

## Reflections on the scientific documentation of human rights violations

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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***

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*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.*