cinq de ses membres agissant en tant qu'experts nommés à titre personnel, pour examiner les questions concernant les disparitions forcées ou involontaires de personnes». La Commission renouvela par la suite le mandat du Groupe. L'Assemblée générale prit acte de la résolution créant le Groupe et demanda à la Commission de continuer à examiner, avec un caractère prioritaire, la question des disparitions forcées et de prendre les mesures nécessaires à ses activités<sup>9</sup>. En outre, elle réaffirma que le Groupe devait mettre en œuvre ses activités de manière «efficace et avec esprit humanitaire».

Le Groupe a ainsi vu le jour avec pour mandat de «faciliter la communication entre les familles des personnes disparues et les gouvernements intéressés afin de faire en sorte que les cas suffisamment circonstanciés et clairement identifiés fassent l'objet d'enquêtes et que la lumière soit faite sur le sort des personnes disparues»<sup>10</sup>. Ce mandat a été qualifié de «mandat humanitaire», ou d'élucidation. Parallèlement à ce mandat initial, ou «mandat humanitaire», le Groupe vit peu à peu croître le champ de ses activités. La pratique des missions *in situ* l'amena à dépasser le cadre de son mandat humanitaire et à examiner le phénomène des disparitions forcées dans une

1 Ainsi, à Chypre, en Éthiopie, en Indonésie et aux Philippines, la disparition forcée était pratiquée dans les années 70. Auparavant, pendant la guerre d'Algérie, par exemple, les militaires français eurent recours à cette pratique.

2 Ce Comité fut établi dans le cadre de la procédure 1503 (résolution 1503 (XXVIII) du 13 août 1971).

3 Voir María Luisa Bartolomei, *Gross and Massive Violations of Human Rights in Argentina, 1976-1983, An Analysis of the Procedure under ECOSOC Resolution 1503*, Juristförlaget i Lund, Suède, 1994.

4 Résolution 33/173, intitulée «Personnes disparues», adoptée le 20 décembre 1978.

5 Par exemple Chypre et le Chili.

6 Résolution 1979/38 du Conseil économique et social, du 10 mai 1979.

7 Résolution 5 B (XXXII), de la Sous-Commission de la lutte contre les mesures discriminatoires et de la protection des minorités, du 5 septembre 1979.

8 Résolution 20 (XXXVI), «Question des personnes disparues», du 29 février 1980.

9 Résolution 35/193, «Question des disparitions forcées ou involontaires», du 15 décembre 1980.

10 Document des Nations Unies, E/CN.4/1999/62, du 28 décembre 1998, paragraphe 2.

perspective plus globale. Il commença, tant dans ses rapports de mission que dans ses rapports à la Commission et à l'Assemblée générale, à étudier les pratiques, les législations et les institutions qui favorisaient les disparitions forcées. Il entreprit aussi d'identifier les mesures préventives et répressives que les États devaient mettre en place pour éradiquer la pratique des disparitions forcées. Postérieurement, il fut chargé de veiller à la mise en œuvre, par les États, des obligations découlant de la Déclaration sur la protection de toutes les personnes contre les disparitions forcées (ci-après dénommée la « Déclaration »), adoptée en 1992 par l'Assemblée générale des Nations Unies.<sup>11</sup> Par ailleurs, la Commission demanda au Groupe d'examiner, dans le cadre des disparitions forcées, les questions relatives à l'impunité, à l'enlèvement des enfants de parents disparus et à la protection des défenseurs des droits de l'homme. Ainsi, progressivement, le mandat initial du Groupe a été amplifié de manière considérable.

La création du Groupe de travail sur les disparitions forcées ou involontaires marqua une véritable « révolution » au sein des Nations Unies, car il fut le premier mécanisme thématique conçu, dans le cadre du Programme des Nations Unies pour les droits de l'homme, pour traiter de violations spécifiques et particulièrement graves des droits de l'homme. Cela se fit non sans réticences de la part de plusieurs États, notamment l'Argentine, qui contesta la création du Groupe.<sup>12</sup>

### **Le Groupe de travail sur les disparitions forcées ou involontaires**

Le Groupe est un mécanisme extra-conventionnel du système des droits de l'homme des Nations Unies. Initialement, son mandat était renouvelé chaque année par la Commission, avec l'approbation du Conseil économique et social. Depuis 1992, il est reconduit tous les trois ans. Le Groupe est composé de cinq experts indépendants, qui siègent à titre personnel et sont nommés par le président de la Commission en tenant compte de la représentation régionale. Ceux-ci doivent, en principe, être renouvelés périodiquement<sup>13</sup>, mais cette règle a été très peu respectée dans la pratique.

<sup>11</sup> Résolution 47/133 du 18 décembre 1992.

<sup>12</sup> À ce sujet, voir l'échange de communications entre la Mission de l'Argentine auprès des Nations Unies et le président du Groupe de travail sur les disparitions forcées ou involontaires (Documents des Nations Unies, E/CN.4/1435, du 22 janvier 1981, annexes IX, X, XI et XII).

<sup>13</sup> Les périodes établies pour le renouvellement des membres ont varié aux cours de l'histoire du Groupe. Ces dernières années, toutefois, la Commission a décidé que la durée maximum d'un mandat d'expert ne devait pas dépasser six ans.



Pendant 20 ans, le Groupe a eu la composition suivante : deux membres de l'Afrique et de l'Amérique latine ; trois de l'Asie et du groupe occidental ; et un seul pour les pays d'Europe de l'Est. En 2000, la Commission a mis fin à cette situation<sup>14</sup> en décidant que le roulement dans la composition du Groupe devait se faire par étapes, sur une période de transition de trois ans, de façon qu'en 2003 celle-ci soit totalement renouvelée<sup>15</sup>.

Le Groupe est appuyé par un secrétariat, composé de personnel permanent du bureau du haut-commissaire des Nations Unies aux droits de l'homme. Paradoxalement, alors que le mandat et le champ des activités du Groupe étaient élargis, cet appui a été considérablement réduit. Dans son dernier rapport à la Commission, le Groupe signalait que « [l']effectif du secrétariat a été considérablement réduit ces dernières années puisqu'il est passé de neuf administrateurs et quatre agents des services généraux à deux administrateurs, dont un à mi-temps, et deux agents des services généraux travaillant à temps partiel »<sup>16</sup>.

Le Groupe tient trois sessions annuelles et présente chaque année un rapport à la Commission et à l'Assemblée générale. Le rapport rend compte, pays par pays, de tous les cas de disparitions forcées dont le Groupe a été saisi, des démarches qui ont été engagées et des décisions qui ont été prises. Dans le rapport figurent également les conclusions et recommandations, soit spécifiques à des pays soit d'ordre général. Le Groupe y présente aussi ses observations sur l'application de la Déclaration ainsi que ses interprétations sur la portée des dispositions de la Déclaration.

### **Mandat et fonctions du Groupe**

Les sources juridiques du mandat du Groupe se trouvent dans les résolutions de la Commission. Le mandat est systématisé à travers les « méthodes de travail du Groupe », que celui-ci révisé périodiquement<sup>17</sup>.

Le Groupe ne s'occupe que des cas de disparitions forcées imputables, directement ou indirectement, aux agents de l'État. Il utilise une définition opérationnelle de la disparition forcée, tirée de la Déclaration<sup>18</sup>, c'est-à-dire

<sup>14</sup> Cette situation existe, dans une moindre mesure, dans d'autres mécanismes thématiques.

<sup>15</sup> Décision 2000/109 de la Commission des droits de l'homme, adoptée le 26 avril 2000.

<sup>16</sup> Document des Nations Unies E/CN.4/2002/79, du 18 janvier 2002, paragraphe 367.

<sup>17</sup> Les dernières en date ont été adoptées le 14 novembre 2001 et figurent comme Annexe I au document E/CN.4/2002/79.

<sup>18</sup> Paragraphe 3 du Préambule de la Déclaration.

les cas où des personnes «sont arrêtées, détenues ou enlevées contre leur volonté ou privées de toute autre manière de leur liberté par des agents du gouvernement, de quelque service ou à quelque niveau que ce soit, par des groupes organisés ou par des particuliers, qui agissent au nom du gouvernement ou avec son appui direct ou indirect, son autorisation ou son assentiment, et qui refusent ensuite de révéler le sort réservé à ces personnes ou l'endroit où elles se trouvent ou d'admettre qu'elles sont privées de liberté, les soustrayant ainsi à la protection de la loi »<sup>19</sup>.

Dans ce cadre, le Groupe ne s'occupe ni des situations de conflit armé international ni des enlèvements et autres pratiques, proches ou assimilables à la disparition forcée, commis par des groupes armés d'opposition ou d'autres acteurs non étatiques. Il considère que les disparitions forcées commises dans le contexte des situations de conflit armé international relèvent de la compétence du Comité international de la Croix-Rouge<sup>20</sup>. Néanmoins, et de manière exceptionnelle, il a dérogé à cette règle dans le cas des personnes portées disparues sur le territoire de l'ex-Yougoslavie. Lors de ses missions *in situ* ou dans ses recommandations spécifiques aux États, le Groupe se penche sur le phénomène des enlèvements commis par des acteurs non étatiques, bien qu'il considère que ceux-ci ne relèvent pas de son « mandat humanitaire ».

Il apparaît que le Groupe a deux mandats spécifiques: un mandat «humanitaire», ou d'élucidation de cas de disparitions, et un mandat de contrôle de la mise en œuvre de la Déclaration. Dans ce cadre, le Groupe est habilité à réaliser des missions *in situ*, à l'invitation de l'État concerné ou à la demande de la Commission. En tout cas, le Groupe doit avoir l'autorisation de l'État concerné.

### **Le mandat humanitaire et la procédure d'élucidation**

Le mandat «humanitaire», ou d'élucidation, a pour objectif de «retrouver la trace des personnes disparues»<sup>21</sup> et «d'aider les familles à déterminer le sort de ceux de leurs proches qui, ayant disparu, ne sont pas placés sous la protection de la loi»<sup>22</sup>. Le Groupe dispose, à cette fin, d'une procédure de communication. Étant donné la nature extra-conventionnelle et humanitaire

<sup>19</sup> Règle n° 2 « Définition » des Méthodes de travail révisées du Groupe de travail (E/CN.4/2002/79, Annexe I).

<sup>20</sup> Règle n° 5 « Conflits internationaux armés » des Méthodes de travail révisées du Groupe de travail.

<sup>21</sup> Document des Nations Unies, E/CN.4/1999/62, du 28 décembre 1998, paragraphe 20.

<sup>22</sup> Règle n° 3 des Méthodes de travail révisées du Groupe de travail.

de cette procédure, aucune exigence n'est imposée en matière de ratification d'instruments internationaux ou d'épuisement des recours internes. La procédure vise à élucider les cas de disparition forcée, déterminer le sort de la victime, si possible faire cesser la disparition forcée et obtenir la « réapparition » du disparu. Il ne s'agit pas d'un mécanisme de contrôle quasi judiciaire. Le Groupe ne s'occupe pas d'établir la responsabilité de l'État concerné et des auteurs de la disparition forcée ou des autres violations de droits de l'homme qui ont pu être commises au moment de la disparition.

La procédure repose sur un système de communications. Le Groupe a établi un formulaire de base pour les communications<sup>23</sup>. Les auteurs des communications peuvent être la famille de la victime, des ONG, des gouvernements, des organisations intergouvernementales, des tierces personnes et, en général, toute source digne de foi. Le Groupe s'assure que la communication répond aux critères qu'il a édictés, puis transmet le cas au gouvernement concerné, en lui demandant de procéder à des enquêtes et de l'informer de leurs résultats. Il s'instaure ainsi un « dialogue » entre le Groupe et le gouvernement, et entre le Groupe et l'auteur de la communication, en vue d'élucider le cas. Le cas est maintenu ouvert tant que le sort de la personne disparue n'a pas été élucidé.

Le Groupe a défini, à travers ses méthodes de travail, les critères qui doivent être remplis pour considérer qu'un cas est élucidé et/ou pour décider de son classement. Un cas est déclaré élucidé lorsque – que la personne soit en vie ou décédée – le sort du disparu et le lieu où il se trouve ont été clairement établis à la suite d'une enquête menée par le gouvernement, des recherches effectuées par la famille, d'une enquête conduite par des ONG, d'une mission d'enquête entreprise par le Groupe ou par des spécialistes des droits de l'homme des Nations Unies ou de toute autre organisation internationale opérant sur le terrain. Lorsque le cas est élucidé, mais que la personne a été victime d'autres violations de droits fondamentaux (par exemple, exécution extrajudiciaire, torture, détention arbitraire), le Groupe transmet le cas au mécanisme compétent de la Commission.

**23** Celui-ci signale les éléments d'information minimum que le Groupe requiert pour traiter les cas, à savoir : nom complet de la personne disparue ; date de la disparition ; lieu de l'arrestation ou de l'enlèvement ou endroit où la personne disparue a été vue pour la dernière fois ; renseignements sur les responsables présumés de l'arrestation ou de l'enlèvement ; renseignements sur les mesures prises par la famille ou par d'autres personnes pour localiser la personne disparue ; et identité de l'auteur de la communication (nom et adresse seront gardés secrets sur demande).

Le Groupe peut également classer ou se dessaisir d'une affaire, sans que le cas soit élucidé. Il a prévu deux cas de figure. Le premier concerne les situations où l'autorité nationale compétente décide qu'il y a présomption de décès de la personne portée disparue. Néanmoins, le Groupe ne retient cette décision que dans la mesure où les proches du disparu et les autres parties intéressées y ont souscrit. Le deuxième concerne les situations où la famille a décidé de ne pas donner suite, ou la source n'existe plus ou n'est plus en mesure de suivre l'affaire.

Le Groupe tenant trois sessions annuelles, au cours desquelles les communications sont examinées, une procédure d'intervention rapide a été établie. En vertu de cette procédure, son président peut prendre des mesures sur les cas de disparitions forcées dont le Groupe est saisi entre les sessions.

La procédure, comme celle de l'intervention rapide, n'est pas limitée aux cas de disparition forcée. Elle s'applique aussi aux cas d'intimidation, de persécution ou de représailles dont font l'objet des proches de personnes disparues, des témoins de disparitions ou des membres de leur famille, des membres d'organisations de familles de personnes disparues et d'autres organisations non gouvernementales ou des particuliers qui se préoccupent des disparitions. Dans ces cas, l'action du Groupe vise à engager les États concernés à prendre les mesures nécessaires pour protéger l'intégrité de ces personnes ainsi que leurs droits fondamentaux.

Enfin, il faut souligner que le Groupe a adopté, à la demande de la Commission, un dispositif spécial concernant les personnes disparues sur le territoire de l'ex-Yougoslavie<sup>24</sup>. Les méthodes de travail de ce dispositif, le premier qui ait été chargé d'« étudier une question spécifique dans un pays spécifique »<sup>25</sup>, étaient inspirées de celles du Groupe et impliquaient l'expert responsable, M. Manfred Nowak, et le rapporteur spécial pour l'ex-Yougoslavie. Le dispositif présentait toutefois quelques particularités: il s'appliquait à des cas résultant d'une situation de conflit armé, que celui-ci ait un caractère international ou non international; il concernait le problème des « disparus », tant civils que combattants, c'est-à-dire, une catégorie plus large que celle des « victimes de disparition forcée ». Faute d'appui de la part de la Communauté internationale, dans un acte courageux, M. Nowak a présenté sa démission en 1997, et le dispositif spécial a été suspendu<sup>26</sup>.

<sup>24</sup> Résolutions 1994/72, 1995/35 et 1996/71 de la Commission des droits de l'homme.

<sup>25</sup> Document des Nations Unies, E/CN.4/1995/37, du 12 janvier 1995, paragraphe 10.

<sup>26</sup> Résolution de la Commission des droits de l'homme 1997/57 du 15 avril 1997, paragraphes 33 à 39.

### Le contrôle de la Déclaration

Dans le cadre de son « objectif ultime », à savoir « l'éradication du phénomène des disparitions forcées ou involontaires grâce à l'adoption de mesures de prévention appropriées »<sup>27</sup>, le Groupe a pour mandat de « veiller à ce que les États s'acquittent des obligations qu'ils ont contractées en vertu de la Déclaration sur la protection de toutes les personnes contre les disparitions forcées »<sup>28</sup>. Il faut préciser que ces mesures ont trait non seulement à la prévention, mais aussi à la répression des auteurs de disparitions forcées et à l'impunité, de même qu'aux « droits à la vérité, à la justice et à une réparation », comme le signale le Groupe<sup>29</sup>. Dans le cadre de ce mandat, le Groupe fait des « observations générales » sur les dispositions de la Déclaration, précisant la portée de ses prescriptions, des obligations et des droits établis. En outre, il formule, à l'intention des États concernés, des observations et des recommandations en vue d'une mise en œuvre adéquate des obligations qui découlent de la Déclaration.

Il faut préciser que ce mandat de contrôle de la Déclaration n'est pas limité aux aspects généraux ou aux situations de pays. Le Groupe, dans ces méthodes de travail, a établi qu'il doit veiller également au respect des obligations de la Déclaration dans le cadre de l'élucidation d' « affaires individuelles »<sup>30</sup>. Dans le cadre de ce mandat, le Groupe peut éventuellement fournir des services consultatifs aux États.

### Éléments pour un bilan

Au cours de son existence et jusqu'en novembre 2001, le Groupe a été saisi de 49 802 cas, dont 41 859 n'ont pas encore été élucidés ou ne font plus l'objet de suivi<sup>31</sup>. Les cas non élucidés concernaient 74 pays. Comme le signale le Groupe dans son Rapport de 2002 à la Commission, « sur les 7921 cas au total que le Groupe de travail estime avoir élucidés depuis le début de ses activités en 1980, 2398 seulement concernent des personnes toujours en vie, ce qui représente une très faible proportion des 41 859 cas non résolus

<sup>27</sup> Document des Nations Unies, E/CN.4/2002/79, résumé exécutif.

<sup>28</sup> Document des Nations Unies, E/CN.4/1999/62, du 28 décembre 1998, paragraphe 2.

<sup>29</sup> Règle n° 3 des Méthodes de travail révisées du Groupe de travail.

<sup>30</sup> *Ibid.*

<sup>31</sup> Document des Nations Unies E/CN.4/2002/79, du 8 janvier 2002, paragraphe 3.

répertoriés dans ses dossiers»<sup>32</sup>. Néanmoins, juger le succès ou l'échec du Groupe sur cette base serait non seulement injuste mais aussi et surtout naïf. En premier lieu, il faut rappeler que la disparition forcée est une violation des droits de l'homme *sui generis*, qui se caractérise par une privation de liberté non reconnue par les autorités, où, comme le signala Niall MacDermot, l'être humain est transformé en un non-être<sup>33</sup>. La disparition forcée est liée, généralement, à des formes clandestines et des structures secrètes ou parallèles de répression et de terreur<sup>34</sup>. La recherche du disparu ou l'élucidation de son sort devient de plus en plus difficile à mesure que le temps passe. En second lieu, étant donné la nature extra-conventionnelle du Groupe, la procédure d'élucidation a des limites qui découlent de son caractère non contraignant et de son fondement volontariste<sup>35</sup>. Le succès de la procédure d'élucidation dépend largement de l'engagement et de la volonté politique des autorités nationales. En 2001, à Sri Lanka, l'élucidation de 4390 cas, à l'issue d'un long processus amorcé par le Groupe<sup>36</sup> avec les autorités sri-lankaises, les familles des disparus et des ONG, a démontré l'utilité de la procédure s'il y a un réel engagement des autorités nationales à résoudre le problème.

Depuis sa création, le Groupe a permis, à travers ses activités, de mieux cerner et délimiter le phénomène des disparitions forcées, ainsi que les obligations internationales des États face à ce fléau. Il a identifié les pratiques, les législations et les institutions qui favorisent les disparitions forcées et surtout, il a mis en évidence le grave problème de l'impunité. En outre, le Groupe a défini les mesures que devraient prendre les États pour prévenir les disparitions forcées, par exemple l'*habeas corpus*, et pour combattre et éradiquer cette pratique ainsi que l'impunité<sup>37</sup>. Les différentes observations et recommandations du Groupe, tant générales que spécifiquement adressées à des

<sup>32</sup> *Ibid.*, paragraphe 362.

<sup>33</sup> *Le Refus de l'oubli – la politique de disparition forcée de personnes, Colloque de Paris, janvier - février 1981*, Éd. Berger-Levrault, Paris, 1981, p. 35.

<sup>34</sup> Federico Andreu-Guzmán, «El Proyecto de Convención internacional para la protección de todas las personas contra las desapariciones forzadas», *La Revista, de la Comisión Internacional de Juristas*, n° 62-63, Genève, juillet, 2001, p. 78.

<sup>35</sup> Il faut préciser que cette caractéristique n'est pas spécifique à la procédure d'élucidation du Groupe, mais propre à toutes les procédures des mécanismes thématiques de la Commission.

<sup>36</sup> Au cours de ce processus, le Groupe réalisa trois missions *in situ* dans les années 90.

<sup>37</sup> Wilder Tayler, «Antecedentes del proceso de elaboración del proyecto de Convención internacional para la protección de todas las personas contra las desapariciones forzadas», *La Revista, de la Comisión Internacional de Juristas*, n° 62-63, Genève, juillet, 2001, p. 66.

États, constituent un corps doctrinaire d'une grande valeur tant pour guider l'action des associations de familles de disparus et des ONG que pour les autorités nationales.

Le Groupe a œuvré à l'établissement de nouvelles normes internationales sur les disparitions forcées. Ainsi, le Groupe a contribué à l'élaboration, par la Sous-Commission, de la Déclaration. Plus récemment, il a apporté son appui au processus d'élaboration du projet de convention internationale pour la protection de toutes les personnes contre les disparitions forcées (ci-après dénommé le «projet de convention») <sup>38</sup>. De manière générale, il a largement contribué à sensibiliser la communauté internationale au fléau que constituent les disparitions forcées.

Il faut néanmoins reconnaître que le Groupe a perdu beaucoup de son dynamisme et, sans doute, de son efficacité au cours des dernières années. Plusieurs facteurs ont favorisé cette situation.

- Dans les années 90, on a assisté à un désengagement progressif de nombreux pays, qui ont accordé un intérêt moindre au phénomène des disparitions forcées. Cela est dû en partie à la perception – erronée – que les disparitions forcées sont un phénomène latino-américain, lié aux pratiques répressives des dictatures et des régimes autoritaires des années 70 et 80. En outre, l'adoption du Statut de Rome de la Cour pénale internationale a créé le sentiment, dans plusieurs États, que le problème des disparitions forcées allait être résolu <sup>39</sup>. Ce sentiment était particulièrement perceptible lors des débats sur le projet de convention à la Commission.
- Au cours des dix dernières années, le Groupe a connu d'importantes restrictions budgétaires et de graves pénuries de personnel de son secrétariat, ce qui a limité son efficacité. Paradoxalement, pendant cette même

<sup>38</sup> Le projet a été élaboré par la Sous-Commission, qui s'est largement inspirée du corps doctrinaire établi par le Groupe. Le Groupe a participé à plusieurs séminaires organisés par les ONG pour appuyer l'expert de la Sous-Commission chargé de rédiger le texte. Le projet est reproduit dans le document des Nations Unies E/CN.4/Sub.2/1998/19, Annexe I. Pour ce qui est de la contribution du Groupe voir, notamment, les documents des Nations Unies E/CN.4/2001/68 (Annexe III) et E/CN.4/2002/79, paragraphes 24, 25, 26 et 364.

<sup>39</sup> Le Statut de Rome permettra à un tribunal international de réprimer les disparitions forcées, mais uniquement quand elles sont commises «dans le cadre d'une attaque généralisée ou systématique contre la population civile», c'est-à-dire quand elles constituent un crime contre l'humanité. Le Statut de Rome ne couvre pas la prévention et la répression des disparitions forcées pratiquées en dehors d'une «attaque généralisée ou systématique contre la population civile». Par sa nature même, le Statut de Rome n'aborde pas le problème de l'élucidation humanitaire des cas.

période, le Groupe a vu croître son mandat et le champ de ses activités. Cette situation est généralisée. Ainsi, les rapporteurs et les représentants spéciaux, les experts et les présidents des groupes de travail de la Commission ont indiqué que l'insuffisance de l'appui administratif que le Haut-Commissariat apporte aux titulaires d'un mandat «perturbe grandement leurs travaux»<sup>40</sup>. On assiste à un affaiblissement des mécanismes et des procédures de la Commission, et notamment du Groupe, ainsi que de leurs positions et de leurs rôles au sein du système. La restructuration du Haut-Commissariat des Nations Unies aux droits de l'homme, et la priorité que le premier haut-commissaire, M. José Ayala-Lasso (1994-1997), a donnée aux services d'assistance technique, ont largement favorisé ce processus. Malgré les changements d'orientation et les aménagements administratifs opérés par le deuxième haut-commissaire, Mme Mary Robinson (1997-2002), les contraintes budgétaires ont un impact considérable, d'autant plus que, depuis la Conférence mondiale sur les droits de l'homme (Vienne, 1993), le nombre des procédures thématiques de la Commission a doublé. Le recours aux contributions extra-budgétaires a augmenté<sup>41</sup>. Reste que les contributions volontaires, par nature aléatoires, ne sauraient résoudre sur le long terme une situation qui est structurelle et permanente.

- Le processus de réforme des mécanismes de la Commission, amorcé dans les années 90, est l'un des facteurs qui a le plus contribué à réduire le dynamisme et à affaiblir l'action du Groupe. Au cours de ce processus, non achevé, de nombreux États ont contesté les travaux et l'existence même du Groupe. Il a été proposé de supprimer le Groupe, de le fusionner avec le Groupe de travail sur la détention arbitraire ou de le remplacer par un rapporteur spécial. Le processus de réforme, conjugué aux critiques de certains États, a créé un climat de crainte au sein du Groupe. Considérée, à juste titre, comme une épée de Damoclès, cette situation a suscité, dans le Groupe, un réflexe défensif qui s'est traduit par une révision à la baisse des méthodes de travail et un retranchement sur le mandat initial. La crise au Timor oriental (1998-1999) en a été un dramatique exemple. La

<sup>40</sup> «Rapport de la réunion des rapporteurs et représentants spéciaux, experts et présidents des groupes de travail chargés de l'application des procédures spéciales de la Commission des droits de l'homme et du programme de services consultatifs», document des Nations Unies E/CN.4/2002/14, du 11 septembre 2001, paragraphe 76, p. 26.

<sup>41</sup> Haut-Commissariat aux droits de l'homme, *Appel annuel 2001 – aperçu général des activités et des besoins financiers*, p. 25.



Commission, réunie en session extraordinaire en septembre 1999, avait demandé à plusieurs mécanismes thématiques, dont le Groupe, d'effectuer des missions au Timor oriental<sup>42</sup>. Les mécanismes thématiques saisis ont donc réalisé une mission conjointe, à laquelle le Groupe a décidé de ne pas participer.<sup>43</sup> L'argument avancé par le Groupe était que la nature humanitaire de son mandat ne lui permettait pas de participer à une mission conjointe avec des mécanismes qui avaient un mandat « accusatoire ». La position ne fit pas l'unanimité des membres du Groupe. L'argument était, en effet, très contestable, voire non fondé. Le Groupe n'a pas réalisé la mission au Timor oriental demandée par la Commission.

Les méthodes de travail furent révisées<sup>44</sup>. Le Groupe y incorpora des éléments permettant de classer les cas de disparitions forcées non élucidés pour lesquels la source avait cessé d'exister, ou les familles concernées ne souhaitaient pas la poursuite de l'examen ou il y avait eu réparation financière. À cela s'ajouta un relâchement non seulement dans le traitement des cas soumis au Groupe et l'application des critères classiques d'élucidation, mais aussi dans la communication du Groupe avec les familles des victimes et les auteurs des saisines. Ainsi, le Groupe déclara élucidé un cas concernant plus de 30 personnes disparues en Colombie, sur la seule base d'un communiqué de presse d'un groupe paramilitaire annonçant « l'exécution » des victimes et la découverte des corps sans vie de neuf d'entre elles<sup>45</sup>.

Les ONG actives dans le domaine des disparitions forcées, notamment FEDEFAM et *Amnesty International*, lancèrent plusieurs initiatives pour revitaliser le Groupe et contrer cette dérive. L'une d'elles – la plus fructueuse – fut l'organisation de plusieurs réunions avec le Groupe, en vue d'en modifier les méthodes de travail et la pratique<sup>46</sup>. Lors de ces réunions,

<sup>42</sup> Résolution de la Commission des droits de l'homme 1999/S-4/1, paragraphe 7. Outre le Groupe, il s'agissait des mécanismes suivants : la rapporteuse spéciale sur les exécutions extrajudiciaires, sommaires ou arbitraires ; le représentant du secrétaire général, chargé d'examiner la question des personnes déplacées à l'intérieur de leur propre pays ; le rapporteur spécial sur la question de la torture ; et la rapporteuse spéciale sur la violence contre les femmes.

<sup>43</sup> Voir « Situation des droits de l'homme au Timor oriental – Note du Secrétaire général », document des Nations Unies E/CN.4/2000/115, du 20 décembre 1999.

<sup>44</sup> Voir « WGEID - Méthodes de travail - Rev.2 », en annexe au document des Nations Unies E/CN.4/1996/38.

<sup>45</sup> Le Groupe, après des réunions avec des représentants de la Fédération latino-américaine des associations de familles de détenus-disparus (FEDEFAM), revint sur sa décision et rouvrit la procédure.

<sup>46</sup> Voir documents des Nations Unies : E/CN.4/1998/43, du 12 janvier 1998, paragraphes 17 à 20 ; E/CN.4/1999/62, du 28 décembre 1998, paragraphes 19 à 23 ; E/CN.4/2000/64, du 21 décembre 1999, paragraphes 19 à 23 ; et E/CN.4/2001/68, du 18 décembre 2000, paragraphes 21 à 23.

les ONG signalèrent que le tarissement de la source d'information ou le souhait de la famille d'arrêter la procédure pouvaient être motivés par l'existence de menaces et d'actes d'intimidation. En outre, elles soulignèrent qu'en cas de classement pour présomption de décès de la victime ou pour cause d'indemnisation financière, le Groupe devait prévoir certaines sauvegardes dans ses méthodes de travail. Le Groupe reprit nombre de ces contributions dans la révision de ses méthodes de travail, en 2001, et améliora progressivement sa pratique.

- Le manque de renouvellement des membres du Groupe est un autre facteur qui a contribué à cette situation. Néanmoins, il est généralement surdimensionné car, s'il est vrai que certains membres se sont désengagés et ont pratiqué l'absentéisme, d'autres ont continué à accomplir leur tâche. Réduire le problème du Groupe à cette donnée pourrait conduire à un diagnostic erroné et à des solutions incomplètes.
- Les deux derniers facteurs indiqués ont eu une conséquence que l'on ne saurait occulter : l'érosion progressive de la crédibilité du Groupe auprès des ONG et des États qui souhaitent préserver ce mécanisme. Elle s'est traduite, ces dernières années, par une diminution des communications de cas. Si le Groupe interprète cette diminution comme le fruit d'un « recul [de la pratique de la disparition forcée et] comme un signe encourageant »<sup>47</sup>, on peut douter légitimement de cette interprétation.

### Perspectives

Les disparitions forcées ne sont pas une pratique du passé ni un phénomène à la baisse. Si dans certaines régions du monde, notamment l'Amérique latine, ce fléau n'a plus les proportions qu'il a eues par le passé, en revanche les disparitions forcées continuent à être pratiquées dans plusieurs pays. En Colombie, par exemple, les ONG sur le terrain ont recensé une moyenne d'une disparition forcée tous les deux jours, et cela depuis quatre ans. Dans plusieurs pays d'Afrique, du Moyen-Orient et d'Asie, les disparitions forcées sont monnaie courante. En Tchétchénie, la pratique des disparitions forcées est devenue systématique. En Algérie, le nombre de disparitions forcées enregistré ces dernières années est alarmant. Comme l'a souligné le directeur du Bureau des affaires juridiques de *Human Rights Watch*, M. Wilder Tayler, « la disparition forcée a été et continue d'être un

<sup>47</sup> Document des Nations Unies E/CN.4/2002/79, du 18 janvier 2002, paragraphe 3.

phénomène global: les dernières 15 années ont vu également des milliers de cas de « disparitions » en Asie, en Afrique, en Europe et au Moyen-Orient »<sup>48</sup>

Il serait non seulement naïf mais aussi irresponsable de penser que les disparitions forcées sont une pratique du passé. La réalité des faits indique tout le contraire. Une lecture des derniers rapports annuels d'*Amnesty International*, de *Human Rights Watch*, de FEDEFAM, d'AFAD (*Asian Federation Against Involuntary Disappearances*) et de la FIDH révèle que ce fléau sévit aujourd'hui partout dans le monde. L'adoption du projet de Convention sur les disparitions forcées, en 1998, par la Sous-Commission de la promotion et la protection des droits de l'homme,<sup>49</sup> et la décision de la Commission des droits de l'homme d'établir un Groupe de travail intersession pour élaborer un « instrument normatif juridiquement contraignant pour la protection de toutes les personnes contre les disparitions forcées ou involontaires »<sup>50</sup>, qui commencera ses travaux en janvier 2003, mettent en évidence cette réalité et le besoin de se donner les moyens de combattre ce fléau.

L'existence d'un mécanisme et d'une procédure de la Commission des droits de l'homme pour faire face à la pratique des disparitions forcées continue d'être une nécessité. Bien que le processus d'adoption d'un « instrument normatif juridiquement contraignant » pour lutter contre les disparitions forcées ait été amorcé, ce qui permettra, comme l'a souligné l'expert Manfred Nowak<sup>51</sup>, de combler les lacunes du système juridique actuel, l'existence du Groupe de travail sur les disparitions forcées ou involontaires reste nécessaire. Comme tout processus d'établissement de nouvelles normes contraignantes, il sera long et une fois qu'il aura été adopté, sa ratification universelle prendra plusieurs années. La nouvelle Cour pénale internationale (CPI) ne saurait répondre aux problèmes humanitaires et aux attentes des familles des victimes. La CPI n'est pas un moyen de réprimer les disparitions forcées commises en dehors « d'une attaque généralisée ou systématique lancée contre toute population civile »<sup>52</sup>, c'est-à-dire, un crime contre l'humanité. En effet, le Statut de Rome n'aborde pas le problème des disparitions forcées qui ne

<sup>48</sup> Tayler, *Doc. Cit.* (note 37), p. 65.

<sup>49</sup> Voir document des Nations Unies E/CN.4/Subb.2/1998/19, Annexe.

<sup>50</sup> Résolutions N° 2001/46 (paragraphe 12) du 23 avril 2001 et N° 2002/41 (paragraphe 13) du 23 avril 2002.

<sup>51</sup> Document des Nations Unies E/CN.4/2002/71, du 8 janvier 2002, paragraphes 94 et 98.

<sup>52</sup> Article 7 du Statut de Rome.

sont pas liées à un crime contre l'humanité, et il ne fixe pas les obligations spécifiques permettant de réprimer les disparitions forcées au plan national<sup>53</sup>.

Il ne fait aucun doute que le Groupe de travail sur les disparitions forcées ou involontaires est une nécessité et qu'il faut préserver son mandat d'élucidation et de contrôle de la mise en œuvre de la Déclaration. Dès lors, le Groupe doit retrouver son efficacité et son dynamisme. Quelques mesures pourraient y contribuer, dont certaines pourraient être mises en œuvre dans le court terme :

- Révision des méthodes de travail, en consultation avec les ONG, pour y intégrer des mesures de sauvegarde en faveur des disparus et des familles, et assurer un suivi du respect par les États de leurs obligations en vertu de la Déclaration, notamment en ce qui concerne la réparation et les poursuites judiciaires contre les responsables des disparitions forcées.
- Mise en place d'un réseau d'information et de relais de l'action du Groupe, utilisant les missions et les bureaux extérieurs du Haut-Commissariat aux droits de l'homme et des institutions des Nations Unies. Ce système est déjà utilisé par le Groupe, mais de manière *ad hoc* et sur des bases intérimaires. Il serait d'une grande utilité, non seulement pour l'activité humanitaire du Groupe mais aussi en termes de prévention, d'alerte et de visites *in situ*.
- Renforcement de la communication avec les familles de disparus et les ONG, comme l'a réitéré à maintes reprises la Commission des droits de l'homme. Cette mesure contribuerait à accroître l'efficacité et le dynamisme du Groupe car, comme dans toutes les procédures spéciales de la Commission des droits de l'homme, les victimes, leurs familles et les ONG jouent un rôle clé.
- Établissement de critères clairs et d'une procédure transparente de désignation des experts du Groupe, qui tienne compte des avis des ONG actives dans le domaine des disparitions forcées<sup>54</sup>.
- Établissement d'un mécanisme ou d'une procédure sanctionnant l'absentéisme des membres du Groupe, qui pourrait aboutir à la révocation de l'expert fautif avant l'expiration de son mandat de trois ans.

<sup>53</sup> Par exemple, l'obligation de qualifier la disparition comme un délit dans la législation nationale, l'obligation incombant aux tribunaux nationaux d'exercer leur juridiction territoriale et extraterritoriale, et les obligations en matière de prévention. Voir Andreu-Guzmán, *Doc. Cit.* (note 34), p. 81.

<sup>54</sup> Il faut souligner ici qu'un précédent a été marqué dans ce sens par le président, M. Leandro Despouy, de la Commission des droits de l'homme de 2001.

- Renforcement de l'appui administratif et du personnel du secrétariat. Le Haut-Commissariat devrait affecter un effectif accru au secrétariat, et cela sur des bases stables et permanentes.
- Augmentation du budget ordinaire alloué au Groupe.

Ces mesures devraient s'accompagner d'un réengagement des États dans la lutte contre les disparitions forcées et le soutien au Groupe. Ce réengagement devrait se traduire, notamment, par des invitations permanentes et ouvertes au Groupe de visiter les pays; des contributions financières accrues au budget du Groupe; et une large diffusion, à l'échelon national, de la Déclaration et des activités du Groupe.

## Abstract

### ***The United Nations working group on enforced disappearances***

*Federico Andreu-Guzmán*

*The article outlines the inception and subsequent development of the Working Group on Enforced or Involuntary Disappearances, describes its mandate and working methods, reviews its activities and makes several recommendations to restore its effectiveness.*

*Established in 1980 with a humanitarian mandate, the Group saw its duties steadily increase and, when the Declaration on the Protection of All Persons from Enforced Disappearances was adopted, it was entrusted with the task of monitoring States' compliance with their obligations deriving from it. Its humanitarian task includes an elucidatory procedure to trace the whereabouts of missing persons. In its task of monitoring compliance with the Declaration, the Group verifies that the obligations deriving from it are duly performed by States and addresses general observations and recommendations to them.*

*During its existence the Group has made substantial contributions. For several reasons, however, it has lost much of its effectiveness. Yet enforced disappearances are not a thing of the past, nor are they diminishing. The Group and its mandate are as necessary as ever.*

# Overcoming tensions between family and judicial procedures

VASUKI NESIAH\*

This article looks at how judicial and non-judicial mechanisms can address the needs and priorities of families of the missing and makes some recommendations for State, non-State and international players.

When people go missing, their families are devastated. But the traumatic effects of the loved one's absence are often further exacerbated by the fact that the needs and priorities resulting from it are neglected or denied. The ICRC has identified three principal categories of family needs and priorities: information, accountability, and acknowledgement. This paper will focus only on these three categories. Each one involves a complex array of interests and claims as regards handling cases of the missing.

## Families and judicial mechanisms

Judicial mechanisms vary widely in different legal systems, socio-historical contexts and interpretative traditions, etc. In the present context, the generalizations necessitated by this broad overview should not be read as comprehensive claims describing all existing judicial mechanisms; rather, it is a more modest venture that employs generalizations for heuristic purposes of highlighting the specific characteristics of a certain "type" of routine criminal justice mechanism that we classify as judicial. A judicial system that does not perform its function according to human rights principles will function poorly in meeting the informational, accountability and acknowledgement needs of families of the missing. This article presents the discussion on how reasonably well-functioning judicial mechanisms address, or could address, family needs by focusing on each of the three categories of family

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needs and priorities. Indeed, the extent to which a judicial system addresses victim or family needs and priorities may itself cast light on an important aspect of the status of human rights principles in that judicial system.

### Information and judicial mechanisms

Depending on the specific legal system, the police, the prosecutor's office and/or the investigative judge or magistrate conducts investigations for trials. In subsequent stages of a trial process, from depositions to courtroom proceedings, information is also provided by lawyers and witnesses and is channelled through the authority of the substantive and procedural rules of law and judicial rulings. The role of State functionaries and court procedures in gathering and evaluating information may benefit families of the missing and their interest in the investigation and disclosure of information.

Investigations pursuant to court actions can marshal the resources and authority of the State in procuring information. They can effectively mobilize police powers of arrest, lawful detention, interrogation, plea-bargaining and related strategies to persuade reluctant witnesses to provide information. Similarly, they are able to procure warrants to access documents and other evidence that are hidden or in the possession of private parties or the State. Judicial investigations also ensure that the information gathered is focused on the crime and feeds into accountability processes. Moreover, because police and prosecutorial investigators have training and professional experience that has been honed precisely for the purpose of procuring information about crimes, they can be particularly effective in gathering sensitive information. Finally, since it is channelled through judicial mechanisms that test and evaluate it according to objective standards of proof, families of the missing may be assured of the reliability and authority of the information that emerges in this process.

Thus, insofar as they are conducted in good faith and an objective manner, the investigations entailed in judicial proceedings have the potential at least of making important advances in uncovering information with regard to the perpetrators of the crime and the immediate circumstances of the crime itself. Moreover, much of the information uncovered by the criminal investigative process may be valuable for any civil action that families of the missing might also undertake. To this extent, good faith criminal investigations are almost always welcomed by families of the missing.

At the same time, however, police and prosecutorial investigations for trial actions can also be unresponsive to the needs of families. In most cases,

the launching of a criminal investigation with a view to a trial may depend solely on the prosecutor's decision whether to pursue the matter with little or no input from victims. The victims' access to information in the hands of police and prosecutors is often curtailed by legal and due process requirements and other demands of the law that may require that investigators and prosecutorial authorities maintain confidences, do not prematurely release information still subject to testing by the trial process, and do not prejudice the defendant's right to a fair trial through premature publicity. Furthermore, prosecutorial tactical strategies, as well as the institutional and professional culture of police and prosecutorial investigations, almost always envelop such investigations in considerable secrecy. Thus, while families of the missing may be questioned and investigated, they may not have access to information about developments in the investigation process. This may cause them to feel further disempowered and excluded from the judicial process.

Investigations are designed to attain the prosecutorial goals of identifying those who can be proven to be legally culpable. Families of the missing may have broader goals. In the context of disappearances, for example, families of the disappeared may want information about the political authorities who intellectually instigated, rendered possible or legitimized such crimes, whereas the criminal investigation may prioritize channelling investigative energies into ascertaining the "trigger-puller", given that command responsibility is difficult to prove in a court of law (and particularly because disappearances typically occur through centralized sanction and decentralized planning and implementation).

In addressing these challenges, some civil law countries allow individual victims the right to initiate prosecutions and/or become a *partie civile*, or co-plaintiff, with the prosecutor. These provisions do enable victims' families to have greater access to and control over information gathered through judicial mechanism. Other facilities giving families of the missing greater access to information within the framework of judicial mechanisms include strengthened legal aid mechanisms that allow for greater consultation and coordination with the client.

To sum up, judicial investigations may up to a point match the goals of families; in other cases, however, the respective interests may diverge and judicial mechanisms may be torn between the victims' need for information and the prosecutor's need to ensure that such disclosure does not adversely prejudice the case against the defendant.



### Accountability and judicial mechanisms

Judicial mechanisms are, of course, seen as the standard model for providing victims' families with an effective means of holding the perpetrators accountable for their actions. In a well-functioning system, with respect for civil liberties and equal protection under the law, judicial mechanisms are a particularly effective avenue for ensuring accountability.

The judicial system is geared to determining guilt and innocence under due process of law and established standards of proof-findings that unequivocally testify to the fact that identifiable individuals, not anonymous entities, commit violations. In holding perpetrators accountable for those violations, judicial systems may also impose sanctions on the perpetrators and order reparations for victims. For families of the missing, judicial mechanisms provide not only a reliable mechanism for establishing perpetrators' violations of the law, but also an official and public statement recognizing that a violation has occurred under the State's watch, and that victims have been harmed. In addition to the accountability of the individual, judicial mechanisms go some way towards holding the system accountable, either directly or indirectly. Most importantly, they give a strong signal that impunity is inadmissible and affirm the State's commitment to judicial redress and human rights.

Notwithstanding the great value of judicial systems in holding individual perpetrators accountable, judicial mechanisms may also hinder accountability. They have elaborate rules of procedure to ensure a fair and objective trial. However, implementing such safeguards can also be resource-intensive and time-consuming and requires an effective police and legal infrastructure. Where these ingredients are absent or in short supply, the judicial system will not have the institutional capacity to meet the accountability goals of victims' families. This problem is aggravated in those cases where the scale of human rights atrocities, including the numbers of missing persons, is so high that even a well-functioning system can deal with only a fraction of the perpetrators. The judicial quest for accountability has an overwhelming focus on individual accountability. Most cases may come before courts as individual matters rather than as class action suits. Yet many families may feel violated by fundamental aspects of the system that fostered, or at the very least allowed, such atrocities. They may consequently want accountability mechanisms to look beyond individual culpability to aspects such as the specific structure or organization of the State, the class structure, a military government, a militant group, an oppressive ethnic, racial or religious majority or

even an indifferent or complicit international community. In some cases, judicial mechanisms may also function primarily in closed sessions that deny victims the right to public accountability.

Hostile cross-examination can further exacerbate the injury suffered by victims even in the process of providing accountability. This is perhaps a symptom of a broader problem — the manner in which judicial systems are often alienated from victims and attuned to the needs of the law and legal victory rather than to the needs of victims and their families.

### Acknowledgement and judicial mechanisms

Judicial mechanisms provide an important basis for responding to the acknowledgement goals of families of the missing. They can be a symbol of the State's acknowledgement of the violation and its direct or indirect culpability. In providing a mode of official "truth-seeking", judicial mechanisms can help to expose and acknowledge the contexts within which violations occurred. They can also allow individual perpetrators, through their own testimony, to acknowledge their role in the crime and take responsibility for the injury caused. Particularly when they call for compensation, institutional reform, etc., they are furthermore a powerful means of acknowledging the injury victims and their families have suffered.

On the other hand, families of the missing may experience the procedural hurdles entailed in judicial findings as holding information and "acknowledgement" hostage to legal process. For instance, judicial truth may not be designed to hold accountable those individuals and institutions that may have command responsibility for the missing if they are not "legally" culpable in ways that can be proven in court. Typically, they address cases individually and, to that extent, State acknowledgement is also individualized. There is little capacity to directly acknowledge systematic or structural problems that led to the violation or enabled it to take place. Similarly, when classes of victims have been targeted as a group (because of factors such as ethnicity, religion, etc.), judicial mechanisms are particularly ill equipped to identify and track those systemic patterns and causes.

In this context we need to look also to non-judicial mechanisms (including provisions for special prosecutors and other non-routine processes) for their capacity to address the needs and priorities of families of the missing.

### **Families and non-judicial mechanisms**

As used in this article, “non-judicial mechanisms” is an open-ended category that covers a diverse array of initiatives ranging from truth commissions to human rights documentation projects to public monuments. Typically, non-judicial mechanisms are more informal and flexible than their judicial counterparts. Some worry that this very malleability may make such mechanisms weaker weapons in pressing the authorities for information and acknowledgement, and/or holding them accountable for their action and inaction. Yet the promise of such mechanisms may lie precisely in the fact that they are able to focus on victims, not just perpetrators, on civil society, not just the State. Their very informality and flexibility may make them better able to adapt to the needs of victims and their families.

### **Information and non-judicial mechanisms**

In a campaign to gather more information about the missing, investigative bodies with a mandate to inquire into their whereabouts can be empowered to use a combination of rewards, incentives and threats to encourage cooperation by reluctant witnesses and perpetrators. While the design of such provisions would depend on context-specific strategic planning as to who has information, and what set of rewards, incentives and threats would serve to elicit information from them, their use would also depend on the institutional capacity of the investigative body to offer fundamental due process protections to witnesses who come forward in response to those provisions. There should be consultation with victim support and advocacy groups to ensure that these methods do not jeopardize the security of witnesses, offers of amnesty or opportunities for victims to share their views and have those views taken into account in the decision-making process.

Investigative bodies could provide incentives for cooperation without dealing directly with criminal sanctions. For example, investigative bodies could offer witnesses the option of confidential testimony, which may be an incentive in contexts where ongoing security threats warrant witness protection mechanisms. Confidential testimony could also be an incentive for those who are reluctant to speak out in public for fear of social stigma or other social mores. For instance, in many contexts victims of sexual crimes have hesitated to come forward and disclose information because they fear

public shaming and/or feel that the violation is too intimate and personal for public discussion. Confidential testimony, combined with some limited immunity provision, could also be an incentive for those who want to disclose information that may help families to obtain further knowledge about the fate of their loved one without jeopardizing the perpetrators in terms of criminal prosecution.

Investigative bodies could also be empowered to elicit information by creating a penalty for non-cooperation such as withholding information about a human rights violation (assuming that there is an adequate witness protection programme if compliance with such an obligation creates a security risk). Thus, rather than reward cooperation with amnesties and/or lesser penalties, this approach suggests that there could be a provision to threaten penalties such as criminal or administrative sanctions for those who do not cooperate. This provision may be particularly useful where a prior amnesty for the original crime has left very little incentive for perpetrators to cooperate, and investigators have very little bargaining power to induce perpetrators and reluctant witnesses to disclose information. Even when the prior amnesty protects perpetrators from prosecution for their original crime, that amnesty is limited to the criminal responsibility for the crime itself and does not condone withholding information about the crime.

In this context, too, the right to refrain from self-incrimination and other due process safeguards should be built into the provision. In crafting and implementing such a law there should be specific care to ensure that this does not create a new offence *ex-post-facto*. The law should give adequate notice of a new obligation for disclosure, rather than retroactively create an obligation. It is particularly important to ensure that the victims of the crimes in question are not held guilty of the crime of non-disclosure. With this mechanism, as with others, it is important to take into account the complexities of distinguishing between victims and perpetrators in some situations; from Rwanda to Sierra Leone, there are many cases in which perpetrators are also victims.

In general, amnesties inhibit the disclosure of information and should be avoided if at all possible. In some cases, however, investigative bodies endowed with a carefully crafted amnesty-granting power may be able to prompt perpetrators to disclose information. The promise of a conditional pardon or lesser penalty for those who voluntarily disclose information can work as an incentive not unlike the plea-bargaining process used in some

criminal justice jurisdictions. Such a provision is also a key feature of the South African Truth and Rehabilitation Commission (TRC) that offers perpetrators who make a full disclosure regarding a particular crime an amnesty from any criminal or civil liability for that crime.<sup>1</sup> For such a provision to be effective, perpetrators have to feel genuinely threatened by prosecution and a severe sentence. If perpetrators determine that prosecution is unlikely, then a lesser sentence or an amnesty would be of little value in encouraging cooperation. Although a non-judicial investigative body such as a special task force on the disappeared or a truth commission may use the granting of amnesty, the effectiveness of this measure depends very largely on the simultaneous operation of an effective criminal justice system. Moreover, rather than being a blanket amnesty, it would be conditional on the full and good faith disclosure of relevant information to the satisfaction of the investigative body, and it would apply only to politically motivated crimes. Consideration should be given to whether even a limited and conditional amnesty compromises the struggle against impunity; to some extent this is a context-specific issue concerning the best strategy to address the victims' right to information *and* accountability in constrained circumstances.

Conditional amnesty processes should be designed to protect the right of the witness to refrain from self-incrimination, and the victim's right to redress through civil actions. Above all, the legitimacy of any amnesty depends on consultation with victim groups and the human rights community. Finally, consideration should be given to whether such an amnesty law interferes with the State's international legal obligations under international humanitarian law, human rights law or international criminal law.

In most cases, many of the mechanisms are used in combination; thus coordination and collaboration between different institutions can be crucial to the success of each mechanism. For instance, judicial mechanisms and non-judicial mechanisms can be designed to complement their respective jurisdictions, as is the current situation in East Timor (where the truth commission and special prosecutor's office are working simultaneously, with each having a distinct jurisdiction for different kinds of crimes). Ongoing consultation

<sup>1</sup> In South Africa, the Amnesty Committee of the TRC was given the power to grant amnesty to individual perpetrators if they made full disclosure. An amnesty applicant was required to appear before the Committee in a public hearing, unless the act in question did not involve a gross violation of human rights. See *Promotion of National Unity and Reconciliation Act*, 26 July, 1995, Article 19(3)(b)(iii).

between prosecutorial offices and institutions operating non-judicial accountability mechanisms can help to balance the complex priorities, jurisdictions and approaches of each institution and to manage information-sharing.

### Truth commissions and similar mechanisms

Varying widely in their mandate and powers, truth commissions and other commissions of inquiry specifically intended to address the problem of the missing can be flexibly designed to proactively seek out information that will otherwise be difficult to access through routine criminal action. For instance, the recently created Commission for the Right to Biological Identity in Argentina is tasked with registering information on the genetic data of missing children who were kidnapped or born in custody. These procedures may help those children and their biological parents to get more information about their cases, while easing the children's fears about whether they are making their adopted parents vulnerable to criminal action. To some extent this approach represents a deferring of the impulse to prosecute, in order to prioritize the informational needs of the child victims and their families. Similarly, the Argentinian truth trials used the prosecutor's office to obtain more information about the missing — these cases focused specifically on using judicial mechanisms to uncover information even though there was no possibility of judicial sanction.

Unlike an overburdened criminal justice system juggling a range of priorities, the specialized institutions discussed in this section are centred on investigating past abuses, and in this context can be, and often are, specifically commissioned to investigate the fate of the missing.<sup>2</sup> The South African Truth and Reconciliation Commission's final report cites "establishing and making known the fate and whereabouts of victims" as one of the means of achieving

<sup>2</sup> Gathering information on the fate of the disappeared was the primary mandate of the truth commission in Argentina, the Argentine National Commission on Disappeared Persons (CONADEP). "The Commission took over 7,000 statements over nine months' time, documenting over 8,960 persons who had disappeared." Priscilla Hayner, *Unspeakable Truths*, Routledge, New York, 2001, p. 34. See also *Nunca Mas: Report of the Argentinian Commission on the Disappeared*, September 1984. Similarly, in Chile, the second volume of the Commission's report "lists the names of the victims and provides personal information, including any known circumstances related to their disappearance or death". Jo M. Pasqualucci, "The whole truth and nothing but the truth: Truth commissions, impunity and the inter-American human rights system", *Boston University International Law Journal*, Vol. 2, 1994, p. 339.

<sup>3</sup> The South African TRC was mandated to "facilitate, and initiate or co-ordinate, the gathering of information(...) [in order] to establish the identity of victims of [past] violations, their fate or present whereabouts." *South African Truth and Reconciliation Commission Final Report*, Vol. 1, Ch. 4, para. 31.

national unity and reconciliation.<sup>3</sup> When the missing are presumed dead, a truth commission's investigation can also entail exhumations of bodies and other action that may be desired by families of the missing to clarify the fate of their loved ones. Such investigations can result in the issuing of death certificates, which can be very important to help the families achieve closure, while also giving information necessary for life insurance purposes, pensions and the like.

The recovery of information for victims is at the heart of what all truth commissions do. This ranges from gathering details about specific cases and the fate of the missing to tracing patterns of command responsibility, researching the impact of human rights abuse on particular communities, looking into the complicity of diverse institutional players and developing a broader historical understanding of the conditions that enabled widespread human rights violations to occur. As many have urged, the end goal of a truth commission's work should not be to produce a new official canon of information, but rather to meet the victim's need for information in as transparent and participatory a fashion as possible. Rather than fixing a new "Truth" by recording the injury suffered by victims, a truth commission could, as Michael Ignatieff has noted, narrow the range of "permissible lies" regarding the history of human rights violations in that community.

Because truth commissions are not adversarial criminal proceedings, the information-gathering undertaken under the aegis of the commission's mandate can take place under due process rules that are less rigid than the regular criminal justice system. Thus the burden of proof required for a commission's findings may not have to be proof beyond reasonable doubt, but the balance of probabilities. In general, subpoena powers may allow truth commissions to compel perpetrator testimony under more relaxed due process constraints. The evidentiary constraints on witness and victim testimony may also be relaxed (e.g., no hearsay rule); this helps to enable truth commissions to rely on a wide variety of sources. Truth commissions may also have readier access to documentary information, and can incorporate material that may not be admitted into evidence in a criminal trial (such as unsworn testimony).

As they are not limited to information relevant for prosecutorial efforts to establish guilt or innocence in specific cases, truth commission investigations can also gather information relating to the different conditions and dynamics that served as enabling factors in incidents concerning missing persons. Looking at issues such as patterns of abus — issues that may be less

apparent with a narrower focus on individual cases — may also help clarify why particular individuals were targeted. All of these possibilities could help truth commissions to provide a quality and quantity of information to victims that will not generally be available in criminal trials.

Public hearings tend to make the truth-seeking process more social, more of a dialogue, contributing not only to the truth commission's findings but also to the broader conversation in the public sphere. This gives victims a platform to make known their experiences, interests and demands, helps to highlight information that has been marginalized in official narratives, and enables victims themselves to have more say in the truth commission's information-gathering process. In that regard, such hearings at least have the potential for better serving the interests of victims' families through a more comprehensive approach to information-gathering and analysis.

#### Investigation and reporting by national and international non-governmental organizations

Historically, both national and international non-governmental organizations have played a particularly constructive role not only in building institutional consciousness of the various States' human rights record, but also in developing a national database bringing together different sources of information on cases of missing persons and other human rights violations.<sup>4</sup> The reach and value of this information has been extended and expanded in cases where there has been coordination and collaboration between different players in the human rights and humanitarian relief community. For example, over the past year the ICRC and the Peruvian Truth Commission have formed a partnership to share files, with certain restrictions, and launch a public campaign to gather further information.<sup>5</sup> This is an extremely significant partnership and has the potential for substantially

<sup>4</sup> In South Africa, the NGO Coalition on the TRC coordinated information held by human rights organizations in South Africa and internationally even before the TRC began its proceedings; the Coalition then handed over their records of human rights violations to the TRC to be incorporated in a national database. See Hugo van der Merwe *et al.*, "Nongovernmental organizations and the Truth and Reconciliation Commission: An impact assessment," <http://www.csvr.org.za/papers/paphvp&b.htm>, p. 12 and footnote 23 on p. 30.

<sup>5</sup> In accordance with the partnership, the ICRC will give the Peruvian Truth Commission generic information (not dossiers on individuals *per se*) on about 430 cases that do not figure in any database so far. There will then be a public campaign to verify this information and request more; ICRC delegates will work in local communities to urge people to come forward with further information. The project includes a systematic compilation of the ICRC's experience in the search for individuals and the creation of a single list of disappeared.



increasing the amount of information available to families. In a time of widespread human rights violations, it is often NGOs that document and store information; this information can be, and often has been, turned over to truth commissions, special prosecutors and other investigative teams.

NGOs can also play a role in a different type of information provision, namely information about victim advocacy and victim support services. In view of the traumatic nature of the testimony given by victims, various components of civil society often provide them with counselling and other support services, which can also form part of the acknowledgement victims seek. In situations where victims often come from marginalized and disenfranchised communities, NGOs can play a decisive role in organizing them as a group, mobilizing advocacy efforts and facilitating family networks, support groups and suchlike. Similarly, because families of missing persons often feel helpless and isolated for want of information about how to trace their loved ones, many organizations can provide legal and research services to help them follow up their cases and seek the necessary support. In this context NGOs can (and often do) act as a crucial intermediary between government and citizen in making the system more accessible to families and empowering victims to make use of government services to meet their needs.

International fact-finding missions by the United Nations or regional bodies could function as neutral intermediaries in gathering information confidentially from witnesses and perpetrators and transmitting it to victims' families. Where there is concern that such information-sharing may jeopardize future judicial action against those perpetrators, international players may, as outsiders, be well positioned to coordinate joint consultations with victim groups, human rights groups and prosecutorial authorities on agreeing to some shared principles and protocols for the handling of information in accordance with a balance of priorities between information and judicial accountability.

### Institutional reforms

Institutional reform is a forward-looking approach to meeting victims' needs for information. Two categories of institutional reform are relevant here: reforms that address the current informational needs of families of the missing, and reforms that provide future safeguards to ward against the kinds of situations that result in persons going missing and the accompanying barriers to families' access to information.

The State should put in place the laws and institutions that will enable citizens to have access to State records in ways that safeguard fundamental

rights and freedoms. In most cases we would recommend a strong default assumption regarding citizens' freedom to access official documents. Classification practices relating to secrecy and accountability should have a default assumption regarding public access, with the State having to meet a high standard of proof to classify a document as secret.

It is equally important to pass legislation and institutionalize procedures that require detailed record-keeping about those taken into custody and immediate notification of the detained persons' whereabouts to their families, as well as similar provisions ensuring a paper trail. Furthermore, when a citizen is taken into custody, information should be provided to the police department that has jurisdiction over the person's place of residence. Knowledge of the families' right to information should be disseminated among the general public.

Many countries with large numbers of missing persons have emergency regulations that allow State forces greater secrecy in their operations. In contexts where people are taken into custody under emergency regulations and other laws outside the routine human rights safeguards, there should be supervisory procedures ensuring that a record is kept of actions by State forces operating under such regulations. State forces should be required to submit periodic reports to supervisory agencies, such as the national human rights commission or Attorney General's department, regarding arrests, detentions, transfers and release of prisoners under emergency regulations. Such supervisory bodies could also be set up by impartial outsiders such as the ICRC.

### Indigenous forms of truth-seeking, justice and reconciliation

In some contexts, the most valuable methods of information-seeking may derive from sources that work outside mainstream criminal justice models. Some may classify these as indigenous forms of truth-seeking, but typically they are modern, hybrid models that draw from a range of traditions.

People are less likely to share information with institutions from which they feel alienated. The Gacaca process in Rwanda may be an example of an approach that has been consciously crafted from a variety of conflict resolution and criminal justice processes, some of which are perceived as particularly Rwandan and others as stemming from other African and European traditions. It is still too early to draw any conclusions as to whether this process is just to all concerned, and whether it elicits information that is accurate and fair. However, the creativity behind its conceptualization is instructive; in many situations there may need to be experiments with alternative procedures that have local legitimacy.

Institutions that sacrifice social reconstruction, reconciliation and other elements of a community's long-term priorities to a narrow focus on accountability alone may not succeed in eliciting participation and the disclosure of information. In many cases, communities place emphasis on both accountability and social reconstruction processes, and information may be most readily forthcoming when truth-seeking mechanisms address both those goals. In this context, the role of respected members of the community publicly urging witnesses to come forward, and doing so by making the link between information-seeking and social reconstruction, may go far in legitimizing information-seeking processes. For instance, the role of Archbishop Tutu in encouraging witnesses to come forward to the truth commission in South Africa is an example not only of the successful mobilization of his "indigenous" legitimacy, but also of his success in linking information disclosure to a broader set of social commitments and goals, namely the need for reconciliation and healing of the community as a whole.

#### Public information campaigns about the missing

Public information campaigns can be crucially important, not just in gathering information but also in making families feel less isolated in their victimization. They both convey and collect information. Information is often dispersed and disorganized, and a public information campaign can serve as a catalyst in centrally reconstructing all information that is already available and gathering additional information by reaching new sectors of society.

#### Accountability and non-judicial mechanisms

While truth commissions have the potential of being institutionally flexible and publicly accessible mechanisms to achieve the accountability desired by families of the missing, it is important to note that they are not necessarily substitutes for criminal justice mechanisms. In fact, truth commissions can often work in coordination with prosecution efforts, as in Argentina, Sierra Leone and East Timor, or strongly recommend prosecutions, as in South Africa, and/or perform investigations that could be of value to later prosecutorial efforts, as in Chile. In specific circumstances there may be tensions between the requirements of the law and meeting the needs of families through alternative mechanisms. Those tensions can, however, often be best reconciled through coordination, timing and working out common principles that guide the respective mechanisms' work.

Such consultations could lead to agreements on a division of jurisdiction or an order of priority with regard to different kinds of cases of missing persons, and on the diverse procedural implications that follow for the different case loads handled by judicial and non-judicial mechanisms. Similarly, such consultations could lead to agreements on certain protocols for information-sharing that balance the diverse imperatives of these different mechanisms. Judicial and non-judicial accountability mechanisms address family needs and priorities in different ways, and indeed may well address different but equally important needs. In brief, while the following paragraphs highlight the capacity of truth commissions to further accountability, we see truth commissions and judicial processes as complementary rather than competing accountability mechanisms.

Truth commissions could be particularly valuable in cases where an amnesty prohibits criminal prosecutions, or a fragile peace makes prosecutions too politically volatile and therefore undesirable, or the judiciary is perceived as biased, closely linked to a repressive order and therefore having little legitimacy. In such contexts, a truth commission could be the only avenue to ensuring that victims have access to some measure of accountability that addresses their needs. The work of truth commissions could be particularly valuable in advancing criminal accountability in the long term when, in a different political environment, it becomes possible to repeal amnesty laws and revisit prosecution options. In that context, the work of an earlier truth commission provides an invaluable archive of evidentiary resources gathered at a point in time that is closer to the original crime. Truth commissions can also serve as a valuable avenue for accountability in those cases where the sheer scale of violations makes prosecution of all perpetrators impossible. However, such a pattern may dissuade perpetrators of crimes from participating in the truth commission, in that the information they are providing may incriminate them in the future.

Some truth commissions are empowered to name names in making findings — this can be an important way to provide accountability if the circumstances allow. Such circumstances may include the possibility of impartiality and due process in making findings, prospects of either helping or hindering prosecutions, the political tensions surrounding the process, and so on. When prosecutions are unlikely, and to the extent that truth commissions are focused on collective acknowledgement and collective responsibility, calling individual perpetrators to account through the naming of individual names may be particularly important.

In those contexts where human rights violations such as disappearances reflect the structural divisions of the former system, truth commissions could also focus on accountability between those who benefited from the former system and those who were oppressed by it. Truth commissions could hear from and about the immediate “trigger-puller”, as it were, but because of their broader mandate they could also track the chain of command responsibility to address the intellectual instigators of the crime. Victims and their families often seek accountability on all these levels, and ideally truth commissions should conceive and address accountability on multiple fronts.

In general, truth commissions are also more accessible, are often centred on victim support, are less procedurally complex, and are staffed by legal professionals, social workers and others with human resource training and experience. Invariably, they are also creatures of human rights reform and therefore do not carry the taint of past regimes; in fact, they are often conceived and mandated in response to victim groups. Mechanisms such as public hearings also enable victims’ families and the public at large to follow and participate in the life and work of the truth commission. Thus there may often be a broader sense of ownership over the processes of accountability that the truth commission brings about.

### **Acknowledgement and non-judicial mechanisms**

If conceived and institutionalized in ways that accord with human rights and victim-centred principles, commissions of inquiry are vehicles for those in authority to acknowledge responsibility for human rights violations under their watch. For victims and their families, such commissions could offer a process for official recognition of the factual context in which people went missing, the normative principle that there has been a violation of trust between citizen and State, and the legal legitimation of their claims and complaints.

A truth commission’s use of a very public process in delving into the fate of the missing and the responsibility of those involved can also be an invaluable opportunity for various social players to acknowledge the secrets, lies and injustices of the past. Truth commissions could be particularly powerful instruments of official acknowledgement by State authorities, but they have the potential to be equally, if not even more, powerful avenues for acknowledgement by perpetrators, by those who benefited from a repressive regime, by those who were complicit by their inaction in failing to protest to prevent

repression, and even by society at large. For an engaged civil society, truth commissions could serve as an institutional avenue for the community as a whole to acknowledge and come to terms with its past.

## Reparations

The issue of reparations has emerged as a matter of national significance in countries in transition after years of repression. Following a period of pervasive human right violations, victims and survivors, as well as their families, often suffer from a range of physical and psychological trauma. In addition, they may be living in extreme poverty owing to the loss of their breadwinners, their physical or emotional inability to work and/or additional costs incurred by the investigation to ascertain their missing relative's fate and related legal action. The principle of reparation is to provide some sort of justice by "removing or redressing the consequences of the wrongful acts and by preventing and deterring violations".<sup>6</sup> It includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Both judicial (e.g. judicial sanctions or a judicial decision) and non-judicial mechanisms (e.g. public disclosure of the truth or commemorations) form part of the reparations.<sup>7</sup>

The jurisprudence of the Inter-American Court of Human Rights as well as of specific national jurisdictions such as that of Argentina have increasingly recognized a right to truth.<sup>8</sup> Non-judicial bodies such as the Chilean Commission have also recognized that information is a crucial component of reparations and have classified the disclosure of the truth and the end of secrecy as one of three categories of reparation, the other two being acknowledgement and some measure of compensation.

<sup>6</sup> "Basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law", Annex, "Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law", prepared by Mr Theo van Boven pursuant to Sub-Commission decision, 1995/117, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996, para. 7.

<sup>7</sup> *Ibid.*, para. 15.

<sup>8</sup> The Argentinian Courts have developed an interesting jurisprudence on the right to truth. Notwithstanding the 1987 laws (the "Full-stop law" and the "Due obedience law") seeking to curtail prosecutorial investigation into past human rights crimes, in the mid-1990s families of the disappeared successfully petitioned courts to recognize that victims had a right to truth which the State should take proactive measures to address. Courts recognized that victims needed closure and the ability to mourn their dead and that "the state had an unquestionable obligation to use legal means to reconstruct the past in order to discover facts and thereby give a response to family members and to society." Margaret Popkin *et al.*, "Latin American amnesties in comparative perspective", *Ethics and International Affairs*, Vol. 13, 1999, p. 109.

There are several reparatory measures that may be taken to enhance victims' access to information. In Guatemala, the Historical Clarification Commission has recommended the creation of a National Reparation Programme, comprising *inter alia* a special commission to "search for children who were disappeared, illegally adopted or separated from their families" and to pursue "an active policy of exhumation, as locating clandestine and hidden cemeteries" is "itself an act of justice and reparation".<sup>9</sup> Reparation programmes could involve family support services that give families the necessary investigative, research and legal resources to establish the fate of the missing.

Material reparation programmes could provide acknowledgement in different ways — monetary payments, access to welfare services, release from State obligations for military service, and the like. In some cases the package of reparation programmes could be designed to acknowledge the specific loss suffered by individual victims; thus, the nature and quantum of compensation is tied to the specific injury. In other cases, for pragmatic reasons and/or for reasons of principle, reparation programmes could opt for a more generalized and uniform compensation programme that acknowledges the State's responsibility to the entire class of victims without differentiation. While no amount of money or services can fully compensate for the harm suffered or for the loss of a loved one, even a relatively modest payment can provide critical assistance to victims living in poverty, and can offer important psychological support by acknowledging past violations and providing a tangible official apology. Moreover, such payments can be avenues for ongoing recognition of those injuries and trauma through reparations that extend over a period of time. In addition to recognizing the material plight of the victims, symbolic reparations mobilize the authority of the State to recognize the dignity and value of the missing person, the legal and normative injuries entailed by incidents concerning missing persons, and the emotional and psychological trauma victims have suffered.

Symbolically significant measures could include apologies, monuments, gravestones and a range of other measures. These provide an avenue for acknowledgement that may be particularly significant in meeting families' needs to memorialize their loved ones and the extent of the loss suffered by them and their communities. For society as a whole as well, monuments

9 *Ibid.*

embody the living memory of those who are missing — the aspiration for closure and the enormity of the trauma. Apologies and memorials can be exceptionally valuable in providing very *public* acknowledgement. Perpetrators often achieve impunity by violations, particularly disappearances, taking place in secret; concomitantly, victims often suffer their loss in isolation with little social recognition of the injury inflicted upon them. In this context, publicly memorializing the missing through official apologies and monuments can have enormous symbolic value in acknowledging the missing. Typically, such memorials are most likely to be sources of healing and closure for the families if the families of the missing are consulted in their design and implementation.

In some contexts, reparations programmes may be most useful in acknowledging and addressing the uncertainty that accompanies cases of missing persons. In Argentina, non-monetary reparations included the new legal category of the “forcibly disappeared”; this category is the legal equivalent to death for purposes of the law (allowing the processing of wills and the closing of estates) while preserving the possibility of a person’s reappearance, as well as a waiver of military service and the provision of housing credits for children of the disappeared.<sup>10</sup>

There are at least four different players that may be held accountable in theory: the government in power, society at large, those who benefited from a repressive system, and perpetrators of repression. The government funds most reparation programmes, and to that extent can be taken to hold the State accountable for failing to safeguard its citizens and/or for State officials and State institutions that were directly responsible for the missing. The principle of State accountability as implemented through reparation programmes offers victims some small measure of redress. As was the case in Chile when the reparation programme was inaugurated, redress through reparations is particularly important for those victims who are denied or are unable to access judicial redress through criminal trials or civil suits.

In taking a share of its budget, any reparation programme does hold the government in power responsible for the policy priorities that guide its

<sup>10</sup> Some groups representing victim families in Argentina, most notably Las Madres de la Plaza de Mayo, denounce State reparations and instead demand full disclosure of the fate of their loved ones. However, the majority of families of the disappeared and former political prisoners have accepted the reparations. Priscilla Hayner, *Unspeakable Truths*, Routledge, New York, 2001, pp. 177-178 and pp. 330-331.



budgetary allocation process. However, the government's particular method of financing the line item for reparations can also hold other players accountable. Typically such programmes are funded partly by international aid and partly by internal revenues, including public taxation. If partly financed through the government's routine public taxation process, the reparation programme could be a way of holding society as whole responsible. However, general public funds are not the only option for financing reparation programmes. Corporations or other players who may have benefited from the previous regime can also finance a reparation fund. For example, the reparation programme for victims of slave labour in Nazi Germany is partially funded by a conglomerate of corporations who used slave labour in their factories at the time. Similarly, the South African TRC recommended that a one-off tax on all whites be used for reparations to black victims; this was, in essence, holding the primary beneficiaries of apartheid accountable to its primary victims. Finally, reparation programmes can also be financed directly by perpetrators. While civil suits may be the traditional method of holding perpetrators financially accountable to their victims, there are also alternative methods of doing so. For example in some countries, such as the Philippines, the government has sought to freeze the assets of those responsible for human rights violations, while in Peru the assets recovered from those responsible for the Barrios Altos case will be used to finance reparations for their victims. In this way, the victims not only receive reparations, but those reparations are likely to have an added significance because they have extracted some measure of financial accountability from perpetrators.

### **Conclusion**

There should be recognition that victim families may have diverse and even divergent needs, and therefore are best served by a plurality of mechanisms rather than by any single path. Judicial mechanisms and non-judicial mechanisms are not necessarily two alternative paths; rather they need to find common protocols for sharing of information and other resources to address families' needs for information, accountability and acknowledgement. To maximize effectiveness, we need coordination of those diverse mechanisms, and collaboration between different institutions addressing different aspects of victim needs and priorities.

For instance, in most countries the informational needs of families would be better addressed by bringing together different mechanisms to pool all that is known about all cases of missing persons. To that end, NGOs and

bodies mandated by the State to investigate cases of the disappeared should seek to set up a comprehensive database by marshalling their various areas of expertise, resources and points of access to missing persons' families so as to collate and share information.

All mechanisms should seek to keep victims and victims' families informed and empowered. For example, both judicial and non-judicial mechanisms can develop protocols entitling families to express their views with regard to sentencing, bail, and release hearings in cases concerning their missing relatives. This could be done with family members physically present at such hearings and/or the submission of victim impact statements. Without including families in the conceptualization, design and implementation of mechanisms to deal with cases of missing persons, we risk newly victimizing families in the very processes that were intended to address their injury.

Furthermore, it is crucial that such processes take into account and proactively address issues of language, rural location, gender, poverty, illiteracy and other factors that may inhibit access by victims' families to information, participation in and ownership of the initiatives sponsored by human rights organizations, truth commissions, special prosecutor's offices, government departments and others. This is to some extent also a recognition that in order to ensure a process that has local legitimacy and addresses the priorities and needs of those most affected, a strengthening of civil society is indispensable.

Flexibility and creativity in investigative techniques and procedures are the key to balancing diverse priorities through context-specific approaches. From East Timor to Rwanda to South Africa, a transitional environment has proved fertile ground for institutional innovation, where necessity — be it scarcity of resources, the scale of abuse or the compromises of a negotiated transition — has engendered great creativity and experimentation in the mechanisms that address mass atrocity.

## Résumé

### ***Surmonter les tensions entre les familles et les procédures judiciaires***

*Vasuki Nesiah*

*Les disparitions ont des effets dévastateurs sur les familles des victimes. Le traumatisme est exacerbé lorsque les besoins qu'engendre la situation sont négligés ou niés. Le CICR recense trois catégories de besoins : information, responsabilité et reconnaissance. Cet article examine les mécanismes qui couvrent ces trois catégories en détail, et formule des recommandations à l'intention des acteurs étatiques, non étatiques et internationaux.*

*Les familles des victimes ont des besoins divers, que des mécanismes différents sont plus à même de satisfaire. Ceux-ci devraient prendre en compte les besoins des communautés socialement vulnérables en matière d'accès à l'information, de participation aux initiatives et d'« appartenance ». De plus, si nous négligeons d'associer les familles à la conceptualisation, la mise au point et la création des mécanismes, nous risquons de leur infliger de nouvelles souffrances à travers les processus qui visaient à panser leurs plaies. Pour garantir la légitimité et la pertinence des mécanismes, il est indispensable d'y associer la société civile. Enfin, la flexibilité du mandat, la créativité institutionnelle et des approches adaptées au contexte sont essentielles pour réaliser les diverses priorités.*

## The missing in the aftermath of war: When do the needs of victims' families and international war crimes tribunals clash?

ERIC STOVER AND RACHEL SHIGEKANE\*

*History counts its skeletons in round numbers.  
A thousand and one remain a thousand  
as though the one never existed<sup>1</sup>.*

One hot summer evening in 1999, Kevin Berry and his team of British investigators suddenly found themselves surrounded by a throng of angry villagers in south-western Kosovo. Berry's group was one of over a dozen teams of forensic scientists sent to Kosovo by the International Criminal Tribunal for the former Yugoslavia (ICTY) to investigate a series of massacres allegedly committed by Yugoslav forces earlier that spring. Their mission was to determine if there had been a pattern in the mayhem: What methods did the perpetrators use to dispatch their victims? Were the methods similar at different execution sites? And did the perpetrators make an effort to cover their tracks?

For six sweltering weeks, Berry and his team had worked closely with the inhabitants of Mala Krusa locating and exhuming mass graves in the rubble-strewn village. Then one day a rumour spread there that Berry and his team had gathered all the evidence they needed and would be leaving for another village. "It was a tense moment", Berry recalled. "We'd received orders that afternoon to move on and somehow the villagers had caught wind of it. They were concerned that we would leave with our work unfinished."<sup>2</sup> Faced with a clash between the evidentiary needs of the ICTY for only certain kinds of evidence and the needs of the villagers, Berry opted to stay in Mala Krusa and finish all of the exhumations. "The villagers were right", he said later. "They were waiting for their loved ones to be recovered. It would have been disrespectful to leave."

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Kevin Berry's encounter with the villagers of Mala Krusa illustrates a growing tension that has emerged in the past ten years between the humanitarian needs of families of the missing and the evidentiary needs and limitations of international war crimes tribunals in the aftermath of mass killings. On one side are families who wish to know the fate of their missing relatives and, if they have died, to receive their remains. As the Argentine Forensic Anthropology Team (EAAF), which has conducted exhumations in more than twenty countries over the past sixteen years, notes: "[F]amilies have a desperate need to recover the remains so that they may properly bury them and close – if only partially – the circle of uncertainty."<sup>3</sup> Moreover, under Additional Protocol I to the Geneva Conventions of 1949, families have the right to know the fate of their missing relatives.<sup>4</sup>

On the other side are international war crimes tribunals, which are charged with investigating large-scale killings but may lack the resources or political will to undertake forensic investigations aimed at identifying all of the dead. When a tribunal does levy charges of genocide or crimes against humanity – the two most heinous of all state-sponsored crimes – against suspected high-level perpetrators of mass killings, personal identification of the victims may not be a necessary part of a legal investigation. The charge of genocide, for example, requires that the prosecution prove that the alleged perpetrators committed acts with the intent "to destroy, in whole or in part, a national, ethnic, racial or religious group".<sup>5</sup> As such, particular persons became victims because of how they were perceived by the perpetrators.<sup>6</sup> A forensic investigation will then focus on ascertaining the "categorical identification" of the dead, such as the victims' ethnicity, religion or race, and the

1 Wislawa Szymborska, "Hunger camp at Jasko", in Carolyn Forché (ed.), *Against Forgetting: Twentieth Century Poetry of Witness*, W.W. Norton, New York, 1993, p. 459.

2 Kevin Berry was interviewed by one of the authors (Stover) for National Public Radio in July 1999. Also, see Fred Abrahams, Gilles Peress, and Eric Stover, *A Village Destroyed: May 14, 1999, War Crimes in Kosovo*, University of California Press, Berkeley, CA, 2002.

3 See Mimi Doretti and Luis Fondebrider, "Science and human rights - Truth, justice, reparation and reconciliation: A long way in Third World countries", in V. Buchli and L. Gavin (eds), *Archaeologies of the Contemporary Past*, Routledge, London, 2001.

4 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 (hereinafter Protocol I), Art. 32.

5 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, adopted by Resolution 260 (III) A of the General Assembly of the United Nations on 9 December 1948 Art.2.

6 See William D. Haglund, "Recent mass graves: An introduction", in William D. Haglund and Marcell Sorg (eds), *Advances in Forensic Taphonomy*, CPR Press, New York, 2001, pp. 243-262.

cause and manner of death. Once these attributes have been established, the tribunal usually releases the remains to local forensic scientists to conduct the more difficult process of making personal identifications of the victims. Meanwhile, many families may continue to live with the uncertainty as to whether their missing loved ones are dead or alive.

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 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>7</sup> Finally, while the ICTY has been successful in identifying many of the dead at sites of small-scale massacres, it has chosen, largely for lack of resources, to forgo long-term identification projects at sites where the victims number in the thousands.

In this era of attention to international criminal justice and accountability, we need to develop a new, more comprehensive strategy for identifying and treating the remains of the dead in the aftermath of war, a coordinated strategy that satisfies both the humanitarian needs of the families of the missing and the legal needs of international war crimes tribunals. This article looks at the rationale for developing such a strategy.

### **The search for the missing**

Recent history is replete with examples of situations where the International Committee of the Red Cross (ICRC) and other humanitarian and human rights monitoring organizations have been rendered powerless by

<sup>7</sup> See *The Prosecutor v. Jean Kambanda: Judgment and Sentence*, International Criminal Tribunal for Rwanda, Case No. ICTR 97-23-S, 4 September 1998.

military commanders and civilian leaders who disregard their obligations under international humanitarian law and block access to detainees and other vulnerable groups. One such incident took place in the summer of 1992, when Bosnian Serb authorities repeatedly denied an ICRC delegate access to three concentration camps near the central Bosnian town of Prijedor where thousands of Bosnian Muslims and Bosnian Croats were imprisoned in appalling conditions.<sup>8</sup> Many of the detainees were summarily executed, while others died under torture or were starved to death.<sup>9</sup> It wasn't until a British television crew filmed the emaciated prisoners in one of the camps, sparking international outrage, that the camps were finally closed down.<sup>10</sup>

Another incident took place seven months earlier, on 20 November 1991, when a commander of the Yugoslav National Army (JNA), Army Major Veselin Sljivancanin, stopped an ICRC convoy from entering the grounds of the Vukovar hospital in eastern Croatia where hundreds of civilians were waiting to be evacuated.<sup>11</sup> While the ICRC delegate argued with the JNA officer in an effort to gain access, Yugoslav troops removed 200 lightly wounded soldiers and hospital workers from the hospital and took them by bus to a farm called Ovcara nine kilometres south of the city. As night descended, the soldiers forced the men to stand in a freshly dug pit and then opened fire.

In October 1992, largely as a result of the suspected massacre on the Ovcara farm and the existence of so-called "death camps" in central Bosnia, the UN Security Council appointed a commission of experts to investigate reports of massive violations of international humanitarian law in the former Yugoslavia.<sup>12</sup> Their findings, in turn, prompted the UN Security Council to

<sup>8</sup> One of the camps, Omarska, alone held 3,000 or more prisoners. See *The Prosecutor v. Kvočka et al.: Judgment*, International Criminal Tribunal for the former Yugoslavia, Case No. ICTY IT-98-30/1, 2 November 2001, p. 8.

<sup>9</sup> In its Judgment, the Tribunal noted that: "The evidence is overwhelming that abusive treatment and inhuman conditions in the camps were standard operating procedure (...). Many detainees perished as a result of the inhumane conditions, in addition to those who died as a result of the physical violence inflicted upon them." See *The Prosecutor v. Kvočka et al.: Judgment*, International Criminal Tribunal for the former Yugoslavia, Case No. ICTY IT-98-30/1, 2 November 2001.

<sup>10</sup> Roy Gutman, *Witness to Genocide*, Macmillan Publishing, New York, 1993, p. 63. Two of the camps, Omarska and Keraterm, were closed in August 1992 and a third, Trnopolje, was closed in October 1992.

<sup>11</sup> See Eric Stover and Gilles Peress, *The Graves: Srebrenica and Vukovar*, Scalo, Zurich, 1998, pp. 104-107.

<sup>12</sup> See *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, S/1994/674, 27 May 1994 and Annexes, S/1994/674/Add. 2 (Vol. I-V), 28 December 1994.

establish the International Criminal Tribunal for the former Yugoslavia<sup>13</sup> at The Hague in May 1993 to investigate alleged war crimes committed there following the disintegration of the Yugoslav State. After a Hutu-led slaughter claimed the lives of hundreds of thousands of people in Rwanda between April and July 1994, the UN Security Council established a second ad hoc tribunal in November 1994.<sup>14</sup> Based in Arusha, Tanzania, the International Criminal Tribunal for Rwanda was charged with prosecuting war crimes and acts of genocide committed in that conflict.<sup>15</sup> To gather physical evidence of war crimes the tribunals set up forensic units which, in turn, drew upon the expertise developed by forensic workers while investigating forced disappearances in Central and South America.

In the early 1970s, journalists and human rights groups first used the term “*desaparecido*”, or “disappeared”, to describe a particular form of government practice used to eliminate real and imagined government opponents in Latin America. But those who had “disappeared” hadn’t really disappeared. Most of the “disappeared” had been abducted, tortured in secret detention centres, and then executed, their mutilated bodies discarded by the side of the road or buried in unmarked graves.

The first forensic investigation of the “disappeared” took place shortly after civilian rule returned to Argentina in 1983. Trained by American forensic anthropologist Clyde Snow, a team of medical and archaeology students set out to document the whereabouts of over 10,000 persons who had disappeared during the previous seven years of military rule. Known as the Argentine Forensic Anthropology Team (EAAF), the young scientists began collecting evidence for the trial of the nine members of the military junta. This aspect of their work was short-lived, however, as the new civilian government, faced with a string of military rebellions, enacted a series of laws in the late 1980s that effectively amnestied all but a handful of military and police personnel. Still, the team persisted in their work, fuelled by the conviction that the families of the missing had a right to know the fate of their loved ones and to give them a proper burial.<sup>16</sup>

<sup>13</sup> SC Res. 827, UN SCOR, 48th Session, 3217th Meeting, UN Document S/RES/827 (1993).

<sup>14</sup> SC Res. 955, UN SCOR, 49th Session, 3453rd Meeting, Annex, UN Document S/RES955 (1994).

<sup>15</sup> As of October 2002, 108 individuals are currently in proceedings before both the Rwandan and Yugoslav tribunals. So far, 41 accused have been tried, of whom 35 have been found guilty. See the International Criminal Tribunal for the former Yugoslavia at <<http://www.un.org/icty/>> and the International Criminal Tribunal for Rwanda at <<http://www.ictcr.org>>.

<sup>16</sup> See Christopher Joyce and Eric Stover, *Witnesses from the Grave: The Stories Bones Tell*, Little, Brown, Inc., Boston, 1991, pp. 215-305.



Snow and his Argentine colleagues went on to train forensic teams in Chile and Guatemala in the early 1990s. The formation of the Guatemalan team was prompted by a declaration signed in 1992 by a coalition of family groups demanding a full accounting of the hundreds of thousands of people who were killed during Guatemala's 36-year civil war. "Peace will not come to Guatemala", the family groups declared, "as long as the remains of our massacred relatives continue to be buried in clandestine cemeteries and we cannot give them Christian burials".<sup>17</sup>

Like their Argentine counterparts, the Guatemalan team soon discovered that their findings would be admitted as evidence in only a handful of criminal trials. Consequently they gave priority to performing exhumations for the families of the missing and their communities. During the first days of an exhumation, family members would cluster near the graves. At first, they were often reluctant to speak to the scientists. Likewise, members of the forensic team recognized how important it was to let the relatives approach them at their own pace and in their own way. Invariably, after a day or so a group of women would draw near. A widow might produce a photograph of her missing husband and recount how he had disappeared.

Often not just families, but entire villages, would come to the exhumation sites in Guatemala. In the morning, women from the surrounding villages would kneel next to the grave and pray for the deceased. They would cook hot meals for the scientists during the day and volunteer to heft buckets of earth out of the grave. In the evenings, men from the village would leave their fields, help the scientists to cover the open pits with tarpaulins and carry their shovels and picks back to the villages. Such encounters were extremely important for the families of the missing. For years – even decades – the military, police, and courts had denied them information about their loved ones. Now, in the presence of scientists whose sole aim was to establish the truth, the relatives could begin to regain a sense of control and help in the process of locating their missing relatives.

Led largely by the Argentine and Guatemalan teams, and by two American organizations – the American Association for the Advancement of Science, and Physicians for Human Rights – the search for the disappeared spread in the mid-1990s from Latin America to other parts of the world.

<sup>17</sup> Dawnie W. Steadman and William D. Haglund, "The anthropologist/archaeologist in international human rights investigations", paper presented at the Annual Meeting of the American Academy of Forensic Sciences, Seattle, Washington, 19 February 2001.

By 1999, 97 forensic scientists from 20 countries had travelled, usually at the request not of governments but of family and human rights organizations, to 32 countries to investigate the whereabouts of the missing and to train local forensic scientists in the procedures of unearthing mass graves.<sup>18</sup> Satellite imagery made it possible to generate maps to be used in pinpointing graves hidden in remote locations. Electronic mapping systems had replaced the standard archaeological technique of a baseline and string grid, which meant that the teams could save time and produce more accurate data. Most importantly, advancements in DNA analysis meant they could now identify the remains of individuals that had confounded more traditional anthropological methods.

### **The legal and evidentiary needs of war crimes tribunals**

The first excavation of a mass grave under the auspices of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda took place in the grounds of a Roman Catholic Church in the western Rwandan town of Kibuye in December 1995. Out of the nearly 500 individuals exhumed at the church, leads could be established for only 17 persons.<sup>19</sup> Six carried identifying documents and eleven more had clothing or personal effects recognizable to acquaintances. None had hospital X-rays or dental records. For only two of the victims could surviving blood relatives be located. Soon after the Kibuye exhumation, the Rwanda tribunal ended its forensic programme. In the absence of other efforts to identify the dead, the remains of the vast majority of the victims – numbering in the hundreds of thousands – of the 1994 genocide remain unidentified.

Meanwhile, in the former Yugoslavia, the Office of the Prosecutor (OTP) of the ICTY launched its first investigation of mass graves in the spring of 1996. One of the five sites was the pit on the Ovcarica farm containing what were believed to be the remains of the 200 patients and staff from the Vukovar hospital.

#### **The grave at Ovcarica**

The Ovcarica investigation represents one of the best case examples of how forensic efforts can satisfy both the legal and evidentiary needs of an international criminal tribunal and the humanitarian needs of families.

<sup>18</sup> *Ibid.*

<sup>19</sup> See William D. Haglund, "Recent mass graves: An introduction", *op cit.* (note 6), pp. 243-262.

As of October 2002, 184 of the Ovcará victims have been identified, largely on the basis of DNA analysis, and returned to relatives for burial.<sup>20</sup> This relatively high success rate of identification can be attributed to a concerted effort on the part of the Croatian government to identify the victims, combined with the fact that the war had left Croatia's infrastructure relatively unscathed. Prior to the OTP exhumation, four years were devoted to collecting ante-mortem information; the Croatian government had moreover built a modern, state-of-the-art morgue at the medical school of the University of Zagreb for the exclusive use of OTP investigators. The government also trained Croatian geneticists in DNA analysis so that they could begin analysing the remains of those individuals which the OTP investigators could not identify using traditional anthropological methods.

From a legal and forensic perspective, the prosecution's case against the four accused in the Ovcará indictment was fairly straightforward.<sup>21</sup> The Ovcará case, unlike subsequent investigations in Bosnia and Kosovo, involved a single crime — the murder of 200 people — at one location. Physical evidence of the crime was contained in a single mass grave that had been left undisturbed since the massacre. The OTP had numerous eyewitnesses who could confirm that one of the accused, the then Army Major Veselin Sljivancanin, had ordered the hospital patients onto the buses that took them to their deaths at the Ovcará farm. Other witnesses, mostly survivors of the massacre, could testify that Sljivancanin and the other co-defendants — three military or paramilitary officers — were at the Ovcará farm on the day of the killings.

Finally, a high level of cooperation and information exchange among the organizations of the relatives of the missing, the OTP, and the Croatian government further contributed to the successful outcome. During the investigation, the OTP investigators and Croatian forensic scientists took the time to keep the relatives of the missing informed about developments in the case. Davor Strinovic, the Croatian forensic pathologist who took over the case from the OTP investigators, was especially responsive to the needs of the families. "Dealing with the mothers has been the most painful part of my work", he said later. "For nearly five years, they have waited for some kind of

<sup>20</sup> Davor Strinovic (personal communication), Institute for Forensic Medicine and Criminology, Zagreb, Croatia, 11 October 2002.

<sup>21</sup> See *The Prosecutor of the Tribunal v. Mile Mrksic, Miroslav Radic, Veselin Sljivancanin, Slavko Dokmanovic*, International Criminal Tribunal for the former Yugoslavia, Case No. IT-95-13a-I, 2 December 1997.

news. Is he alive? Is he dead? Some mothers expected a miracle to happen, something God-sent, which would magically return their child. Then the day comes when the body's been identified and I have to inform the mother. I try to break the news kindly, but it is never easy. All those years of hope are shattered in a matter of seconds."<sup>22</sup>

### Genocide at Srebrenica

In contrast to the Ovcara exhumation, the OTP's forensic investigation of the Srebrenica massacre yielded less salutary results for the families of the missing. Uprooted from their homes and villages, the survivors lived in squalid refugee camps and collective centres where they waited for news of their missing relatives. Because the massacre sites were behind enemy lines, they were unable to observe the exhumations and thus come to acknowledge, difficult though it was, that their loved ones might be dead. Denial nurtured hope, and when it was unfulfilled, frustration and anger took its place. At the same time, decisions were being made about the handling and investigation of the remains of the Srebrenica victims in which the families had no say.

The Srebrenica massacre began shortly after the Bosnian Serb army, under the command of General Ratko Mladic, seized the north-eastern Bosnian town on 11 July 1995. Declared a UN "safe area" two years earlier, the predominantly Muslim community had swollen from a pre-war population of 9,000 to 40,000 people, many of whom had been "ethnically cleansed" from elsewhere in Bosnia. As Mladic's troops swarmed over the town, the women, children and elderly took refuge two kilometres away on a UN base, staffed by a Dutch battalion, in the village of Potocari. Meanwhile, the remaining men and boys — some 10,000 to 15,000 — fled through the woods on foot, trying to reach Muslim-controlled territory almost 40 miles away. Over the next three days, General Mladic's army attacked or captured and executed over 7,500 men and boys, leaving bodies where they fell or burying them in graves scattered throughout the hills. The women and children who had taken refuge at the UN base were later transferred to Bosnian Muslim-controlled territory outside Tuzla. From collective centres and hastily erected tents, they began the wait for news of their missing relatives.<sup>23</sup>

<sup>22</sup> Davor Strenovic, quoted in Eric Stover and Gilles Peress, *op cit.* (note 11), pp. 210-211.

<sup>23</sup> Jan Willem Honig and Norbert Both, *Srebrenica: Record of a War*, Penguin Books, London, 1996, pp. 28-47.

On 16 November 1995, four months after the fall of the enclave, the ICTY Chief Prosecutor, Richard Goldstone, levelled additional charges of genocide against General Mladic and his civilian superior, Radovan Karadzic for their role in planning and carrying out the Srebrenica massacre.<sup>24</sup> Four months earlier, the ICTY had also charged the two men with genocide for their role in the bombardment of civilians in Sarajevo.<sup>25</sup> In May 1996, after the spring thaw, Goldstone dispatched a forensic team, assembled by Physicians for Human Rights, to begin the excavation of four of the suspected mass graves in the hills around Srebrenica. By the end of 1996, the scientists had unearthed approximately 517 bodies and assorted “disarticulated” body parts, autopsied them in a makeshift morgue to determine the cause and manner of death, and carefully preserved incriminatory evidence, such as ligatures and blindfolds.<sup>26</sup> The bodies — all unidentified — were then released to the custody of the local Bosnian authorities who, lacking the means to grapple with the Srebrenica identifications, placed them in an abandoned tunnel cut into a hillside in Tuzla. In effect, the OTP had decided that the establishment of the victims’ ethnicity and cause and manner of death would be enough to build their case of genocide against the principal perpetrators of the massacre, and that individual identifications were unnecessary.<sup>27</sup>

In the meantime, the Srebrenica survivors continued to insist that their relatives were alive. Rumours spread through the collective centres that their menfolk were languishing in Bosnian Serb prisons or working as forced labourers in mines across the border in Serbia. Many of the Srebrenica survivors blamed the Muslim authorities and the UN for failing to protect the enclave and prevent the loss of their menfolk. Rallies held by the Srebrenica families on behalf of the missing often turned violent. The most serious incident took place on 2 February 1996, when hundreds of women stormed the ICRC headquarters in Tuzla demanding that greater efforts be made to find their missing men.

<sup>24</sup> See *The Prosecutor v. Karadzic & Mladic: Indictment*, International Criminal Tribunal for the former Yugoslavia, Case No. ICTY IT-95-18, 16 November 1995.

<sup>25</sup> See *The Prosecutor v. Karadzic & Mladic: Indictment*, International Criminal Tribunal for the former Yugoslavia, Case No. ICTY IT-95-5, 24 July 1995.

<sup>26</sup> See Eric Stover and Gilles Peress, *op. cit.* (note 11).

<sup>27</sup> Laurie Vollen, “All that remains: Identifying the victims of the Srebrenica massacre”, *Cambridge Quarterly of Healthcare Ethics*, Vol. 10, July 2001, pp. 336-340.

Much of the women's rage focused on the ICRC's "death certificate" programme. Since the signing of the Dayton Peace Accords in December 1995, the ICRC, in its humanitarian tradition of trying to reunite families separated by war, had collected information on over 20,000 people who had disappeared on one side or another during the war in Bosnia. For a listing to be accepted, the ICRC required that a close relative submit the missing person's full name, father's name, date of birth, place of birth, and date and place where the victim was last seen. It then sent this information to the relevant authorities on the other side. Any answers provided were double-checked against the information provided by the wife and/or other witnesses who may have been present when the man disappeared. If the ICRC delegate was satisfied that the person was deceased, a "Certificate of Death", signed by an ICRC delegate, would be delivered to the family. In addition to ending the agonizing uncertainty, these documents were intended to help the next of kin obtain legal benefits such as pensions. But the death certificate programme caused a backlash; many, though not all, families were unwilling and unable to accept a "paper death". They claimed that their missing relatives were being written off, that the search for clandestine places of detention was inadequate, and that information was no substitute for bodies. In the autumn of 1997, the ICRC discontinued its death certificate programme in Bosnia.<sup>28</sup>

Throughout 1998 and 1999, both OTP and local Bosnian investigators continued to recover thousands of bodies and body parts from the hills of Srebrenica. Meanwhile, Physicians for Human Rights continued to collect ante-mortem information from the relatives of the missing. With no more space left in the tunnel, the remains were placed in containers in a parking lot, which further angered the family associations. Finally, in 2000, the International Commission on Missing Persons, established by President Clinton in 1996 to assist the families of the missing throughout the former Yugoslavia, built a new storage and morgue facility for the Srebrenica remains. The Commission also began an ambitious programme of DNA

<sup>28</sup> In *The Missing: ICRC Report (Summary of the Conclusions Arising from Events Held prior to the International Conference of Governmental and Non-governmental Experts, 19-21 February 2003)* the ICRC states: "A death certificate alone might not be enough to induce belief in the death of a missing person. The authorities that issue death certificates have a responsibility, as does the ICRC when it delivers information on death, to ensure the authenticity of the information contained therein; the certificates should include information on the cause of death and the availability of the human remains."

testing to identify the remains recovered from Srebrenica and throughout the former Yugoslavia.<sup>29</sup>

Today, nearly seven years after the fall of Srebrenica, over 500 victims have been positively identified, largely through DNA analysis.<sup>30</sup> While recent DNA testing is showing promising results, identifying the dead from Srebrenica has proved more difficult than naming the remains exhumed from other mass graves in Bosnia and Croatia. Indeed, the statistical odds have been stacked against the Srebrenica investigators. Unlike the deceased in the Ovchara grave, the remains of the Srebrenica victims were spread over a large area and the vast majority had been stripped of personal documents, jewellery, and other potential leads to their identity. Bodies left in the open fell prey to scavengers who scattered the remains. In an effort to cover their tracks, Bosnian Serb soldiers used earth-moving equipment to exhume some of the graves and redeposit the remains in secondary graves. In the process, the remains were disarticulated, commingled, and crushed.<sup>31</sup> 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 and skills to do efficient investigative work themselves and thus set back the identification process by years.

### Widespread killings and command responsibility in Kosovo

The OTP's next large-scale forensic investigation of war crimes in the former Yugoslavia began in mid-June 1999, days after NATO tanks rumbled into war-torn Kosovo. Over the next three months, the OTP shuttled more than 300 forensic scientists from 14 countries in and out of the region in what soon became the largest international forensic investigation of war crimes — or possibly of any crime — in history. Scotland Yard, the Royal Canadian Mounted Police and the FBI all sent teams, as did police agencies in Germany, Denmark, France, Belgium, the Netherlands and Switzerland. The FBI team, consisting of 64 people and 107,000 pounds of equipment,

<sup>29</sup> See the website of the International Commission of Missing Persons, <<http://www.ic-mp.org/icfact.asp>>.

<sup>30</sup> Edward Huffine (personal communication), International Commission of Missing Persons, 29 September 2002. According to Huffine, the total number of positive identifications of the Srebrenica dead will be near 1,000 by early 2003.

<sup>31</sup> Testimony of William Haglund, *The Prosecutor v. Krstic*, International Criminal Tribunal for the former Yugoslavia, Case No. ICTY IT-98-33, 29 May 1999, T. 3722.

even brought heavily armed agents from its Hostage Response Team to provide on-site security.

The forensic teams were charged with collecting physical evidence in support of an ICTY indictment issued against Yugoslav President Slobodan Milosevic and four high-ranking military and civilian leaders on 24 May 1999. The indictment charged the five co-defendants with crimes against humanity and violations of the laws of war for having “planned, instigated, ordered, committed or otherwise aided and abetted in a campaign of terror and violence directed against the Kosovo Albanian civilians living in Kosovo of the Federal Republic of Yugoslavia”.<sup>32</sup> The core of the tribunal’s indictment was based on detailed accounts of massacres Yugoslav forces carried out against civilians in seven villages and towns throughout the province.

The most serious charge against Milosevic and his co-defendants was “crimes against humanity”.<sup>33</sup> The term originated in the Preamble to the 1907 Hague Convention, which codified the customary law of armed conflict. In 1915, the Allies accused the Ottoman Empire of crimes against humanity. Thirty years later, in 1945, the United States and its Allies incorporated it in the Nuremberg Charter,<sup>34</sup> which served as the corpus juris for levying charges against Nazi leaders following World War II. Crimes against humanity encompass a wide range of abominable acts – mass murder, extermination, enslavement, deportation, rape, torture – committed against civilians on a large scale.

Whilst Milosevic and his co-defendants faced serious charges for their actions in Kosovo, punishable with life imprisonment, the OTP’s forensic investigators had some serious investigative work ahead of them. In effect, they had to prove, beyond a reasonable doubt, that the crimes Yugoslav forces committed in villages and towns across Kosovo were not just an accident but had been planned and were *widespread and systematic*. As in the case of Srebrenica, the investigators did not need to identify every victim. Instead, they had to establish whether the victims were civilians and if the manner in which they were killed was similar in each of the seven villages and towns named in the indictment.

<sup>32</sup> *The Prosecutor v. Milosevic et al. : Indictment*, International Criminal Tribunal for the former Yugoslavia, Case No. ICTY IT-02-54, 24 May 1999, para. 90.

<sup>33</sup> Statute of the International Criminal Tribunal for the former Yugoslavia, adopted by UN Security Council Resolution 827 on 25 May 1993, Art. 5.

<sup>34</sup> The Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, of 8 August 1945, Art. 6(c).



“In the absence of direct evidence of a plan to massacre these people”, the OTP’s Deputy Prosecutor Graham Blewitt said in July 1999, “we have to rely on circumstantial evidence. So proving patterns is important. We have to demonstrate that the tactics used by Yugoslav military, police, and paramilitary units in say, village A, were the same as those in village B, on or about the same day and thereafter in village C and village D. We don’t have to prove every single murder, or every single massacre, we just need to select a sample of these so that we can prove a pattern of killing and destruction aimed against civilians.”<sup>35</sup>

Blewitt’s most difficult task in Kosovo, as it had been in the Ovcara and Srebrenica cases, was establishing “command responsibility” – namely, that Milosevic and his co-accused had either ordered or, having known that crimes were taking place, had failed to take all necessary and reasonable measures to prevent subordinates from committing such acts.<sup>36</sup> Establishing the chain of command in Kosovo would require gathering testimonies from Kosovar Albanians who had witnessed war crimes in the seven villages and towns named in the indictment. It also meant obtaining documentary evidence, such as orders of troop deployments, notes from high-level meetings and intelligence intercepts of telephone conversations, that would demonstrate a systematic plan, conceived and implemented at a high level, to kill and terrorize civilians in those seven locations. Finally, establishing the chain of command would require an enormous forensic effort to exhume the mass graves in those areas to determine how the victims had been killed and disposed of. “Our aim in the forensic area,” Blewitt said in July 1999, “is not to identify every single victim. We just don’t have the resources to do it.” In essence, the forensic experts were in Kosovo to corroborate witness testimonies and documentary evidence by identifying some of the victims of mass killings, determining how they had died, and demonstrating that the systematic and widespread nature of the killings suggested they had been planned in high places.

Given these evidentiary priorities, the OTP’s forensic teams, with a few exceptions, did not set up formal procedures for gathering ante-mortem

<sup>35</sup> Graham Blewitt, quoted in Abrahams, Peress, and Stover, *op. cit.* (note 2), p. 75.

<sup>36</sup> The principle enunciating the responsibility of command responsibility derives from the principle of individual criminal responsibility applied by the Nuremberg and Tokyo Tribunals. It was subsequently codified in Art. 86(2) of Protocol I.

information from the relatives of the missing. Nor did they routinely take bone or teeth samples from the remains they exhumed for future DNA analysis. In addition, the teams were under a great deal of pressure to investigate as many massacre sites as possible and to report their findings back to The Hague. This put the investigators in a difficult position vis-à-vis the local villagers who were waiting anxiously for the remains of their relatives to be exhumed and identified.

Today, nearly four years after the end of the war, approximately 4,500 bodies have been recovered from mass graves throughout Kosovo.<sup>37</sup> Of these, half have been identified.<sup>38</sup> Some of the identifications are a legacy of the ICTY's efforts immediately following the war. But many of the dead have been identified by local and international teams working solely for humanitarian purposes. Many of the bodies originally autopsied by ICTY forensic teams were left unidentified and then reburied haphazardly, without proper identifying markers. This has caused problems for forensic teams working with the United Nations Interim Administration Mission in Kosovo (UNMIK) and the International Commission on Missing Persons which later re-exhumed the bodies for identification purposes. In September 2002, the Commission launched a large-scale DNA-led identification process, similar to the programme underway in Bosnia.<sup>39</sup> In the meantime, the relatives of the missing have staged protests and hunger strikes throughout Kosovo, demanding that the process of identifying the dead be accelerated.

### **The humanitarian needs of families**

No large-scale, cross-cultural study has ever been conducted to understand the long-term psychological impact of disappearances on the relatives of the missing. But anecdotal evidence and country-specific studies indicate that relatives of the missing can suffer "a sustained shock" as a result of "the anguish and pain caused by the absence of a loved one".<sup>40</sup> Without the

<sup>37</sup> ICTY investigators have also observed the exhumations of the remains of hundreds of Kosovar Albanians who were killed by Yugoslav forces during the war in Kosovo and later transferred to Serbia and buried in clandestine graves.

<sup>38</sup> Jose-Pablo Baraybar, Director, Office on Missing Persons and Forensics, United Nations Interim Administration Mission in Kosovo (UNMIK), Press Statement, Pristina, Kosovo, 29 September 2002.

<sup>39</sup> Press Statement, UNMIK, Pristina, Kosovo, 24 September 2002.

<sup>40</sup> Amnesty International, "*Disappearances*": A Workbook, Amnesty International USA Publications, New York, 1981, p. 109. Also see Gregory J. Quirk and Leonel Casco, "Stress disorders of families of the disappeared: A controlled study in Honduras", *Social Science and Medicine*, Vol. 39, No. 12, 1994, pp. 1675-1679.

remains of loved ones, families are caught in a limbo of “ambiguous loss”, torn between hope and grief, unable to return to their past or plan for the future.<sup>41</sup>

Without bodies and funerals, the relatives of the missing are often unable to visualize the death of their loved ones and accept it as real. Nor can they fulfil their religious and communal obligations to the dead. Funerals express the emotional links of the living to the dead, be they of respect or grief. In some cultures and religious groups funerary rituals are explicitly carried out for the dead, but they are also rites of passage for the principal survivors, a mechanism for restoring the rent in the social fabric caused by death. Bosnian Muslims, for instance, view bereavement as an experience to be shared, strengthening the solidarity of family and community. For days and weeks after the burial, women and men may hold separate and, at times, collective prayers, or *tevhids*, for the departed. The most important aspect of the *tevhid* for the traditional Bosnian Muslim woman, in the words of anthropologist Tone Bringa, “is fulfilling her obligation to care for the spiritual well-being of deceased persons with whom her household has had close social relations, whether they were relatives, neighbors, or friends”.<sup>42</sup> For the Srebrenica survivors, and especially the women, the absence of bodies has robbed them not only of funerary ritual but of the visual cues that would help them to acknowledge the death of their loved ones and to pass through the states of mourning and grief.

When neighbours, friends and relatives join together to recite, eat, and talk at a *tevhid*, they bring the loss of the individual into the larger community. In her study of the reburial of bones from the Second World War in Yugoslavia, Katherine Verdery found that “[b]urials and reburials serve both to create and to reorder the community”.<sup>43</sup> They do so by bringing people together, through exchanges of food and objects, and through limiting the “community of mourners, all of whom think they have some relation to the dead person”. In defining a group of mourners, funerals strengthen the sense that the individual does not suffer the grief alone.

Experience in several countries suggests that involving family members as observers at forensic exhumations can have positive results, especially if

<sup>41</sup> See Pauline Boss, *Ambiguous Loss: Learning to Live with Unresolved Grief*, Harvard University Press, Cambridge, Mass., 1999.

<sup>42</sup> See Tone Bringa, *Being Muslim the Bosnian Way: Identity and Community in a Central Bosnian Village*, Princeton University Press, Princeton, N.J., 1995, p. 194.

<sup>43</sup> Katherine Verdery, *The Political Lives of Dead Bodies: Reburial and Postsocialist Change*, Columbia University Press, New York, 1999, pp. 107-108.

they are able to observe both the technical skills required and the care that is taken to honour the dead.<sup>44</sup> At the level of the individual, involving family members in tracking down ante-mortem information to help identify the deceased, such as medical records and X-rays, can partly ease feelings of helplessness or guilt for not having done more to find a missing relative. At the community level, exhumations can become a commemorative event that can facilitate the process of mourning. If conducted under the aegis of local or international institutions, exhumations can help individual mourners and whole communities to receive acknowledgement of their loss and move forward in the grieving process.<sup>45</sup> The presence of family members at exhumations can also remind the forensic investigators of the human difference their work is making.<sup>46</sup>

According to Amani Trust, a Zimbabwean human rights organization, many family members of the missing in the western province of Matabeleland have gone through tremendous psychological suffering because they have been unable to bury and mourn their dead according to local custom. In the Ndebele culture the dead play a significant role in the well-being of the living, and those who have not been given a proper burial can return as “a restless and vengeful presence, innocent yet wronged, aggrieved and dangerous to the living”.<sup>47</sup> In order for an ancestral spirit to fulfil its true task in protecting the family, it needs an honourable funeral followed by another traditional ritual known as “*umbuyiso*”. During the winter months, approximately a year after the initial funeral, family elders take a goat to the grave of the deceased and allow his or her spirit to climb onto the animal’s back. The spirit is then conveyed to the family home, where it goes through a ritual of being reintroduced to the living, and of being welcomed as an ancestor. This process brings the person’s soul out of the wilderness and into the home to rest and to watch over the living.

In contrast to the legally-motivated exhumations of the ad hoc international criminal tribunals, Amani Trust conducts exhumations and reburials solely at the request of the families of the missing. “Our work is not about the

<sup>44</sup> See Doretta and Fondebrider, *op cit.* (note 3).

<sup>45</sup> Harvey M. Weinstein, “Where there is no body: Trauma and bereavement in communities coping with the aftermath of mass violence”, paper presented at the ICRC Workshop on Support for Families of People Unaccounted For, Geneva, Switzerland, 10-11 June 2002.

<sup>46</sup> Luis Fondebrider, “Reflections of the scientific documentation of human rights violations”, paper presented at the ICRC Workshop on Human Remains: Law, Politics, and Ethics, Geneva, Switzerland, 23-24 May 2002.

<sup>47</sup> See Shari Eppel, “Healing the dead to transform the living: The preventive implications”, paper presented at the International Seminar on Torture and Organized Violence in the 21st Century, 24-26 January 2001, Copenhagen, Denmark.

exhumation of hundreds or thousands of skeletons in a short space of time”, writes Shari Eppel. “We are more concerned in exhuming a few graves and working closely with the families and communities over several years, in order to gain a more thorough understanding of how the process of exhumations and reburials can transform the lives of families and restore the social fabric” in the wake of widespread political violence.<sup>48</sup> For instance, in the five adjacent villages where the Amani Trust has worked for the past four years, the collection of ante-mortem records from family members is used to conduct informal “testimony therapy”. Over consecutive visits family members are encouraged to recall the complete history and habits of the deceased, something they may never have had the opportunity to do since the death. Amani workers also prepare family members for the pitfalls of exhumations, including the real possibility that the remains of the deceased may not be located or may reveal, upon post-mortem examination, that the deceased suffered great physical trauma prior to death.

Some individuals, families and entire communities in post-war societies may find it too painful to go through the process of identifying the dead, especially if the effort will take years. Or they may have other cultural needs that preclude individual identifications. Many of the Srebrenica survivors, for instance, believe that the construction of a memorial and a collective burial site for the anonymous dead should take precedence over individual identifications. In 2000, these survivors lobbied successfully for a commemorative site to be built at a location near where the massacres took place. Their active participation in choosing the site and in its planning and design gave the survivors a sense of control over their own needs and ultimately of the mourning process that had been denied them for so many years.

These findings suggest that families should have more than just “a right to know the fate” of their missing loved ones; they should also be actively involved in the legal and humanitarian efforts to locate, exhume, rebury and memorialize the dead.<sup>49</sup>

<sup>48</sup> *Ibid.*

<sup>49</sup> Psychologists dealing with survivors of trauma have long postulated that personal efficacy is a major determinant in recovery. In recovering from trauma, Judith Herman argues that “[n]o intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest”. See Judith Herman, *Trauma and Recovery: The Aftermath of Violence from Domestic Abuse to Political Terror*, Basic Books, New York, 1992, p. 134. Another way of examining this phenomenon is through the “control over one’s destiny” hypothesis, developed by Leonard Syme, who holds that control over one’s destiny refers to the ability “to influence the events that impinge upon our lives”. According to Syme’s research, a great sense of control in one’s life often leads to better health outcomes. See S. Leonard Syme, “Social and economic disparities in health: Thoughts about intervention”, *The Millbank Quarterly*, Vol. 76, 1998, pp. 493-505.

### **Integrating humanitarian and legal needs**

At the beginning of the 21st century armed conflicts are increasing in number and ferocity. There are now over fifty wars raging in various parts of the world, and dozens of hot spots which could explode into violence at any moment. Meanwhile, the international community has finally taken seriously its obligations to prosecute war criminals.<sup>50</sup> This in turn has created a growing demand for forensic expertise to investigate reports of war crimes and human rights abuses worldwide. In its 2000 report, the UN Office of the High Commissioner for Human Rights stressed that “the growing number of national conflicts generating gross and massive human rights violations has provided more impetus to the need to resort to forensic and related experts to identify the victims”.<sup>51</sup> This demand has resulted in the formation of nine forensic teams and programmes within non-governmental organizations dedicated to the medico-legal investigation of violations of international human rights and humanitarian law. The UN, through its Commission on Human Rights, has also created a list of 487 forensic experts who are available for human rights fact-finding missions.<sup>52</sup>

As more forensic scientists enter this growing field, the need to develop scientific and ethical standards and protocols relating to the exhumation and post-mortem examination of the remains of the missing is becoming apparent. Such guidelines should ensure that forensic investigations into the fate of the missing are conducted in a manner that serves the best interests of the families as well as bringing those responsible for these crimes to justice. After a year of consultations with forensic scientists, military personnel, legal experts and representatives of family and human rights organizations, the ICRC has called on forensic scientists working in the missing persons context to demonstrate a level of professionalism that goes beyond simply adhering to scientific standards. Forensic specialists, the ICRC argues, must also:

<sup>50</sup> Besides the two ad hoc international criminal tribunals for Rwanda and the former Yugoslavia, a permanent International Criminal Court has been established to try persons accused of war crimes, crimes against humanity, and genocide. The Statute of the International Criminal Court, of 17 July 1998 (which entered into force on 1 July 2002) can be found at <<http://www.un.org/law/icc/statute/.htm>>.

<sup>51</sup> *Report of the United Nations Office of the High Commissioner for Human Rights*, E/CN.4/2002/67, 21 January 2000.

<sup>52</sup> *Ibid.* The UN has also produced two documents – *Manual for the Prevention of Extra-Legal, Arbitrary and Summary Executions* and *Guidelines for the Conduct of United Nations Inquiries into Allegations of Massacres* – that set out the standards and procedures for investigating war crimes and violations of human rights.

- be qualified and competent to work in the process of exhuming and conducting post-mortem examinations of the remains of missing persons;
- advocate the development of a process to identify the dead and observe and record all crime scene and post-mortem information potentially relevant to identification;
- refrain from destroying material that may be used for future identification purposes;
- consider the families' rights and needs before, during, and after exhumation;
- be familiar with the pertinent provisions of international humanitarian and human rights law, and promote their incorporation in forensic training programmes; and
- know the ethical boundaries of their work.

The underlying message is that forensic scientists must recognize that they have an obligation to the legal institutions that retain their services *and* to the families of the missing.

The ICRC has also recommended that an international network of forensic scientists be established to work on behalf of missing persons.<sup>53</sup> This network should be guided by the principle that “[i]dentification for purposes of informing the family and returning remains is *just as important* as providing evidence for criminal investigations and constitutes due recognition of the rights of the families [emphasis added]”. It should, among other things, develop and disseminate standards of practice and codes of ethical conduct; accredit laboratories to undertake DNA analysis; help train local and regional forensic teams which will be best suited to deal with local cultural customs and traditions; lobby governments to make forensic expertise and material resources available for national and international work; speak out on behalf of forensic scientists who face persecution for their professional activities; and develop mechanisms for debriefing and providing psychological assistance to forensic scientists.

In our view, such a network should be inclusive rather than exclusive. Its governing boards should include forensic scientists as well as representatives of family, human rights and humanitarian organizations; jurists who have worked with the ad hoc war crimes tribunals; anthropologists who are familiar with bereavement and funerary rituals in varying cultures and social

<sup>53</sup> *The Missing: ICRC Report, op cit.* (note 28), p. 65.

settings worldwide; and mental health professionals experienced in post-war situations. The network should facilitate rather than dictate. Such an institution must not internationalize the search for the missing to such an extent that it undermines the capacity of local governmental and non-governmental institutions to develop culturally appropriate responses to what are ultimately local problems. The network must ensure that the families of the missing and the organizations that represent them have a voice in the processes that guide forensic investigations into the fate of the missing.

### Conclusion

In the winter of 1984, before leaving on his first forensic mission to Argentina to investigate the fate of the “disappeared,” the American anthropologist Clyde Snow told a meeting of scientists in New York City: “Of all the forms of murder, none is more monstrous than that committed by a state (...). Maybe it’s time for the forensic scientists of the world to (...) go after the biggest game of all.”<sup>54</sup> Eighteen years later, Snow and his colleagues can take pride in the contributions they have made to international criminal justice and the rule of law worldwide. The evidence these forensic scientists have so painstakingly collected has helped put dozens of war criminals and human rights violators behind bars. With the aid of DNA analysis, they have also helped countless families and communities to learn the fate of the missing and move forward in the grieving process.

Such progress notwithstanding, the challenge we face in today’s increasingly violent world is to keep the primacy of international criminal law from supplanting our obligations to the living. Forensic scientists must continue to advocate for the dead. But, in doing so, they must not lose sight of the needs and rights of the survivors for whom justice is also sought.

<sup>54</sup> Clyde Snow quoted in Joyce and Stover, *op cit.* (note 16), p. 217.



## Résumé

### ***Les personnes portées disparues au lendemain d'un conflit***

*Eric Stover et Rachel Shigekane*

De plus en plus, les tribunaux pénaux internationaux pour l'ex-Yougoslavie et le Rwanda font appel à des experts légistes pour réunir des preuves scientifiques des massacres liés à des actes de génocide et des crimes contre l'humanité. D'une manière générale, ces investigations n'ont permis d'identifier qu'un petit nombre de défunts parce que les tribunaux ne disposent pas de ressources nécessaires pour mener des enquêtes approfondies, ou parce que les besoins en matière de preuve n'imposent pas d'identifier toutes les victimes. Entre-temps, les familles des personnes portées disparues sont laissées dans l'incertitude d'une « perte ambiguë », déchirées entre l'espoir et le chagrin, incapables de revenir sur le passé ou de se tourner vers l'avenir. Sans dépouille et sans funérailles, elles sont souvent dans l'incapacité de visualiser le décès de l'être cher et d'en accepter la réalité. En application du Protocole additionnel I aux Conventions de Genève de 1949, les familles ont le droit de connaître le sort de leurs proches. Afin de faciliter l'exercice de ce droit, il conviendrait de créer un réseau international d'experts légistes qui serait chargé d'élaborer et de diffuser des lignes directrices et des normes pratiques, ainsi que de coordonner les enquêtes humanitaires sur le sort des personnes portées disparues. Le réseau devrait être guidé par le principe qu'il est tout aussi important d'identifier les disparus que de recueillir des preuves pour les enquêtes pénales.

## Developing standards in international forensic work to identify missing persons

STEPHEN CORDNER AND HELEN MCKELVIE\*

“Forensic expertise in human rights investigations serves four purposes. On a humanitarian level, the aim is to help families uncover the fate of their loved ones. The investigation also serves as documentation to set the historical record straight. The purpose is furthermore to uncover legally admissible evidence that will result in the conviction of those responsible for the crime. Ultimately it is hoped that such investigations will deter future violations by demonstrating through forensic documentation and litigation that those responsible will be held accountable for their actions.”<sup>1</sup>

The structures to protect the neutrality and impartiality that forensic scientists take for granted in their domestic contexts do not exist in the context of identifying missing persons. Furthermore, biomedical ethics, despite the explosion in its literature in recent decades, has generally had little to say about rights and obligations with regard to human remains. Finally, technical standards which could be applied to the context of missing persons either do not exist, or need to be adapted. This article traces the background of the role of forensic science in identifying missing persons and outlines some recommendations for developing standards and best practice guidelines with a view to fulfilling the objectives both of families of the missing and the evidentiary needs of tribunals.

### Evolution of international forensic work

It is 55 years since the first systematic medical investigation of human rights abuses was used as evidence in an internationally recognized tribunal — the testimony of British Army pathologists (amongst others) in the trial held in Nuremberg for war crimes involving “medical experimentation” by

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twenty Nazi doctors (and three others). After this 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. At that time there were a number of developments. Notably the National Commission on Disappeared Persons was established by President Alfonsín in Argentina, after thousands of citizens had been arrested, detained, tortured and killed by agents of the reigning military junta between 1976 and 1983. During 1984 and 1985, under the auspices of the American Association for the Advancement of Science (AAAS), a team of forensic practitioners was able to provide crucial evidence to the 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>2</sup>

The actions of the forensic team in Argentina were not an isolated undertaking, as similar efforts were occurring at other locations in South America and elsewhere. In the early 1980s US human rights groups received requests for assistance from medical action groups in Chile, the Philippines and El Salvador “to help document abuses, expose official complicity and break down the walls of impunity”.<sup>3</sup> Missions of inquiry were set up under the auspices of a number of organizations, including the (US) National Academy of Sciences, the International League for Human Rights and the American Public Health Association, as well as the AAAS. Back in the US, dissemination of their findings via congressional committee hearings and at professional conferences created a groundswell of awareness amongst health professionals. “Interest in the public health consequences of human rights abuses and the application of public health and medical skills to curtailing these abuses was beginning.”<sup>4</sup>

It was in this context that Physicians for Human Rights (PHR) was formed in 1986.<sup>5</sup> PHR’s ongoing campaign is underpinned by a dual philosophy. First, many human rights violations have significant health consequen-

1 R. Kirschner and K. Hannibal, “The application of forensic sciences to human rights investigations”, *Medicine Science and Law*, Vol. 13, 1994, p. 453.

2 Kirschner and Hannibal, *op. cit.* (note 1), p. 451.

3 K. Hannibal and R. Lawrence, “The health professional as human rights promoter: Ten years of physicians for human rights (USA)”, *Health and Human Rights*, Vol. 2, No. 1, p. 112.

4 *Ibid.*, p. 113.

5 Over the last 16 years PHR, based in Boston, has sent more than 75 medical and forensic teams to dozens of countries to carry out forensic investigations, including exhumations and autopsies of deceased victims of alleged torture and extrajudicial executions in Brazil, Israel, Czechoslovakia, Guatemala, Honduras, El Salvador, Iraqi Kurdistan, Kuwait, Mexico, Panama, Rwanda, Thailand, the former Yugoslavia and very recently, Afghanistan. <<http://phrusa.org/research/forensic/croatia/forvuk3.html>>.

ces for entire communities, and not just for direct victims. Secondly, health professionals are uniquely situated to collect the medical documentation that provides concrete evidence of human rights violations. This documentation is more credible and less vulnerable to challenge than traditional methods of case-reporting and is far more difficult to refute than oral or written testimonies of abuse, no matter how well corroborated by witnesses.<sup>6</sup>

Other instances in which forensic scientists have been called upon to investigate human rights violations, outside the context in which PHR has been working, relate back to the Second World War. In the late 1980s and early 1990s various countries, believing themselves to be harbouring alleged Nazi war criminals, enacted laws to deal with the possible violations of human rights. In the case of Australia, investigations associated with these laws resulted in the exhumation of three mass graves in the Ukraine, involving respectively 800 (approximately), 123 and 102 victims. Forensic scientists from Sydney travelled to the Ukraine to perform the exhumations and examine the remains. The experience gained in this context proved very useful for those who subsequently took responsibility for investigations carried out for the purposes of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>7</sup>

The primary emphasis for the international forensic work described here has been on making evidence available to enable prosecution of those accused of perpetrating human rights violations. This emphasis is highlighted by some text from the PHR website:

“PHR believes that the dead have powerful stories to tell and that accountability provides the most secure foundation for future respect for human rights and humanitarian law, assigning individual accountability for what is often seen as collective guilt. By giving voice to the voiceless, PHR hopes to ensure that the innocent victims do not die in vain. That their stories are heard and their killers brought to justice.”<sup>8</sup>

Over the last decade, while the need for evidence for prosecutorial purposes has not diminished, the needs of the victims’ families have gained increased recognition. This is described most eloquently in the report of the Commission for Historical Clarification in Guatemala. Following many

6 <<http://www.phrusa.org/research/forensics/index/html>>.

7 G. Blewitt, “The role of forensic investigations in genocide prosecutions before an international tribunal”, *Medical Science Law*, Vol. 37, No. 4, 1997, pp. 286-7.

8 <<http://www.phrusa.org/research/forensics/index/html>>.

years of human rights violations and acts of violence connected with armed confrontations in that country, one of its primary recommendations is for a national reparation programme, including an active policy of exhumation:

“The Commission believes that exhumation of the remains of the victims(...) is in itself an act of justice and reparation and an important step on the path to reconciliation(...) because it constitutes part of the right to know the truth and it contributes to the knowledge of the whereabouts of the disappeared(...) it dignifies the victims because the right to bury the dead and to carry out ceremonies for them according to each culture is inherent in all human beings.”<sup>9</sup>

In the context of international forensic work, the rights of families to have remains properly identified should be appropriately recognized.

### The branches of medicine and science involved

Table 1 lists those who may be involved in the forensic investigation of international human rights violations.

#### Forensic scientists: a collective term

Table 1

Medicine/Health Care	Science	Other Professionals
Forensic pathology	Anthropology/osteology	Crime scene examiners
Clinical forensic medicine	Molecular biology (DNA)	Evidence handlers
Forensic odontology	Radiography	Photographers
Medical epidemiology	Archaeology	Interviewers
	Ballistics	Liaison
	Firearms and toolmark examiners	Police
	Entomology	Ordinance experts
		Mortuary technicians
		Logistics & administration
		Fingerprints experts

Table 1 emphasizes the reality that there is no such individual as a “forensic scientist”. For the purposes of this paper, the term denotes a class or group of areas spanning medicine, science and technical fields. The composition of any

9 <<http://hrdata.aaas.org/ceh/report/english/recs3.html>>.

investigatory team will be determined by many factors — logistics availability, the task to be performed (size, location, etc). Depending on the context, the team might be a unit spread across a number of different authorities.

### **International guidelines and protocols**

Part of the collaborative efforts of human rights activists and medical personnel since the 1980s has been to establish requirements for sound documentation that can be relied upon in litigation. Again, the emphasis has not explicitly been on the families' rights to know the truth about the disappearance of their loved ones and to be able to lay their remains to rest. Between 1984 and 1988 a human rights group in the US, the Minnesota Advocates for Human Rights, consulted with forensic experts from a number of countries and drew up the "Protocol for Preventing Arbitrary Killings through Adequate Death Investigation and Autopsy" (the "Minnesota Protocol"). When the United Nations (UN) became more active in the area, the Minnesota Protocol was incorporated into general principles for the prevention of deaths and adequate medico-legal investigations that were drafted and then adopted by the United Nations Economic and Social Council (Resolution 65) and the General Assembly in 1989. In 1991 the UN published the *Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, which includes the principles and a number of protocols to provide States with technical guidance for the conduct of investigations, plus a model autopsy protocol and one for the disinterment and analysis of skeletal remains. The appendices contain charts and diagrams to assist with post-mortem detection of torture and the reporting of injuries consistent with torture.

As far as missing persons are concerned, the *Manual* deals with identification of human remains as a part of the investigation process, rather than as an end in itself. It provides for families to make heard their complaints about the inadequacy of initial investigations, and to be entitled to any information arising out of any subsequent inquiry, including being represented at an autopsy. (This presupposes that the family have some knowledge of the whereabouts of their relative's remains, which is not always the case.) The *Manual* also sets out the right of families to fair compensation if their family member has been a victim of extrajudicial execution. Overall, there is only an implied, not explicit, right to know the fate of loved ones.

As the need for UN involvement in investigating serious human rights violations increased, responsibility for this was taken on by the UN Commission

for Human Rights (UNCHR). In 1992 a resolution was passed that created a standing team of forensic experts and other professionals to support their work in investigating massacres and other human rights violations (1992/24). Each year the UNCHR requests that the UN Secretary-General consult with governments around the world to extend the list of experts able to join the Standing Team. (In reality this “Standing Team” is just a list, without the resources and logistical support required to provide it with the wherewithal to act as its name implies.) Resolution 1992/24 establishing the Standing Team does not mention the right of families to have remains identified, and does not appear to have been part of the motivation for the creation of the team.

UN resolutions that followed the creation of the Standing Team aimed to facilitate the implementation of the *Manual* and the establishment of training opportunities to ensure the availability of forensic expertise in countries where these needs were not being met. The rights of families were recognized with regard to ensuring the continuation of the family unit. In Resolution 1993/33, the UNCHR focused on the need to help reunite “children of disappeared persons forcefully separated from their parents with their surviving relatives”.<sup>10</sup> Resolution 1994/31 also stressed that the mandate of the Standing Team of experts was to facilitate the reunification of families.<sup>11</sup> In the early 1990s reports of the UN Secretary-General made indirect reference to the effects on families of summary executions and enforced disappearances.<sup>12</sup> It was not until 1998 that the Secretary-General referred directly to a “right” in relation to identification of human remains — his report described the programme established in the former Yugoslavia for “the excavation of mass graves and exhumation of mortal remains for the purpose of identifying deceased missing persons, returning the remains to the families concerned and thereby responding to the right of families to know the truth about the fate of their loved ones”.<sup>13</sup>

### **Forensic investigations for the International Criminal Tribunal for the former Yugoslavia and in East Timor**

In February 1993 and November 1994 the international community, through the United Nations, established two international criminal tribunals

<sup>10</sup> E/CN.4/RES/1993/33 Preamble and para. 3.

<sup>11</sup> E/CN.4/RES/1993/31, para. 3.

<sup>12</sup> See E/CN.4/1993/20, 5 February 1993, para. 3 and E/CN.4/1993/20 para. 18.

<sup>13</sup> E/CN.4/1998/32, 5 January 1998, I, D, 3.

to prosecute individuals responsible for certain international crimes committed in the former Yugoslavia and Rwanda. The tribunals were not established under a convention, but as a measure adopted by the Security Council acting under Chapter VII of the UN Charter. This means that all member States of the UN (including Rwanda and the States that make up the former Yugoslavia) are bound to comply with the requests, warrants and orders issued by the tribunals. This may be contrasted with the Statute of the International Criminal Court (described below), which States may choose to ratify or not. The tribunals are the international community's first attempt since Nuremberg and Tokyo to apply the rule of law to serious violations of international law occurring during war or ethnic violence.

The ICTY has the power to prosecute four types of crimes — grave breaches of the Geneva Conventions, violations of the laws and customs of war, crimes against humanity, and genocide, while the International Criminal Tribunal for Rwanda (ICTR) has jurisdiction over serious violations of common Article 3 of the Geneva Conventions and Additional Protocol II, crimes against humanity, and genocide. The Prosecutor in both tribunals has a dual role: to investigate the commission of crimes, and to prosecute those alleged to be responsible for perpetrating them. The investigation necessarily involves gathering enough evidence from all available sources to establish the accused's guilt "beyond a reasonable doubt". The Deputy Prosecutor of the ICTY, Graham Blewitt, affirms PHR's stance on the role of forensic evidence: "[it] often provides unequivocal corroboration of what could otherwise be suspect or dubious evidence".<sup>14</sup>

The involvement of forensic experts in the investigation process is by way of invitation from the Prosecutor's Office. PHR was called upon to collaborate in conducting the first exhumations of human remains from four sites in Bosnia. These exhumations provided cogent evidence and corroborated allegations that serious violations of international humanitarian law had occurred. The findings of the forensic practitioners corroborated witness testimony regarding the execution of hundreds of men who had surrendered to Bosnian Serb soldiers after attempting to flee following the Bosnian Serb takeover of Srebrenica in the summer of 1995. Ligatures around the wrists of many of the bodies, the presence of blindfolds and the close-range bullet wounds contradicted the claims of Bosnian Serbs that the mass graves contained bodies of soldiers killed in the course of legitimate military activities.<sup>15</sup>

<sup>14</sup> Blewitt, *op. cit.* (note 7), p. 284.

<sup>15</sup> *Ibid.*, p. 288.



Even with the UN Standing Team of experts and the advent of the International Criminal Tribunals for the former Yugoslavia and Rwanda, arrangements for engaging forensic expertise to investigate allegations of war crimes and other human rights abuses are less than ideal. For example, different contracting bodies have been involved in organizing forensic teams to investigate allegations in the former Yugoslavia. During the armed ethnic conflict in Kosovo in December 1998 the Federal Republic of Yugoslavia and the European Union had some discretion to intervene. One measure in this intervention was to deploy a team of Finnish forensic experts to investigate allegations of mass graves near the capital, Pristina, on the basis of a protocol of cooperation between the Institute of Forensic Medicine of Belgrade University and the Department of Forensic Medicine of Helsinki University.<sup>16</sup> Later, in 1999, the forensic investigations in Kosovo were conducted under the auspices of the ICTY when the Chief Prosecutor requested the aid of the international community and received positive responses from Austria, Belgium, Canada, Denmark, Spain, Sweden, the UK, Australia and the USA. Forensic experts from these countries took part in investigations in the summer and autumn of 1999.<sup>17</sup>

In East Timor, forensic investigations into the alleged massacre of East Timorese following the independence vote in 1999 were complicated by the failure to establish an international tribunal. The UN arrangements for governing East Timor included efforts to investigate deaths, but there was not the same level of coordinated activity and resources brought to bear as in the former Yugoslavia. The paucity of the pre-existing infrastructure complicated matters severely and a comparison with the organization of investigations in the former Yugoslavia is probably therefore not warranted. Responsibility for the investigations was divided between the police and the Human Rights Unit, which had a wide remit extending well beyond forensic investigations.

### **International Criminal Court**

The Rome Statute, which establishes a permanent international court to prosecute those accused of international crimes, came into force on 1 July 2002.

<sup>16</sup> J. Rainio, K. Lalu and A. Penttila, "Independent forensic autopsies in an armed conflict: Investigation of the victims from Racak, Kosovo", *Forensic Science International*, Vol. 116, 2001, p. 166.

<sup>17</sup> S. Sprogøe-Jakobsen *et al.*, "Mobile autopsy teams in the investigation of war crimes in Kosovo 1999", *Journal of Forensic Science*, Vol. 46, No. 6, 2001, p. 1392.

This significant event in world humanitarian affairs means there will now be a permanent forum, as opposed to the *ad hoc* tribunals established to deal with the occurrences in the former Yugoslavia and Rwanda, to hear cases against individuals accused of committing genocide, crimes against humanity, war crimes and the crime of aggression (once a definition of the latter offence has been agreed).<sup>18</sup> These crimes represent some of the most serious possible offences against the person. As in domestic practice and in the international tribunals, there is likely to be a strong medico-scientific evidential base for many of the matters dealt with by the court. This will include the evidence of doctors who have been working in the field in regions of the world where there has been major civil and military conflict. Many of these medical practitioners will have been engaged in the provision of clinical medical services to civilians displaced by armed conflict or indeed targeted by political, civilian or military groups. Such doctors will be able to provide medical evidence of the effects of torture, rape, and physical and emotional deprivation associated with detention. In addition, medical evidence may be available in regard to such matters as nutrition, public health and infectious disease control. This is in addition to the forensic scientists' role in death investigation.

One of the most significant difficulties in establishing an expertise basis within the International Criminal Court will be that there are few international standards for the practice of forensic medicine and science. For example, forensic pathology as a discipline is well recognized in countries whose approach to justice is based on the English legal system, but is less well recognized in countries following European jurisdictional models. Indeed, the individual medical speciality of forensic pathology is not recognized at a registration board level in many European countries, although the specialized area of medico-legal practice is recognized. Such medico-legal practice encompasses both clinical and forensic pathology services, as well as medical examinations performed for civil judicial processes. Different medical speciality structures have implications for standards governing both qualifications and practice in any context where forensic medical or pathology expertise is central to the outcome.

### **Setting standards for international forensic work**

#### The tension between justice and identification

A core issue is the tension between justice and identification. In discussing "The role of forensic investigation in prosecutions for genocide

<sup>18</sup> Rome Statute of the International Criminal Court of 17 July 1998, Art. 5.

before an international criminal tribunal”,<sup>19</sup> Graham Blewitt, Deputy Prosecutor of the ICTY, wrote of their vital role in corroborating “allegations that serious violations of international humanitarian law, including genocide, had occurred”.<sup>20</sup> He also wrote: “following the exhumation in Bosnia and Croatia, all the bodies underwent autopsies by a team of forensic pathologists to determine the cause and manner of death *and the demographic profile of the victims*. Evidence of personal identification was also collected. At the completion of the autopsies, all remains and personal effects were returned to the relevant government officials for the ongoing identification process and the return of the victims’ remains to their families”.<sup>21</sup>

It is no criticism of the ICTY, as Blewitt has pointed out, that individual identification was not a primary aim of the death investigations it initiated.<sup>22</sup> Identification was not necessary for the Tribunal’s purposes and the resources required to mount a mass disaster victim identification exercise are of a higher order of magnitude than those required to undertake death investigations for justice purposes. The ICTY had neither the resources nor the time. Notwithstanding that some of the remains, for example from Srebrenica, have been stored (not reburied) pending formal identification by the International Commission on Missing Persons, in many instances where examinations of human remains were performed, the remains were reinterred to be later re-exhumed for identification purposes. There are a number of issues at stake here relating to the dignified handling of the remains, the respect accorded to the surviving family members and the duties of the forensic specialists involved, as well as the obligations to assist the proper course of justice.

A number of conclusions may be made in that regard:

- current human rights documents relating to forensic sciences do not adequately address the rights of families to know the fate of their relatives;
- it must be recognized that a mark of civilization is that dead people are identified. Authorities must ensure that the examination of human remains and their identification are undertaken by qualified and competent people. The former should be the responsibility of a medical practitioner who is a qualified forensic pathologist. (Obviously this may require modification in some contexts.) Such a person, quite apart from

<sup>19</sup> Blewitt, *op. cit.* (note 7), p. 288.

<sup>20</sup> *Ibid.*, pp. 277-8.

<sup>21</sup> *Ibid.*, p. 288. Emphasis added.

<sup>22</sup> A Danish-Swedish team of forensic scientists working for the ICTY have also made this observation. Sprogøe-Jakobsen *et al*, *op. cit.* (note 17), p. 1395.

having qualifications, skills and experience, is a professional whose practice exists within an organized ethical framework and who can be held accountable for error or unethical practice;

- during the course of an examination of remains, forensic specialists have an ethical duty to observe and record all information and retain appropriate samples potentially relevant to identification.

This last point resonates strongly with some guidance in the World Health Organization publication *Ethical Practice in Laboratory Medicine and Forensic Pathology*.<sup>23</sup> It is suggested that forensic pathologists owe a duty to the deceased to see that the true cause and circumstances of the death or deaths are revealed. Although not explicitly stated, this duty could be fulfilled only if the true cause and circumstances are revealed to those who matter — the family and the authorities. If this is the case, the family can be informed only if the deceased is identified. The guidance goes on to discuss the content of the duty owed by the pathologist and concludes that it is: “(...) to exercise at least a reasonable degree of care and skill in his or her work (...) [to produce] valid and useful observations and conclusions (...)”.

To understand what this means in practical terms requires an understanding of the basic aims of the forensic autopsy. These are as follows:

- to discover, describe and record all the pathological processes present in the deceased and, where necessary, the identifying characteristics of the deceased;
- to relate these processes to the known medical history of the deceased, to draw conclusions about the cause of symptoms and signs observed in life and then to draw conclusions about the cause of death and other medical and non-medical factors contributing to death;
- to contribute to the reconstruction of the circumstances surrounding the death. Where these circumstances are important or likely to be in dispute, this will require consideration of the scene of the death as well as the relevant autopsy observations, many of which may be of trivial medical consequence; and
- in accordance with good medical practice, to record all the relevant observations and negative findings, and to retain specimens, so that another pathologist at another time is in as good a position as possible to come to his or her own conclusions about the death. This will often involve reliance on good quality, preferably colour, photography.

<sup>23</sup> S. Cordner, M. El Nageh, D. Wells, H. McKelvie and B. Lineham, *Ethical Practice in Laboratory Medicine and Forensic Pathology*, WHO Regional Publication, Eastern Mediterranean Series 20, EMRO, 1999, p. 37.

It is axiomatic that the proper forensic examination of human remains should encompass all those observations and procedures which are necessary and practicable to enable, perhaps at a later time, identification of the human remains. None of the foregoing in any way derogates from the serious justice-related purposes of the examination, it is simply intended to underscore the equivalent importance of identification.

### Problems with lack of standardization

Problems could arise from the lack of clearly articulated and universally accepted standards of practice and documentation of the work involved. The Danish-Swedish forensic autopsy teams working in Kosovo from July through to October 1999 describe using a template for autopsy reports modified from one previously used in Bosnia and adapted to the special requirements in Kosovo. "ICTY did not define how the results should be presented: the only instructions given were that the investigations should be performed according to 'national standards'."<sup>24</sup> In another instance, the main role of a Finnish team working in Kosovo in January 1999 was to affirm the impartiality of autopsies performed on bodies found in the village of Racak, where there were conflicting stories about the course of events leading to the deaths. The Finns worked with four local Yugoslav forensic pathologists and two from Belarus. For the autopsies they themselves performed, the Finnish authors described using "standard methods of forensic pathology (...) in accordance with the guidelines set by the United Nations and Interpol",<sup>25</sup> whereas for those autopsies which they observed for monitoring purposes and which were performed by a Yugoslav professor, they reported that "standard methods of forensic pathology" were employed and that "documentation was similar to that" used by the Finnish pathologists.<sup>26</sup> From these descriptions, it is not clear what real differences there may have been in the methods and documentation employed, but anyone who has been aggressively cross-examined about discrepancies in medical evidence can imagine how these differences may be used to discredit otherwise sound evidence, thereby significantly undermining a prosecution case.

Differences in "national standards" and practical and ethical understandings clearly have potential to compromise the utility of evidence for prosecutions. In 1998, a Finnish team working with practitioners from Belgrade

<sup>24</sup> Sprogøe-Jakobsen *et al*, *op. cit.* (note 17), pp. 1392-3.

<sup>25</sup> Rainio *et al*, *op. cit.* (note 16), p. 173.

<sup>26</sup> *Ibid.*, p. 177.

were investigating claims made about Serbs having been killed by ethnic Albanians in Klecka and Volujak. The information received from the presiding District Court was that “several persons” had been killed and buried in Volujak, and that 22 persons, including women and children, had been killed and cremated in Klecka. “By using morphological, anthropological, odontological and DNA analyses, the Volujak remains were shown to contain most likely the bones of five adult males and the Klecka remains, the bones of three adult male victims”.<sup>27</sup> When the Finnish team arrived in Kosovo, the remains from Volujak had already been delivered to the university in Pristina, so that they were unable to document and verify the chain of custody of the remains, or that all the remains located in both areas had been submitted for investigation, or even that they were from the area from which they were purported to have been collected.<sup>28</sup>

### Best practice guidelines

Best practice guidelines should facilitate observance of agreed ethical and technical standards, especially where pressures to deviate may be present. They will also serve as objective standards against which individual national standards may be compared, for example, by the International Criminal Court. The guidelines need to be disseminated and promoted within the forensic community and should include reference to the use wherever possible of local skills.

Other issues at stake for forensic scientists (many of which are familiar in a domestic context) include the importance of the neutrality and independence and therefore impartiality of forensic scientists. The contracting agency consequently must be of a kind which is compatible with these values and which undertakes to respect and support them. The contract should set out clearly the mandate which authorizes the work being contracted. It should also recognize the roles and responsibilities of the forensic scientist and the importance of adherence by him/her to relevant guidelines. The forensic scientist needs to conduct him/herself in ways that do not infringe this impartiality. Secondly, arrangements need to recognize the right of families to information. Subject to the integrity of the investigation and the wishes of families, involvement by families in the processes leading to identification (e.g. exhumation) will generally be beneficial (facilitation of data collection, improved confidence in conclusions, therapeutic

<sup>27</sup> *Ibid.*, p. 171.

<sup>28</sup> *Ibid.*

psycho-social effects). Thirdly, there needs to be recognition by forensic scientists of the accepted principles of protection of personal information, including genetic information. Before exhuming or identifying remains, forensic scientists will want to be assured:

- that procedures are in place to inform and return remains to families;
- that procedures are in place to inform and, if necessary, return the remains to the authorities;
- about the way in which their findings may be used in the domestic and international criminal justice systems and how their work will affect the political process;
- that they and the families understand the legal framework within which they will be working.

Finally, forensic scientists will need to acknowledge and understand the serious pitfalls associated with involvement in this type of work. Apart from the possibility of physical danger, forensic scientists can wittingly, unwittingly or by virtue of poor practice, participate in violations of human rights.

### **Identification and the use of DNA analysis**

Identification can be made in three ways:

- visually (relatives or acquaintances viewing the remains);
- circumstantially (e.g. matching ante-mortem data with information gathered during the autopsy; other circumstantial information);
- scientifically or objectively (e.g. by dental records, fingerprints or DNA).

There is some overlap between these in practice. They do not necessarily represent an order of priority, but as identification becomes more difficult, the emphasis moves down the list. Whenever possible, a visual identification should be supplemented with one of the other two methods. Obviously, depending on the weight of circumstantial evidence, it may need to be supported by objective evidence.

The use of DNA techniques alone, and early in the process, is superficially an attractive and simple option. There are, however, many considerations before they can be used at all. First of all, public perception must not overwhelm science. Before DNA techniques are given primacy over traditional identification methods, the following criteria should be met:

- the techniques as they will be used in practice must be reliable and valid;
- the associated information technology for analysis and matching must be reliable and valid;
- additional costs must be outweighed by additional social benefit.

Particular issues concerning the handling of sensitive information will arise, for example how to deal with the situation when DNA testing reveals that a man might not be the father of a particular child previously thought to be his. Using DNA as a sole identifying method may put relatives under duress to provide blood samples, may preclude the use of sound, simple means of identification and, like most laboratory processes, is not entirely infallible. For all these reasons, it would be wrong for laws to be passed requiring mandatory DNA testing prior to formal identification. Given the public profile of DNA techniques and their essentially humanitarian purpose when applied to identification in the context of the missing, commercial considerations should be minimized by the laboratory performing the work. The public profile may also raise false hopes of rapid identification of large numbers of deceased soon after the events leading to mass deaths.

The field is developing so rapidly that familiarity with the required techniques is variable. Related issues of cost and logistics, not to mention privacy, add to the complexities. Further work should be carried out on the question of accrediting DNA laboratories engaging in the identification of missing persons.

### **International forensic science practice in the future**

As indicated above, there are at present few formal standards designed for international practice in forensic science including the core disciplines of forensic pathology, anthropology, odontology and the others listed in Table 1. There are no credential or qualifying procedures for forensic pathologists practising internationally. There are some standards covering domestic practice. Probably American pathologists have gone the furthest in setting standards for different types of autopsies.<sup>29</sup> A major standard alongside the Minnesota Protocol is the Interpol Disaster Victim Identification Form Set.<sup>30</sup>

<sup>29</sup> G. Hutchins, Autopsy Committee of the College of American Pathologists, "Practice guidelines for autopsy pathology: Autopsy performance", *Archives of Pathology and Laboratory Medicine*, Vol. 118, 1994, pp. 19-25, and "Practice guidelines for autopsy pathology: Autopsy reporting", *Archives of Pathology and Laboratory Medicine*, Vol. 119, 1995, pp. 123-130; The Royal College of Pathologists, *Guidelines on Autopsy Practice*, <<http://www.rcpath.org>>; K. Bove, Autopsy Committee of the College of American Pathologists, "Practice guidelines for autopsy performance: The pre-natal and paediatric autopsy", *Archives of Pathology and Laboratory Medicine*, Vol. 121, 1997, pp. 368-376; J. Powers, Autopsy Committee of the College of American Pathologists, "Practice guidelines for autopsy pathology: Autopsy procedures for brain, spinal cord and neuromuscular systems", *Archives of Pathology and Laboratory Medicine*, Vol. 119, 1995, pp. 777-783.

<sup>30</sup> Available from the Interpol website <<http://www.interpol.int>>.



Any development of standards for operational practice in the international domain would be advised to pay due regard to these well-established documents. The latter in particular, having been used countless times, has an established infrastructure keeping it under review and is well understood by police forces around the world.

Given the importance attached to the competence of forensic scientists for the task, and the reliability and validity of their observations and conclusions, it is recommended that an international body or network of forensic scientists be established. No such global organization currently exists. The International Association of Forensic Science (IAFS) has the correct name, but its Articles limit it to running an international conference every three years and any change in its constitution takes at least six years, as it must be approved at two subsequent meetings. Other organizations with transnational forensic and/or human rights interests would need to be consulted in establishing such a body or network.<sup>31</sup> It should have responsibility for:

- drawing together the different disciplines of forensic science;
- disseminating guidelines and standards of practice;
- evaluating ethical issues;
- professional credentials;
- providing advice to contracting bodies and forensic scientists;
- audit and evaluation of field activities;
- language issues (translation and professional lexicon);
- lobbying governments to make forensic expertise and material resources available for international work;
- lobbying for “clearing houses” on national or regional bases for dealing with missing people.

This rather daunting list of responsibilities should be discharged without creating a centralized bureaucratic organization.

One of the consequences of implementing this approach in the international arena will be the realization that in many countries, the standards are such that their practitioners will not be able to operate at the required

<sup>31</sup> These include World Medical Association; Indo Pacific Association of Law Medicine and Science (INPALMS); World Association of Societies of Pathology; Physicians for Human Rights; European Network of Forensic Science Institutes; American Society of Crime Laboratory Directors (this organization accredits many laboratories outside the US); European Academy of Forensic Sciences; and International Academy of Legal Medicine.

level in an international environment. This imposes a further responsibility on the international forensic community, namely to provide supported, formal, training opportunities for practitioners from the developing world in the full range of forensic disciplines necessary to meet the required standards. Such training is particularly required for the core disciplines of forensic pathology, anthropology and odontology. As far as the authors are aware, there are no organized training programmes for trainees from the developing world funded on a recurrent basis and leading to opportunities to obtain appropriate qualifications. This gap urgently needs to be addressed.

### **Conclusion**

The forensic sciences are widely regarded as the tools of justice. In the context of missing persons they possess profound humanitarian capacities and skills which can help survivors, affected communities and families, assist justice, set straight the historical record and deter future violations. Effective achievement of these outcomes relies upon competent performance producing valid results in particular cases. This requires standards which are established, agreed and adhered to.

## Résumé

### ***Élaborer des normes en matière de travail médico-légal pour l'identification des personnes portées disparues***

*Stephen Cordner et Helen McKelvie*

*L'identification des personnes décédées revêt une importance humanitaire manifeste. La plupart des pays disposent des systèmes nécessaires pour accomplir cette tâche. Dans les situations de dislocation de la société, fréquentes au lendemain d'une guerre, d'une insurrection et de violations flagrantes des droits de l'homme, les familles ont désespérément besoin de savoir ce qu'il est advenu de leurs proches. Le système pénal international naissant n'a souvent pas besoin de connaître l'identité des personnes décédées pour établir la réalité d'un crime et la culpabilité de l'accusé. En outre, il arrive que ceux qui réalisent l'examen n'aient pas été désignés en fonction de leurs qualifications ou d'une évaluation de leurs compétences. Les valeurs internationales et les normes techniques régissant l'action des experts législatives intervenant dans un contexte international sont relativement peu développées. Elles doivent l'être si l'on veut que des observations fiables conduisent à des conclusions que pourraient reproduire des experts compétents.*

## Reflections on the scientific documentation of human rights violations

LUIS FONDEBRIDER\*

The recovery, analysis and identification of the remains of people killed in natural and man-made disasters and outbreaks of political violence have become a key element of both humanitarian operations and judicial investigations in the last thirty years. Governmental and non-governmental bodies, both domestic and international, have become actively involved in such procedures through the participation of forensic doctors, police, lawyers and firemen and the use of other resources.

For the families of those who have disappeared, the uncertainty over whether a loved one is dead or alive is agonizing. Such uncertainty is compounded when a disappearance is the result of political violence. After an earthquake or a plane crash, the State is usually a prime mover in the search for bodies. Families can normally turn to a State agency for information. They will be offered support and sometimes psychological counselling. As society mobilizes on their behalf, the tragedies of individual families are transformed into a collective experience of loss. But where the State itself is responsible for a disappearance, the family will suffer far greater uncertainty, anguish and isolation. They also face the prospect that the agents responsible for this kind of disappearance — usually the security forces — will conceal the victim and may even attempt to eliminate all traces of the body after death.

This article examines the particular challenges to be overcome in searching for and identifying those victims whose disappearance and death is a direct result of domestic political violence.

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### **Politically-motivated disappearances and deaths**

Although it was the wars in the former Yugoslavia which finally attracted global attention to these issues, politically-motivated kidnappings, torture and extra-judicial executions have been widespread in Third World countries for over forty years. In a high proportion of cases the bodies of the disappeared are hidden, or attempts are made to destroy them. Cadavers left out in the open will usually be discovered soon after the time of death. But when an attempt has been made to conceal a body, usually through burial, discovery will tend to come about in one of the following ways:

- the body has been buried in a very shallow grave and becomes exposed through the foraging of animals or other environmental processes;
- the body is uncovered by accident: during road building for example, when a shovel or other equipment strikes bone;
- finally – often years after death – remains may be found by investigators who are actively looking for them, after a change of government or political climate has made such investigations permissible, even desirable.

In most countries said to be “dealing with the past” and where investigations have been conducted following periods of political violence, the wishes of victims’ families have often been overlooked by investigators. In particular, the desire to establish responsibility for the crime and see justice done in a broader sense can be regarded as taking second place to the more immediate task in hand.

Consideration of the psychological, judicial, political, economic and humanitarian consequences of exhuming — and maybe identifying — human remains is a vital part of the beginning of any investigation. What appears as a clear-cut scientific and technical operation may involve complex and ambiguous boundaries, as well as unexpected ethical dilemmas.

### **Legal necessities, humanitarian necessities**

The mechanisms used to investigate human rights violations in the recent past have varied from one country to another. Broadly speaking, there have been two kinds of instruments: truth commissions, both national and international; and tribunals, both local and international. Truth commissions tend to pursue a historical line of enquiry, while tribunals follow a juridical process.

Between 1984 and 1987, Argentina became one of the first countries to use these instruments to initiate extensive investigations, exhuming the remains of large numbers of disappeared people, establishing the cause and

manner of death, then attempting to identify them and return them to their families. Subsequently other countries in the region, first Chile, then later Guatemala and El Salvador, underwent similar processes. In the mid-nineties Ethiopia, Rwanda and South Africa followed suit, emulated soon after by States of the former Yugoslavia: first Croatia, then Bosnia and Kosovo, where investigations are continuing today. Every human rights investigation of disappearances and executions now has a forensic component.

The use of forensic science in the documentation of human rights violations has raised questions and spawned social situations without precedent in most peoples' experience. These are not ordinary crimes, but extraordinary, massive violations, in which the State is often the main perpetrator. Forensic analyses carried out by local professionals may therefore be compromised, a risk explained in part by the fact that in many Third World countries and fledgling democracies, political and executive powers can constrain the functioning of the judiciary, impeding the way that justice is administered. Moreover, the families of victims tend not to trust functionaries of the same State which abducted their loved ones, even if a new regime is in power.

The participation of the United Nations makes a huge difference in the course of an investigation. When the UN intervenes directly in an enquiry (as, for example, in the Truth Commissions in El Salvador and Guatemala, the international ad hoc tribunals for the former Yugoslavia and Rwanda, and the UN Mission to East Timor) many political, financial and logistic problems are resolved or circumvented. This in turn facilitates forensic investigation and analysis. The drawback is that relations with the victims' families become distorted, because they are often left uninformed and excluded from the investigation process in a way which would be unthinkable in the investigation of an "ordinary" domestic murder or disappearance. In our experience it is advisable to work with a local organization which includes victims' families as much as possible. Families can be valuable sources of information and their rights should not be diminished because their loved ones were the victims of mass, not individual, crimes.

Another aspect to consider is whether a judicial case can be built, or whether it is preferable to simply retrieve the remains for humanitarian reasons. Here, it is worth reflecting on long-term implications. In many of the places where these investigations take place, there is a power vacuum. Far away from capital cities, the State's presence may be diffuse and legislation

on procedures for exhuming and analysing human remains may not exist. Who has custody over the gravesite? Where should the remains be stored? Who has authority to analyse them? In many cases, assumptions regarded as normal in the United States and Europe cannot be made. For example, if the excavation of a grave will take more than a single day, the site should remain under police custody whenever investigators are not there. It can be very difficult to meet this requirement if the site is difficult to access, or too dangerous even for a police officer to stay overnight. Such dilemmas are common when the UN is not involved. Most often there is a compromise, and some standards are met while others are not. If the investigation is meant to provide legal evidence, procedural errors — such as gaps in the chain of custody — can make it harder to argue for the legal validity of the evidence. It is also important to consider the different timeframes and objectives of truth commissions and tribunals. A judicial proceeding can be extended for many months, but a commission does not have that option.

### **Identification and cause of death**

The identity of a cadaver or skeleton and the cause of death are the two most common issues that a judicial authority or forensic scientist seeks to resolve. But the answers cannot always be prompt or definitive. From the point of view of the family, the identification is undoubtedly crucial, since it ends the period of uncertainty that began with the disappearance. But the identification process becomes more complicated the longer the body has decomposed.

Also significant in many cases is the fact that the overwhelming majority of victims are very poor. Largely peasants or indigenous people with cultural patterns different from those of the investigators, they may never have had access to medical or dental care. This means that they simply will not have possessed any of the records often used to compare with skeletal remains. Therefore the usual parameters for making identifications in urban contexts may not apply.

The use of DNA has brought enormous changes to forensics and criminology, and to the identification process. Contrary to popular belief, however, it is still very difficult to extract DNA from bony remains, because of contamination of the tissue which occurs during the years of burial. In addition, there are very few laboratories in the world available to process large numbers of these kinds of samples. Furthermore, judiciaries and families in most Third World countries do not have the resources to afford their services.

This has led to a common scenario in which exhumations are carried out, but then the unidentified remains are put into storage indefinitely at a forensic institution, with no further attempt to identify them.

Lack of access to certain scientific and technical processes can cause efforts to be focused on establishing the cause of death, rather than on identification. Legal requirements thus take precedence over the families' humanitarian needs. Before embarking on any case, be it the exhumation of one or two bodies or a large-scale, internationally-sponsored investigation, careful thought should be given at the outset to this balance of interests and needs – with due consideration and priority given wherever necessary to the wishes of the families.

### **The impact on the families**

Regardless of cultural, ideological or religious differences, there are similarities in the impact of a disappearance on families which have experienced periods of political violence. The relatives of a person who has forcibly disappeared first of all suffer the sudden kidnapping of a child, sibling or spouse whom they never see alive again. They have no news of their loved ones and are left in total ignorance of their fate, not knowing whether they are dead or alive, precisely because the authorities responsible for the disappearance refuse to give them information. Moreover, the justice system does not investigate their cases and so for years they live in limbo. Even in countries where families know that their relatives have most likely been assassinated, they still cling to the hope that they may return alive. Until their bodies are found or their death is confirmed, there can be no funeral rites and no final answers. Thus in almost every case there is affliction, fear and a deeply disrupted family life, together with a desperate need to recover the remains so they can give them proper burial and close – if only partially – the agonizing circle of uncertainty.

During excavations, relatives often ask to be present throughout the entire process, and in some places — such as Iraqi Kurdistan and Ethiopia — have even worked alongside us, because they say that it helps fulfil their need to do something more for their loved ones. So while the archeologists are mindful of the methodological constraints, they also work within a much broader — so to speak — human landscape, because in many cases they become emotionally involved with the relatives and their stories. The forensic work is made more transparent and understandable for the victims' relatives when they are able to observe the forensic team and ask us questions directly.



To sum up, in every process involving scientific documentation of human rights violations, above and beyond the appropriate technical procedures the needs and wishes of the victims' families ought to be soberly and respectfully considered and never regarded as an afterthought.

### **Conclusions and recommendations**

The habitual – and in our view, mistaken – procedure often followed is to open a grave first and conduct the rest of the investigation afterwards. We propose the following general procedures for investigation, which have proved to be the most effective in our experience in over twenty countries.

In cases that require exhumation, the investigation should be organized in three phases, which are closely interrelated and should preferably be carried out in the following order:

- prior to the exhumation, an investigation of written and oral sources to reconstruct the case history and elaborate a working hypothesis;
- fieldwork, which includes the retrieval of the body and associated evidence, whether from the discovery site or from a regular grave;
- laboratory work for the corresponding analysis of remains and other physical evidence.

It may not always be possible or desirable to follow this order, and the phases may overlap with each other. When bodies are discovered accidentally, for example, the second phase prompts the investigation, so the historical investigation can only follow.

In human rights cases in particular, it is often assumed that the medical expert witness can deal with the whole array of tasks, which may in fact go beyond his experience. Another difficulty observed is a general lack of dialogue about the case as a whole among prosecutors, physicians, and criminologists – to mention the three most common components of an investigation. Expert witnesses, regardless of their specialization, are technical assistants to the prosecutor, who orders the investigative measures that he deems necessary. If the prosecutor is unaware of what information can be derived, from a scientific point of view, from a cadaver or bloodstain at the discovery site, it may be difficult to know whether the expert examination presented in court is complete. As different areas of expertise and specialists from various fields are involved, only a multidisciplinary approach can lead to a successful outcome.

## Resumé

### ***Réflexions sur la documentation scientifique des violations des droits de l'homme***

*Luis Fondebrider*

*L'utilisation de la médecine légale dans la documentation scientifique des violations des droits de l'homme a créé de nouveaux défis pour les professionnels. Il ne s'agit pas d'élucider des crimes ordinaires, mais de travailler sur des actes commis à grande échelle, dont l'État est souvent le principal auteur. Dans les processus de violence politique, la disparition d'un être cher est une immense souffrance pour la famille, qui ignore si la personne est vivante ou décédée. Les experts de la médecine légale et les hommes de loi concernés doivent donc se pencher, avant d'engager une enquête, sur les conséquences psychologiques, judiciaires, politiques, économiques et humanitaires de l'exhumation de restes humains et des efforts déployés pour les identifier. Ce qui, à première vue, semble constituer une opération purement technique et scientifique a peut-être des limites complexes et ambiguës, de même qu'une dimension éthique.*

## Management, exhumation and identification of human remains : A viewpoint of the developing world

ALEX KIRASI OLUMBE AND AHMED KALEBI YAKUB\*

It is sadly ironical to note that the regions in the world that are hardest hit by armed conflicts and internal violence are also the hardest hit by poverty and human rights abuse. In these resource-poor countries, the tragedy of missing persons<sup>1</sup> resulting from such conflicts is often underestimated, untold or sometimes simply ignored, as a *fait accompli*, by the respective governments, the military, national and international non-governmental organizations and even the general public. Despite some spirited efforts to resolve the issue of missing persons, spearheaded in various countries by multinational teams and international organizations, many reports emerging from the countries affected suggest that only little progress is being made and leaves much to be desired.

It is also imperative to note that an overwhelming number of cases of missing persons are encountered in particular circumstances in which human rights are seriously abused, but that there are no mechanisms to prevent, deter or rectify such abuses. This is remarkably so in Third World countries where people go missing in various incidents, some isolated, others systematic, that fail to get publicity or cannot be directly labelled as armed conflict or internal violence. The tragedy that befalls the relatives of these missing persons in such circumstances is equal to that of war victims, if not worse, for the lack of the necessary facilities and organization in their respective local region means that a long time passes before any structured international effort is made to assist them.

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### The process of identifying human remains

The process of identifying human remains of missing persons begins with the recovery of those remains from their specific location. An exhumation is the disinterment of a buried body from a designated burial site, cemetery or other place that may be unmarked.<sup>2</sup> Exhumation serves several important purposes, including recovery of the remains for physical examination and analysis for their identification; release of remains to relatives so as to facilitate funeral arrangements and emotional healing; documentation of injuries and other evidence for legal proceedings and to uncover human rights abuses; the search for clues that may assist in the historical reconstruction of events and revelations to create awareness; and acknowledgement that is necessary for healing and to draw lessons for the future of the community.

The entire process of exhumation is intricate and delicate, requiring well-trained and highly skilled personnel with expertise in various disciplines of forensic science. Forensic pathologists are generally conversant with these disciplines and able to work with a team of technicians with specialized training in the various fields. These include forensic archaeology, which consists of applying standard archaeological techniques modified to suit forensic crime scene processing where human remains are thought to be present. The archaeological approach provides a rational way to recover remains and reconstruct events, ensuring that evidence is not damaged, recovery is complete and documentation adequate. Another area of expertise is forensic anthropology, which consists of applying methods and techniques from physical anthropology and forensic medicine to legal cases involving skeletal human remains. A basic exhumation team would consist of diggers, a pathologist, an investigating officer, a photographer to serve in documentation, and a transport coordinator. Additional personnel would depend on the specifics of the case, availability of trained manpower and capacity of the local Missing Persons Clearinghouse, or MPC centre. Such centres are described below.

The steps in exhumation are *inter alia* obtaining legal permission, depending on local jurisdiction; informing interested parties, including

<sup>1</sup> "Missing persons" in the context of this article refers to persons whose whereabouts are unknown by relatives and who consequently have been presumed dead, and those who are known to have died but whose remains have not been recovered or positively identified.

<sup>2</sup> M.A. Dada and D.J. McQuoid-Mason DJ, *Introduction to Medico-legal Practice*, Butterworths, Durban, 2001, pp. 341-343.

relatives where possible; organizing the exhumation team; identifying the site; ensuring that protective health measures are put in place; manual or mechanical excavation; documentation, preliminary examination, removal, collection and transportation of the remains and other specimens and proper identification; and finally sealing of the site for any future investigation and historical purposes, bearing in mind local legislation and cultural sensitivities. The entire exercise must respect the wishes of the communities concerned, judicial proceedings and the demands of professionalism.

The remains are transported to a mortuary or designated storage centre for complete examination and analysis. Standard traditional scientific methods must be employed and all findings must be properly documented throughout the process. Specialized techniques may be required in most cases dating back a long time. Correct procedure must be followed in handling the remains and obtaining samples for identification analysis. Acceptable methods of identification include visual examination based on anthropometric characteristics such as age, gender, height and unique identifying features, identification by radiological means, identification by dental records (forensic odontology) and identification by DNA. Most of the identification methods that are particularly useful in cases of missing persons, e.g. DNA testing, are extremely specialized, calling for highly trained personnel as well as expensive equipment and facilities. These factors must be taken into consideration when establishing local and regional MPC networks.

After examination and analysis, positively identified remains must be released to the relatives if they so wish. Those that cannot be identified must be “protected” for any future re-examination and re-analysis, or for release to relatives in the event of subsequent positive identification matching; they should preferably be stored unburied in above-ground sepulchres to decrease the organic effect of soil. If that is not culturally acceptable or if there are economic or technical constraints, the remains should be buried in the hardest possible inorganic container or concrete underground storage facility that would allow future retrieval. Throughout the entire process and until the very end, the remains must at all times be accurately labelled and catalogued, with information tracking their movements securely stored in the central database. Whenever more information about missing or unidentified persons is received or acquired, the database is utilized to make file entries and update personal files that may lead to positive identification matches. Relatives of missing persons would be asked to give DNA samples that would be used in DNA testing.

### **New initiatives: Missing Persons Clearinghouses (MPC)**

Spain was the first country to officially start a national programme, the “Phoenix Programme”, to try and identify cadavers and human remains unidentifiable by traditional forensic approaches. It started in 1999 and its first phase, involving DNA typing of all unidentifiable human remains, is expected to be completed in December 2003, whereas hitherto only few identifications had been successful.<sup>3</sup> In Argentina, where 10,000 people are thought to have been killed between 1976 and 1983, efforts to recover and identify the missing dead using traditional forensic techniques have been hampered by the lack of official records of the identity of victims and burial locations and of ante-mortem physical information on many of the victims. There, too, DNA typing techniques have been applied.<sup>4</sup>

In the former Yugoslavia, the staff of the International Commission on Missing Persons (ICMP) is attempting the largest human identification effort in history.<sup>5</sup> The campaign has been making painfully slow progress, despite being fairly well established and better supported than similar such campaigns needed in Third World countries (especially in Africa, even basic traditional forensic approaches are lacking, as shown by an NGO report from Zimbabwe on the 1980s disturbances in Matabeleland and the Midlands<sup>6</sup>). Although the possibility of recovering and identifying many of the human remains was high, the inadequate structure, coordination and financing has meant that very little has been or could be done to recover and identify the dead, including missing persons in mass graves.

Any proper initiative to resolve the issue of missing persons *must be proactive* rather than reactive. As illustrated by the experience of various campaigns worldwide, reactive efforts to recover and identify remains of missing persons are usually arduous, unacceptably slow and often futile. This is even more true of campaigns instituted long after the incident that gave

3 J. A. Lorente *et al.*, “Identification of missing persons: The Spanish ‘Phoenix’ program”, *Croatian Medical Journal*, Vol. 42, 2001, pp. 267-270.

4 D. Corach *et al.*, “Additional approaches to DNA typing of skeletal remains: The search for ‘missing’ persons killed during the last dictatorship in Argentina”, *Electrophoresis*, Vol. 18, 1997, pp. 1608-1612.

5 E. Huffine *et al.*, “Mass identification of persons missing from the breakup of the former Yugoslavia: Structure, function, and role of the International Commission on Missing Persons”, *Croatian Medical Journal*, Vol. 42, 2001, pp. 271-275.

6 *Report on the 1980s Disturbances in Matabeleland and the Midlands*, Catholic Commission for Justice and Peace in Zimbabwe, March 1997.

rise to missing persons. An apt proactive approach would involve establishing well structured, highly organized, adequately funded and properly equipped local, regional and international centres capable of handling the recovery and identification of missing persons. Such centres would actively participate in programmes targeted at past incidents, including the use of forensic archaeological methods, as well as at any new incidents. They would serve as Missing Persons Clearinghouses in their respective regions, with inter-regional and international links and networks.

The MPC programme in America was first established in a few States in the early eighties to liaise between citizens, private organizations and law enforcement agencies. The MPC operates as a division of the Criminal Justice Information Service and is used as a resource centre and information exchange service complementing federal computerized missing persons files; it also promotes public awareness of the missing persons issue. As soon as a person is reported missing, available pertinent information and individual identifying characteristics are entered into a database, which is expanded when necessary statewide and beyond. It is in addition to a General Police Incident Report, and serves as a standard database to collect and trace specific information on missing persons. Whenever further information about unidentified persons, alive or dead, is received or acquired, personal files in the database are updated and file entries made. It is the responsibility of each agency, on identifying a previously unidentified individual, to clear entries and update the database so as to close the case on that particular missing person. Law enforcement agencies, other interested parties and relatives of missing persons contact the MPC via appropriate established channels for assistance as required.

To establish well structured, highly organized, adequately funded and properly equipped local and regional centres worldwide, especially within developing countries where no proper set-up exists, would be a suitable proactive approach towards resolving the issue of missing persons. These centres would be akin to the MPC, capable of handling the work of recovering and identifying missing persons and aimed at resolving past and newly reported cases irrespective of the circumstances in which they occurred. Rather than being concentrated only in areas where publicized cases of missing persons have been reported e.g. from wars and violent atrocities, these centres must be established in all regions of the globe. Thus each region would be enabled to undertake the task of investigating and resolving missing person cases, including those newly reported from day to day.

### **Forensic services in developing countries: the example of Kenya**

Forensic science, as a group of interrelated disciplines which utilize diverse scientific methods to analyse physical evidence related to legal cases, is recognized as indispensable for the recovery and identification of human remains. Unfortunately forensic services, including the examination of both dead and living persons, are downright meagre or completely lacking in most developing countries.<sup>7</sup> In these economically-challenged regions where food, security, health care and preventive medicine are in reality the foremost and greatest concern, forensic services rank low on the priority list, with dire consequences for the observance of human rights.

To cite Kenya as an example, it is a fact that no reliable information on missing persons is available. An unknown number of people went missing during the First and Second World Wars, as well as during the fight for independence – the 1950s Mau Mau uprising. There was no properly constituted formal effort to recover and identify human remains; although huge numbers of unidentified human skeletons were sporadically found. As a result, countless relatives of missing persons had given up on ever finding out what happened to their loved ones or recovering the remains. Several cases of unidentified human remains of national historical significance are yet to be resolved, such as that of Field Marshal Dedan Kimathi, one of Kenya's most celebrated freedom fighters in the Mau Mau uprising, whose burial site remains a mystery half a century after he was reportedly buried at a prison cemetery.

But sadder still is the fact that even today the country lacks the capability to properly investigate and resolve cases of missing persons. There are no standard databases on missing persons, and anyway the reporting relatives usually do not have adequate ante-mortem records of the deceased such as medical and dental records. The medico-legal services department is generally underfunded, ill-equipped, seriously understaffed and therefore unable to carry out forensic analysis on human remains beyond the basic forensic autopsy. This has contributed to the apathy and lack of coordination among governmental departments, law enforcement agencies and non-governmental organizations concerned with the issue of missing persons. Consequently, there is no public confidence in the system and in most cases people ultimately give up hope of ending their agony of uncertainty.

<sup>7</sup> "Human rights and forensic science", United Nations Commission of Human Rights Resolution 2000/32.



The Kenya Police estimates that 80 cases of missing persons occur every month countrywide, while media reports suggest that every day someone in the country goes missing, never to be found again.<sup>8</sup> It is general speculation that some of the main reasons why people go missing include being held by police without their relatives' knowledge, death in custody, abduction of females and minors, and mental and psychiatric problems, as well as the abandonment of responsibilities owing to socio-economic pressures and the search for a new identity. Our own experiences at the City Mortuary, which is the main morgue serving the country's capital Nairobi and its environs, shows a completely different picture. First of all, the above figure of 80 is a gross underestimate because at the City Mortuary in Nairobi alone we have records indicating that an average of 350 bodies which are unclaimed by relatives or unidentified are left uncollected each year. In the year 2001, the remains of 759 males and 94 females were brought to the mortuary by police as "unknown deceased". Of these, 409 males and 64 females were identified and their remains collected by relatives. The remaining 350 males and 30 females were never collected by relatives mainly because they were unidentified. Similarly, in the year 2000 the remains of 717 males and 78 females were brought there by police as "unknown deceased", of whom 383 males and 55 females were identified and their remains collected by relatives. The remaining 334 males and 23 females were likewise never collected by relatives mainly because they were unidentified. This means that in a period of two years, 737 missing persons with almost zero chances of ever being recovered or identified were being sought by their relatives, yet their bodies had been examined by the authorities. In June 1992 about 100 people were reported dead following "land/ethnic clashes" in Kenya's Rift Valley Province and some bodies were eaten by dogs, while 16 unclaimed bodies from the Molo and Olenguruone ethnic clashes were buried by the local municipal council.

Furthermore, contrary to the aforementioned police statements, most of these bodies show signs suggestive of death by homicide.<sup>9</sup> The relatives are certainly unlikely ever to find out what happened to their loved ones, and

<sup>8</sup> "Gone forever: they are lost without a trace", "The Big Issue", reported in the *East African Standard Kenyan Daily Newspaper*, 27 September 1999 to 11 October 1999; "Where are you?", *Wednesday Magazine*, appearing in the *Daily Nation Newspaper*, 26 August 1998.

<sup>9</sup> A. K. Olumbe, "A report of medico-legal autopsy cases performed in Nairobi 1997-1999", paper presented to the 2001 INPALMS congress meeting in Melbourne, Australia.

the system is unlikely to help them clarify their fate. Kenyan law states that a person missing for a period of seven years is legally declared to be dead. Media reports recount the pain and tragedies of families unable to resolve issues such as inheritance or perform cultural mourning rituals, or to accept that their loved ones are dead. Obviously the above figures, recorded in peacetime, are appalling and are comparable to cases of missing persons resulting from armed conflicts and internal violence. The problems are further compounded by the lack of proper registration of citizens by the Central Bureau of Registration (fingerprinting). The big question that therefore arises is: are Third World countries such as Kenya capable of handling the problem of missing persons resulting from armed conflicts and internal violence?

The 1998 US Nairobi Embassy terrorist bombing, in which over 211 people died, showed that a properly instituted and well equipped international network of forensic investigation teams and experts is imperative in assisting in areas of the globe where substantive resources are lacking.<sup>10</sup> Such a network could be employed in establishing the MPC concept globally. Basically, the MPC should consist of a Data Management Division, a Forensic Investigation Unit, a Public Relations Office and a team of forensic experts. The Data Management Division maintains ante-mortem and post-mortem records of missing persons and human remains, as well as reconciling information whenever possible. The Forensic Investigation Unit consists of investigating officers and forensic detectives concerned with gathering information from the public and establishing the background facts of the cases involved. The Public Relations Office would serve as a link between the MPC and other parties such as the public, relatives of missing persons, law enforcement officials and other agencies. The MPC centre should also have a team of forensic scientists such as forensic pathologists, anthropologists, odontologists, ballistics experts, radiologists, archaeologists, geneticists and others at their disposal. A number of indispensable forensic team members should preferably be appointed full-time to handle specific forensic work, with access to specialized assistance whenever the need arises. When the workload exceeds the capabilities of local personnel, multidisciplinary teams should be assembled from a wider area within the international network and sent in to assist.

<sup>10</sup> A. K. Olumbe, "The Nairobi US Embassy Bombing 1998 : Interdisciplinary collaboration and cooperation in investigation of mass fatalities", paper presented to the 2001 INPALMS congress meeting in Melbourne Australia.

## Conclusion

A network for identification of missing persons should be established in all regions of the world. However, the need for such a network is particularly acute in the developing world. In essence, each MPC centre would have the capability to investigate cases of missing persons and manage human remains. All reports of missing persons, both newly incoming and of past decades, would be forwarded to the MPC, where the information would be entered in a database. Priority should generally be given to those cases that are likely to be easily resolved e.g. those where the history and facts of the case are known and the human remains are likely to be speedily recovered. Human remains that are found by chance would be examined and analysed, any information obtained would also be entered in the database to be matched against reports and records of missing persons and samples from relatives. The human remains that are identified should be released to relatives or interested parties, while those that are not should be appropriately stored and protected. All sites where human remains are recovered must be treated as forensic crime scenes, and those from which many persons are recovered should be respectfully treated in accordance with the local legislature and cultural sensitivities of the local communities. Well instituted, highly organized, adequately funded and properly equipped local, regional and international centres that are capably involved in handling the recovery and identification of missing persons, with retrospective and proactive approaches, are the key to human rights protection work, restoration of family links, management of human remains, exhumation, identification, collection and management of personal data that would help to resolve the issue of missing persons.

## Résumé

### ***Gestion, exhumation et identification de restes humains: une perspective du monde en développement***

*Alex Kirasi Olumbe et Ahmed Kalebi Yakub*

Les personnes portées disparues sont celles dont on est sans nouvelles et qui sont donc présumées décédées, ou celles qui sont décédées mais dont la dépouille n'a pas été retrouvée ou n'a pas été identifiée. Le problème des personnes disparues en raison d'un conflit armé, d'une situation de violence interne ou de violations des droits de l'homme touche essentiellement les pays en développement, qui sont pourtant mal préparés à y faire face. Le compte rendu de première main que les auteurs donnent de l'ampleur et de la gravité de la situation au Kenya en témoigne. Toute initiative qui serait prise pour régler ce problème de manière adéquate doit être dynamique plutôt que réactive. Les auteurs estiment qu'un réseau d'identification des personnes portées disparues, fondé sur le concept des bureaux de centralisation des informations sur les disparus, devrait être établi dans toutes les régions du globe. Ce concept est examiné dans l'article, qui contient une description détaillée des étapes de l'identification des restes humains dans la perspective des pays en développement.

## **Biotechnology, weapons and humanity** **Biotechnologie, armes et humanité**

Today, the world is on the verge of a revolution in biotechnology. Expected advances have enormous potential to benefit humanity. But these same technologies have great potential for misuse. They could facilitate the use of biological weapons either in armed conflict or as a means to spread terror. Deliberately inflicting disease and changing body chemistry is likely to become easier, deadlier, cheaper and more difficult to detect.

The International Committee of the Red Cross (ICRC) is promoting consideration of the risks, rules and responsibilities related to advances in biotechnology which may lead to their hostile use to cause poisoning and deliberately spread disease. An Appeal was launched by the ICRC on 23-25 September 2002.

The ICRC's initiative is distinct from but is meant to complement ongoing efforts by States within the framework of the Biological and Toxin Weapons Convention (BWC). The Fifth Review Conference of States Parties to the BWC ended in November 2002 with the adoption of a plan containing modest commitments by States to meet at regular intervals over the next four years.

The ICRC's Biotechnology, Weapons and Humanity initiative has featured to date:

- A meeting of government and independent experts held in Montreux, Switzerland entitled "Biotechnology, Weapons and Humanity: An examination of risks, rules and responsibilities";
- The launch of the Appeal by the ICRC President to governments at the Montreux meeting;
- The public launch of the Appeal at a press briefing in Geneva on 25 September 2002; and
- A proposed high level political Declaration to be adopted by governments in 2003.

The initiative has three key themes:

**Risks:** Advances in biotechnology carry great potential to benefit humanity. If these same advances are turned to hostile uses, they bring enormous risks for all human beings.

**Rules:** Ancient norms and modern humanitarian law prohibit poisoning and the deliberate spread of disease as inhumane and treacherous. The rules must be reaffirmed, implemented and reinforced.

**Responsibilities:** The risks and rules generate responsibilities for governments, the military, the scientific community and industry. The ICRC calls on these parties to ensure that advances in biotechnology are not used for poisoning or deliberately spreading disease.

International Humanitarian law prohibits the use of poison and the deliberate spread of disease in warfare. This norm is now part of customary international law – binding on all parties to all armed conflicts. The challenge is to ensure it is fully respected.

## **Statement by the President of the ICRC Jakob Kellenberger**

The ICRC's preoccupations and call to action are contained in an "Appeal on Biotechnology, Weapons and Humanity" which has been adopted at the highest level of the institution. You will receive the Appeal in its entirety later this morning. It is being sent today to all governments through Permanent Missions in Geneva and New York and will be made public later this week.

Before presenting the essence of the Appeal I would briefly like to explain the concerns which have prompted the ICRC to launch this initiative.

The "age of biotechnology", like the industrial revolution and the "information age", promises great benefits to humanity. Yet if biotechnology is put to hostile uses, including to spread terror, the human species faces great dangers.

Potential benefits of advances in biological sciences and technologies are impressive. These include cures for diseases, new vaccines and increases in food production, including in impoverished regions of the world.

Yet testimonies from states, United Nations agencies and scientific circles warn of a range of existing and emerging capacities for misuse. These include:

- Deliberate spread of existing diseases such as typhoid and anthrax and smallpox to cause death, disease and fear in a population.

- Alteration of existing disease agents to make them more virulent, as already occurred unintentionally in research on the “mousepox” virus.
- Creation of viruses from synthetic materials, as occurred this year using a recipe from the Internet and gene sequences from a mail order supplier.
- Possible future development of ethnically or racially specific biological agents.
- Creation of novel biological warfare agents for use in conjunction with corresponding vaccines for one’s own troops or population. This could increase the attractiveness of biological weapons.
- New methods to covertly spread naturally occurring biological agents to alter physiological or psychological processes of target populations such as consciousness, behaviour and fertility.
- Production of biological agents that could attack agricultural or industrial infrastructure.
- Creation of biological agents that could affect the make-up of human genes, pursuing people through generations and adversely affecting human evolution itself.

The International Committee of the Red Cross considers these examples of possible misuse, which may be elaborated in more detail in the course of our discussions, to be profoundly disturbing. The life processes at the core of human existence must never be manipulated for hostile ends. In the past, scientific advances have all too often been misused. New developments in biotechnology will almost certainly be misused if urgent action is not taken before it is too late.

If the revolution in biotechnology we are witnessing today is harnessed for hostile ends, such acts would undermine one of the most fundamental norms of customary international humanitarian law: the prohibition of poisoning and the deliberate spread of disease as a method of warfare. It would be an affront to the ancient taboo against the use in war of “plague and poison”, passed down for generations in such diverse cultures as ancient India, the Middle East, Greece and Rome. Such acts would run counter to the survival instinct by which humanity protects itself from disease.

The ICRC deeply regrets that lengthy negotiations to strengthen the Biological Weapons Convention through a compliance-monitoring regime did not come to fruition as expected in November 2001. When this diplomatic impasse is seen in light of the potential for misuse inherent in the “biotech revolution”, the case for a renewed commitment by all States to existing norms and to the effective control of biological agents is compelling.

And now I come to the essential elements of the Appeal.

In keeping with its mandate to protect and assist victims of conflict and to promote and uphold international humanitarian law, the ICRC appeals firstly to all political and military authorities:

- To resume with determination efforts to ensure universalisation and faithful implementation of the 1925 Geneva Protocol and 1972 Biological Weapons Convention and to develop appropriate mechanisms to maintain their relevance in the face of scientific developments,
- To adopt stringent national legislation for implementation of these instruments and to enact effective controls on biological agents with potential for abuse,
- To ensure that any person who commits acts prohibited by the above instruments is prosecuted,
- To undertake actions to ensure that the legal norms prohibiting biological warfare are known and respected by members of armed forces,
- To encourage the development of effective codes of conduct by scientific and medical associations and by industry to govern activities and biological agents with potential for abuse, and
- To enhance international cooperation, including through the development of greater international capacity to monitor and respond to outbreaks of infectious disease.

However, the responsibility to prevent hostile uses of biotechnology extends well beyond governments. It belongs, in particular, to scientists and industry.

Secondly, then, the ICRC appeals to the scientific and medical communities and to the biotechnology and pharmaceutical industries:

- To scrutinize all research with potentially dangerous consequences and to ensure it is submitted to rigorous and independent peer review,
- To adopt professional and industrial codes of conduct aimed at preventing the abuse of biological agents,
- To ensure effective regulation of research programmes, facilities and biological agents which may lend themselves to misuse, and supervision of individuals with access to sensitive technologies, and
- To support enhanced national and international programmes to prevent and respond to the spread of infectious disease.



The ICRC calls on all persons to assume their responsibilities as members of a species whose future may be gravely threatened by abuse of biological knowledge. We urge you to consider the threshold at which we all stand and to remember our common humanity.

And finally, as part of a renewed effort to address the risks and assume the responsibilities arising from the current situation, the ICRC urges States to adopt at a high political level an international Declaration on "Biotechnology, Weapons and Humanity" containing a renewed commitment to existing norms and specific commitments to future preventive action.

## **Appeal of the International Committee of the Red Cross on "Biotechnology, Weapons and Humanity"**

Alarmed by the potential hostile uses of biotechnology, the International Committee of the Red Cross (ICRC) appeals to:

- all political and military authorities to strengthen their commitment to the international humanitarian law norms which prohibit the hostile uses of biological agents, and to work together to subject potentially dangerous biotechnology to effective controls;
- the scientific and medical communities, industry and civil society in general to ensure that potentially dangerous biological knowledge and agents be subject to effective controls.

### **The ICRC appeals in particular:**

#### **To all political and military authorities**

- To become parties to the 1925 Geneva Protocol and the 1972 Biological Weapons Convention, if they have not already done so, to encourage States which are not parties to become parties, and to lift reservations on use to the 1925 Geneva Protocol,
- To resume with determination efforts to ensure faithful implementation of these treaties and develop appropriate mechanisms to maintain their relevance in the face of scientific developments,
- To adopt stringent national legislation, where it does not yet exist, for implementation of the 1925 Geneva Protocol and the 1972 Biological

Weapons Convention, and to enact effective controls on biological agents with potential for abuse,

- To ensure that any person who commits acts prohibited by the above instruments is prosecuted,
- To undertake actions to ensure that the legal norms prohibiting biological warfare are known and respected by members of armed forces,
- To encourage the development of effective codes of conduct by scientific and medical associations and by industry to govern activities and biological agents with potential for abuse,
- To enhance international cooperation, including through the development of greater international capacity to monitor and respond to outbreaks of infectious disease.

#### **To the scientific and medical communities and to the biotechnology and pharmaceutical industries**

- To scrutinize all research with potentially dangerous consequences and to ensure it is submitted to rigorous and independent peer review,
- To adopt professional and industrial codes of conduct aimed at preventing the abuse of biological agents,
- To ensure effective regulation of research programmes, facilities and biological agents which may lend themselves to misuse, and supervision of individuals with access to sensitive technologies,
- To support enhanced national and international programmes to prevent and respond to the spread of infectious disease.

The ICRC calls on all those addressed here to assume their responsibilities as members of a species whose future may be gravely threatened by abuse of biological knowledge. The ICRC appeals to you to make your contribution to the age-old effort to protect humanity from disease. We urge you to consider the threshold at which we all stand and to remember our common humanity.

The ICRC urges States to adopt at a high political level an international Declaration on “Biotechnology, Weapons and Humanity” containing a renewed commitment to existing norms and specific commitments to future preventive action.

Geneva, September 2002

## Appel du Comité international de la Croix-Rouge sur “la biotechnologie, les armes et l’humanité”

Alarmé par le risque d’une utilisation de la biotechnologie à des fins hostiles, le Comité international de la Croix-Rouge (CICR) lance un appel :

- à toutes les autorités politiques et militaires, leur demandant de renforcer leur engagement vis-à-vis des normes du droit international humanitaire prohibant l’emploi d’agents biologiques à des fins hostiles et d’œuvrer ensemble en vue de soumettre à des contrôles efficaces toute biotechnologie potentiellement dangereuse ;
- aux communautés scientifique et médicale, aux milieux de l’industrie et à la société civile dans son ensemble, leur demandant d’exercer un contrôle efficace sur les connaissances et les agents biologiques potentiellement dangereux.

### **L’appel du CICR s’adresse en particulier :**

#### **à toutes les autorités politiques et militaires, à qui il est demandé**

- de devenir parties au Protocole de Genève de 1925 et à la Convention sur les armes biologiques de 1972, si elles ne l’ont pas encore fait, d’encourager les États non encore liés par ces traités à y adhérer et, enfin, de retirer les réserves éventuelles au Protocole de Genève de 1925 ;
- de relancer avec détermination l’action visant à assurer l’application fidèle de ces traités et d’élaborer les mécanismes appropriés pour permettre à ces instruments de conserver leur pertinence en dépit des avancées scientifiques ;
- d’adopter, s’il n’en existe pas encore, une législation nationale rigoureuse en vue de la mise en œuvre du Protocole de Genève de 1925 et de la Convention sur les armes biologiques de 1972, et de soumettre à des contrôles efficaces les agents biologiques présentant un risque d’utilisation abusive ;
- de veiller à ce que des poursuites soient engagées contre toute personne qui commet des actes prohibés par les instruments ci-dessus ;
- de prendre les mesures nécessaires pour que les normes juridiques interdisant la guerre biologique soient connues et respectées par les membres des forces armées,

- d'encourager les associations scientifiques et médicales, ainsi que les représentants de l'industrie, à élaborer des codes de conduite efficaces destinés à régir leurs activités et à exercer un contrôle sur les agents biologiques présentant un risque d'utilisation abusive,
- de renforcer la coopération internationale, y compris à travers le développement d'une capacité internationale plus importante afin d'assurer la surveillance et d'intervenir en cas de flambées de maladies infectieuses.

**Aux communautés scientifique et médicale, ainsi qu'aux industries pharmaceutiques et biotechnologiques, à qui il est demandé**

- De suivre attentivement tous les travaux de recherche risquant d'avoir des conséquences dangereuses, et de veiller à ce qu'ils fassent l'objet d'un examen rigoureux et indépendant par des spécialistes;
- D'adopter, dans leurs domaines respectifs, des codes de conduite destinés à empêcher l'emploi abusif d'agents biologiques;
- de veiller à un contrôle rigoureux des programmes de recherche, des installations et des agents biologiques pouvant se prêter à une utilisation abusive, et à la supervision des individus ayant accès aux technologies "sensibles",
- d'apporter leur appui à des programmes renforcés, sur le plan national et international, afin de prévenir et d'enrayer la propagation des maladies infectieuses.

Le CICR demande à tous les destinataires du présent appel d'assumer leurs responsabilités en tant que membres d'une espèce dont l'avenir pourrait être gravement compromis par un usage abusif des connaissances dans le domaine de la biologie. Le CICR vous exhorte à contribuer à cet effort, engagé de longue date, qui vise à protéger l'humanité contre la maladie. Nous vous prions instamment de considérer le seuil auquel nous nous trouvons tous aujourd'hui, et de vous souvenir de notre humanité commune.

Le CICR exhorte les États à adopter, à un niveau politique élevé, une Déclaration internationale sur "la biotechnologie, les armes et l'humanité" dans laquelle ils réaffirmeront leur engagement à respecter les normes en vigueur et prendront des engagements spécifiques vis-à-vis de futures actions préventives.

Genève, Septembre 2002

## Livres et articles

### Books and articles

Récentes acquisitions faites par le Centre d'Information et de Documentation, CICR

Recent acquisitions of the Library & Research Service, ICRC

#### Afrique – Africa

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– **Génocide au Congo?: analyse des massacres de populations civiles**/Jean Migabo Kalere. – Bruxelles: Broederlijk Delen, janvier 2002. – 216 p.: tabl.; 25 cm – Bibliographie: p. 211–216

– **Sud-Soudan: la longue route vers la paix**/Mathew Haumann; trad. de l'anglais par Paule Mailhes; préf. de Paride Taban. – Paris: Karthala, 2002. – 178 p. (8 p. de fotogr.): ill; 22 cm – Méridiens

– **The politics of truth and reconciliation in South Africa: legitimizing the post-Apartheid State**/Richard A. Wilson. – Cambridge: Cambridge University Press, 2001. – XXI, 271 p.: cartes; 23 cm – Cambridge studies in law and society

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– **Le génocide rwandais, la justice militaire suisse et le droit international**/ par Marco Sassoli. – 2002. – p. 151–178.

– In: Revue suisse de droit international et de droit européen = Schweizerische Zeitschrift für internationale und europäisches Recht; 2

– **Madagascar, les urnes et la rue**/Françoise Raison-Jourde, Jean-Pierre Raison... [et al.]. – Paris: Karthala, juin 2002. – 170 p.: tabl., cartes; 24 cm – In: Politique africaine; no 86

– **Sierra Leone: un état en attente de «paix durable»: la communauté internationale dans l'engrenage de la paix en Afrique de l'Ouest**/Sandra Szurek. – 2001. – p. 176 – 201. – In: Annuaire français de droit international; 46 (2000)

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– **Burma (Myanmar): the time for change**/by Martin Smith. – London: Minority Rights Group International, May 2002. – 44 p.: carte; 30 cm – Bibliographie: p. 44

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– ICG Asia Report; no. 33

– **Dangerous minds: political psychiatry in China today and its origins in the Mao Era**/Human Rights Watch and Geneva Initiative on Psychiatry. – New York [etc.]: Human Rights Watch, August 2002. – 298 p.: ill., fotogr., tabl.; 23 cm

- **People's Republic of China: torture: a growing scourge in China: time for action**/Amnesty International. – [S. l.] : Amnesty international, February 2001. – 60 p.; 30 cm
- **The international boundaries of East Timor**/Neil Deeley; ed. by Shelagh Furness and Clive Schofield. – Durham: International Boundaries Research Unit, 2001. – 61 p.: tabl., cartes; 30 cm – Boundary and territory briefing; vol. 3, no. 5. – Bibliographie: p. 59–61
- **The South Caucasus: nationalism, conflict and minorities**/by Anna Matveeva. – London: Minority rights group, 2002. – 32 p.: carte; 30 cm – An MRG international report. – Bibliographie: p. 32

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- **Disintegrating Indonesia? Implications for regional security** /Tim Huxley. – London: Oxford University Press: The International Institute for Strategic Studies, July 2002. – 103 p.: cartes, tabl.; 23 cm – In: Adelphi paper; 349
- **Inde–Pakistan: guerre improbable, paix impossible?** Mariam Abou Zahab, Isabelle Cordonnier, Jean–Luc Racine, Waheguru Pal Singh Sidnu. – avril–juin 2002. – p. 271–333. – In: Politique étrangère; 2
- **L'action internationale au Timor oriental**/G erard Cahin. – 2001. – p. 139–175. – In: Annuaire fran ais de droit international; 46 (2000)

### Armes – Weapons

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- **Costs of disarmament: rethinking the price tag: a methodological inquiry into the costs and benefits of arms control**/Susan Willett. – Geneva: UNIDIR, 2002. – VIII, 75 p.: tabl.; 21 cm
- **ICBL report on activities [during the] Third meeting of states parties to the 1997 Convention on the prohibition of the use, stockpiling, production and transfer of anti–personnel mines and on their destruction:** 18–21 September 2001, Managua, Nicaragua/International Campaign to Ban Landmines. – Washington: ICBL, [February 2002]. – 236 p.; 30 cm
- **The devil's gardens: a history of landmines**/Lydia Monin and Andrew Gallimore. – London [etc.]: Pimlico, 2002. – XVIII, 234 p.: cartes, fotogr.; 24 cm – A Pimlico original.
- Bibliographie: p. 211–214. Index

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- **A short history of biological warfare**/Neil Metcalfe. – July–Sept. 2002. – p. 271–282. – In: Medicine, conflict and survival; vol. 18, no. 3
- **Biological weapons**/Paul Rogers... [et al.]. – London: F. Cass, April–June 2002. – 105 p.; 24 cm.
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#### Assistance humanitaire – Humanitarian assistance

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- **Aproximación histórica a la noción de intervención humanitaria en el derecho internacional**/Juan Francisco Escudero Espinosa. – León: Universidad de León, 2002. – XX, 430 p. : tabl.; 24 cm – Bibliographie: p. 367–407
- **Engineering in emergencies: a practical guide for relief workers**/Jan Davis and Robert Lambert. – 2nd ed. – London: ITDG, 2002. – XVI, 718 p.: ill., tabl., graph.; 24 cm – Bibliographie: p. 698–704. Index
- **Investing in peace: how development aid can prevent or promote conflict**/Robert J. Muscat. – New-York: M.E. Sharpe, 2002. – XVII, 265 p.; 23 cm – Bibliographie: p. 251–255. Index

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- **Ethics of humanitarian intervention**/Simon Chesterman... [et al.] – September 2002. – p. 261–340 – In: Security dialogue; vol. 33, no. 3
- **Humanitarian assistance in non-international armed conflict: the fourth wave of rights, duties and remedies**/by Mary Ellen O'Connell. – 2002. – p. 183–217. – In: Israel yearbook on human rights; vol. 31 (2001)

#### Conflits, sécurité et forces armées – Conflicts, security and armed forces

##### Livres – Books

- **Armies without states: the privatization of security**/Robert Mandel. – Boulder, CO; London: L. Rienner, 2002. – X, 169 p.: tabl.; 24 cm – Bibliographie: p. 165–166. Index
- **Coping with the new security challenges of Europe: proceedings of the 4th International Security Forum**/ed. by Ulrich Lehner and Fred Tanner. – Bern [etc]: Lang, 2001. – 241 p.: graph.; 23 cm – Studien zu Zeitgeschichte und Sicherheitspolitik; Bd. 7
- **Temporalité et conflits armés: essai sur les temps historiques de la guerre**/présenté par Daniel Palmieri. – [S.l.]: [s.n.], octobre 2002. – 83 fr.; 30 cm. Mémoire présenté en vue de l'obtention du diplôme d'études supérieures en relations internationales, mention: histoire et politique internationales, institut universitaire des hautes études internationales, Université de Genève, octobre 2002.
- **Waging war without warriors?: the changing culture of military conflict**/Christopher Coker. – London; Boulder, CO: Lynne Rienner, 2002. – VII, 223 p.; 23 cm – IISS studies in international security. – Bibliographie: p. 213–218. Index

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- **Legitimate military objectives under the current jus in bello**/by Yoram Dinstein. – 2002. – p. 1–34. – In: *Israel Yearbook on human rights*; vol. 31 (2001)
- **Sécurité et conflits**/Eric Bonnemaïson, Dominique Bangoura et Laurence Porgès. – octobre–décembre 2001. – p. 3–33. – In: *Afrique contemporaine*; no 200
- **Some legal (and few ethical) dimensions of the collateral damage resulting from NATO's Kosovo campaign**/by John F. Murphy. – 2002. – p. 51–77. – In: *Israel Yearbook on human rights*; vol.31 (2001)

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- **Le droit des conflits armés**/Jérôme Cario; préf. de Bruno Cuche. – Panazol: Lavauzelle, 2002. – 192 p.: tabl.; 21 cm – Bibliographie: p. 191–192
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- **Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic sanctions**/August Reinisch. – October 2001. – p. 851–871. – In: *American journal of international law*; vol. 95, no. 4
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- **Le droit international humanitaire et la question israélo-palestinienne: entretien avec Paul Grossrieder, Directeur général du Comité international de la Croix-Rouge.** – juillet 2002. – p. 49–56. – In: *Critique internationale*; no 16
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- **The duty to “ensure respect” under Common article 1 of the Geneva Conventions: its implications on international and non-international armed conflicts**/by Birgit Kessler. – 2001. – p. 498–516. – In: *German yearbook of international law = Jahrbuch für internationales Recht*; vol. 44

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- **Crimes internationaux et juridictions internationales**/sous la dir. de Antonio Cassese, Mireille Delmas-Marty. – Paris: Presses Universitaires de France, juin 2002. – 267 p.; 24 cm
- **Genocide, crimes against humanity, war crimes: nullum crimen sine lege and the subject matter jurisdiction of the international criminal court**/Machteld Boot. – Antwerpen [etc.]: Intersentia, 2002. – XLIX, 708 p.; 25 cm – *School of human rights research*; vol. 12. – Thèse, Katholieke Universiteit Brabant, 15 février 2002. – Bibliographie: p. 661–694. Index
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- **Assigned defense counsel in domestic and international war crimes tribunals: the need for a structural approach**/Richard J. Wilson. – 2002. – p. 145–193. – In: *International criminal law review*; 2

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  - **La Corte penal internacional: estatuto de Roma: algunas reflexiones sobre su ratificación**/Maria Teresa Garces Lloreda, Augusto J. Ibañez Guzman. – julio–diciembre 2001. – p. 129–141. – In: Revista española de derecho militar; 78
  - **La distinción entre crímenes de guerra y crímenes contra la humanidad a la luz de la jurisprudencia de los Tribunales penales internacionales para la ex-Yugoslavia y Ruanda**/José Manuel Sánchez Patrón. – julio–diciembre 2001. – p. 53–84. – In: Revista española de derecho militar; 78
  - **La responsabilité du supérieur hiérarchique devant les tribunaux pénaux internationaux**/Nasser Zakr. – 2002. – p. 59–80. – In: Revue internationale de droit pénal = International review of penal law; 73<sup>e</sup> année, 1<sup>er</sup> et 2<sup>e</sup> trimestres
  - **Les frontières de la compétence de la Cour pénale internationale: observations et critiques**/Gabriele Della Morte. – 2002. – p. 23–57. – In: Revue internationale de droit pénal = International review of penal law; 73<sup>e</sup> année, 1<sup>er</sup> et 2<sup>e</sup> trimestres 2002
  - **Prosecuting war criminals: the case for decentralisation**/Michelle Sieff and Leslie Vinjamuri. – 2002. – p. 103–113. – In: Journal of conflict, security and development; 2h2
  - **The current law of crimes against humanity**/Kai Ambos and Steffen Wirth. – 2002. – p. 1–90. – In: Criminal law forum; vol. 13, no 1
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– **Toward an international criminal tribunal to adjudicate upon corporate wrongs**/by François Rigaux. – avril–mai–juin 2002. – p. 128–142. – In: Transnational associations; 2

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– **Child soldiers: global report on child soldiers 2001**/The Coalition to stop the use of child soldiers. – London: The Coalition to stop the use of child soldiers, May 2001. – 452 p.: tabl., fotogr.; 20 cm

– **L'enfant et la guerre: 7<sup>e</sup> séminaire de l'IDE: 16 au 20 octobre 2001**/Institut international des droits de l'enfant; Jean Zermatten éd. – Sion: Institut international des Droits de l'Enfant: Institut Universitaire Kurt Bösch, avril 2002. – 162 p.; 22 cm – IDE; no 24

– **The impact of war on children: a review of progress since the 1996 United Nations report on the impact of armed conflict on children**/Graça Machel; fotogr. by Sebastião Salgado; contributing ed. Jennifer F. Klot and Theo Sowa. – London: Hurst, 2001. – XV, 230 p., [16] p. de fotogr.; 23 cm

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– **Children's rights in Africa**/Dejo Olowu... [et al.]. – The Hague [etc.]: Kluwer law international, 2002. – 200 p.; 24 cm – In: The international journal of children's rights; Vol. 10, no. 2

– **In war and peace: women and conflict prevention**/Jolynn Shoemaker. – Spring 2002. – p. 27–54. – In: Civil wars; Vol. 5, no. 1

– **Liberia's child combatants: paying the price of neglect**/Olawale Ismail. – 2002. – p. 125–134. – In: Journal of conflict, security and development; 2:2

– **The effect of armed conflict on children: the plight of unaccompanied refugee minors**/Megan E. Kures. – Winter 2001. – p. 141–163. – In: Suffolk transnational law review; Vol. 25, no. 1

– **The protection and participation rights of the child soldier: an African and global perspective**/Christine Jesseman. – 2001. – p. 140–154; 25 cm – In: African Human Rights Law Journal; Vol. 1, no. 1

### Femmes – Women

#### Livre – Book

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