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International Criminal Tribunal for the former Yugoslavia (ICTY) and the forensic pathologist : Ethical considerations

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ABSTRACT

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

In order to study the nature of such ethical tensions, we sent a questionnaire to 65 forensic pathologists who have been involved in the ICTY missions.

The rate of answer was 38%. The majority of the forensic pathologists questioned (n=18) did not know how the medico-legal data were exploited by the ICTY. Three of them have been subjected to pressures. Three of them were aware of mass grave sites wittingly not investigated by the ICTY. Fifteen considered that the ICTY respected the elementary rules of the law and four of them questioned the impartiality of the justice led by the ICTY.

Two conflicting types of ethics can be drawn from these results: a conviction ethics which is shared by most of the forensic pathologists questioned and a responsibility ethics. In the first, the forensic pathologist completely agrees with the need for an international war crime tribunal even if such justice can be challenged regarding the respect of human rights and impartiality. In the second, he or she needs to conduct himself in ways that do not infringe impartiality. As medical deontology duty requires an impartiality ethics, discursive ethics are needed to ease ethical tensions and to suggest ethical guidelines. Alternatives to international justice through a truth and reconciliation commission and by the way of humanitarian mission of victims' identification combined with forensic investigations for historical purposes could be considered.

INTRODUCTION

Perpetrated war crimes in the former Yugoslavia and Kosovo since 1991 have been subjected to several international medico-legal investigations of mass graves within the framework of inquiries led by the ICTY. Most of the papers published on the subject focused on natural and methodological limits of the investigations respectively due to the degraded state of the corpses, the lack of means on the spot and the lack of standardization between the different teams involved (Skinner et al., 2003 and 2005, Schäfer, 2000, Sprogøe-Jakobsen et al., 2001) or they have focused on identification methods or procedures (Vanezis, 1997, Cordner and McKelvie, 2002, Rainio, Lalu et al., 2001, Chandrasiri, 1997). Ethical considerations about the participation of the forensic pathologist to the ICTY missions have not been yet specifically studied, although some authors have stressed the deontological duties of the medico-legal expert such as the importance of objectivity, independence, impartiality and respect for the limitations of his or her competence (Rainio, Hedman et al., 2001, Djuric, 2004, Komar, 2003). Authors have also stressed the humanitarian needs of identification of missing people, which can help affected families in their mourning (Cordner and McKelvie, 2002). Forensic pathologists involved in the ICTY missions could be subjected to ethical tensions in particular due to the difficulties of the missions in the former Yugoslavia, the multidisciplinary character of the team where conflicts between forensic experts of different specialities can be encountered (Skinner and Sterenberg, 2005), and in the original ICTY proceedings where elements of the adversarial and inquisitorial procedures are combined. One disturbing feature of the ICTY proceedings is that not all forensic pathologists involved presented verbal evidence to the court in The Hague, but only the senior chief forensic pathologist of the team appeared to give evidence, in contradiction to the tradition that the responsibilities of an individual forensic scientist are personal and not corporate (White, 1998).

MATERIAL AND METHODS

In order to better determine the nature of such ethical tensions, we therefore sent a questionnaire to a sample of forensic pathologists, including questions respectively about the circumstances of collaboration with the ICTY, the length, the places, goals and difficulties of their missions, the number of performed autopsies, their knowledge of judicial exploitation of the medico-legal data, the existence of pressures on them, their knowledge of mass graves not investigated by the ICTY and their opinion about the justice led by the ICTY according to their past experience. As the ICTY refused to answer our request concerning the list of all forensic pathologists involved in such missions since the creation of the ICTY in 1993, we found the identity of 65 of them by personal research using PubMed and the trial transcripts available in the ICTY official web site (<http://www.un.org/icty/cases-e/index-e.htm>, accessed Nov 21, 2004). The reason of non-answer presented by the ICTY was that the forensic experts are subjected to an obligation of reserve about this institution.

RESULTS

The response rate to the questionnaire was about 38% (n=25). The results of the questionnaire were as follows:

- Most of the forensic pathologists were European (n=21), and twenty of them belonged to countries which are NATO members.
- Circumstances of collaboration with the ICTY were various: a direct or indirect request from the ICTY, a request from a human right organization or a medical association, a request from a national minister or a request of assistance from a colleague already at the site.
- The total length of the missions in the former Yugoslavia ranged from two weeks to six months. Most of the missions were carried out in Kosovo (n=15) and in Bosnia (n=12). In the majority of the cases (79%), the main goals of the missions were the determination of the cause of death and the search for violence lesions. Identification was a secondary goal. The main difficulties of the missions reported were the bad work conditions due to the lack of human and material means and the degradation of the bodies.
- The mean number of forensic autopsies performed in the former Yugoslavia was equal to 101 (range 14 to 402).
- The majority of the forensic pathologists questioned (n=18) did not know how the medico-legal data were exploited by the ICTY.
- Three forensic pathologists reported that they had been subjected to pressures, one by the Croatian government, the two others by a human right organization, a non-governmental organization (NGO) which controlled the course of autopsies and also concerning the writing of the autopsy reports.
- Three forensic pathologists were aware of mass grave sites wittingly not investigated by the ICTY, especially mass graves of Serbian victims.

- Fifteen forensic pathologists considered that the ICTY respected the elementary rules of the law, four of them questioned the judicial impartiality of the ICTY and four others had no opinion. Seventeen forensic pathologists were reinforced in the idea of justice after their experience in the former Yugoslavia and wished to work again for the ICTY. Two of them had a negative opinion and two others had no opinion.

DISCUSSION

Although the sample of those forensic pathologists questioned does not necessarily represent all the involved forensic pathologists in the ICTY missions, two types of ethical issues can be drawn from these results: a conviction ethics which is shared by most of those questioned and an impartiality ethics. In the first, the forensic pathologist agrees with the need for international war crime tribunals such as the ICTY. He or she considers that forensic investigations can provide vital evidence and corroboration which establish the commission of serious violations of international humanitarian law. Such international justice is able to challenge the impunity of high-ranking soldiers or government officials. They also consider that such an international tribunal can achieve justice for the victims and their families, individual accountability of the perpetrators and eventual peace and reconciliation. Second and conversely, forensic pathologists who adopt a responsibility ethics need to conduct themselves in ways that do not infringe neutrality and independence and therefore impartiality. They must be aware of the limits of the medico-legal investigations and that the lack of knowledge of particular war situations can lead to wrong or improper interpretations. The responsibility ethics requires from him a critical point of view about his mission and about aims of the international criminal justice. Having such critical mind requires real facts such as experience of being subjected to pressures or knowledge of non-investigated mass graves, which can challenge the supposed impartiality of the ICTY. They need to acknowledge and understand the serious pitfalls associated with involvement in this type of mission: the forensic pathologist is exposed to participate wittingly, unwittingly or by virtue of poor practice in violations of human rights (Cordner and McKelvie, 2002). They may also be exposed to manipulation.

This opposition between these two types of ethics raises the question of solutions to ease these ethical tensions concerning the participation of the forensic pathologist to the ICTY.

Available solutions can be found in classical ethical sources including medical deontology and the respect of human rights. Indeed, medical deontology imposes a moral obligation of professional independence on the forensic pathologist. Due to this moral obligation, the forensic pathologist must not belong to political or interest groups involved in the armed conflicts in the former Yugoslavia. According to the results of the questionnaire, some of the forensic pathologists involved belonged to human right organizations that were therefore not neutral in the conflicts. Moreover, most of them belonged to countries which are NATO members. NATO openly took sides with the Bosnian Muslims for the first time in 1995 and it took sides with the Kosovo Albanians against the Serbs for the second time in 1999. In this context, the media which led a campaign against the Serbs could strongly influence the medico-legal experts from NATO countries and impugn their impartiality. Moreover, financial independence of the forensic pathologists could be questioned as not all of them have been paid directly by the ICTY according to the comments of some of our respondents.

The participation of the forensic pathologist to an international criminal tribunal supposes an independent and impartial court of law according to article 10 of the Universal Declaration of Human Rights: «Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.» As any physician must refrain from committing any injustice according to the Hippocratic oath, the forensic pathologist needs to know if the international criminal tribunal respects the fundamental principles of the law including the separation of powers, equality between prosecution and defence, and presumption of innocence until guilt is proven. If the forensic pathologist is worried about the need to respect the law and human rights and as the same time is aware that the ICTY has subverted such principles of law (for example, selective justice according to the results of the questionnaire), he will be subjected to strong ethical tensions. Conversely, ethical tensions are minor for a

forensic pathologist interested mainly in the technical aspect of his mission and the conviction that his or her mission will bring clues and evidence of criminal and torture acts useful in convicting war criminals.

Such ethical tensions need collective thoughts through a discursive ethics possibly leading to a consensus based on reason. This type of ethics could be first applied between forensic pathologists from different nationalities, but also extended to other forensic scientists. This would assist in determining ethical guidelines, relative to the place and role of the forensic pathologist in the missions, his financial and professional independence, and the acceptable standards of justice guaranteeing in particular the respect of human rights needed to be completed by an international criminal tribunal. Some previous papers might be useful as sources for ethical guidelines and practical enough to be used in concrete situations. For example, Skinner and Sterenberg made recommendations about the role and authority of the different forensic specialists taking part in mass grave investigations (Skinner and Sterenberg, 2005). These authors did not recognize a hierarchy of authority or expertise among the forensic pathologists, anthropologists, archaeologists and odontologists. Indeed, they suggested in order to avoid competition and discord among experts that no expert should be excluded from contributing to the resolution of the challenges including exhumation, victim identification, documentation of criminal acts. Conversely, the forensic experts should be apprised of their limits within investigations (Skinner and Sterenberg, 2005). In the same way, other authors suggested that the mandate of the forensic pathologists should be specified exactly to avoid unrealistic expectations and uncertainty as to their role (Rainio, Lalu et al., 2001). Determination of reasons for events, their political and moral meanings, or the connection of the autopsied victims to political or other organizations are questions which lie beyond the scope of forensic science practice (Rainio, Lalu et al., 2001). As medical deontology requires from the forensic pathologist a responsibility ethics, alternatives to

international criminal tribunals should be discussed, such as truth and reconciliation commissions where two missions could be entrusted to the forensic pathologist's care:

- A humanitarian mission for the identification of the victims following the armed conflicts in order to ease the mourning and grief of the families of the missing people. Such a mission requires an independent institution, such as the International Commission on Missing People (ICMP) based in Bosnia. Identification was indeed judged by the ICTY not legally necessary whereas the main purpose of the investigations was to establish the victims' ethnicity and cause and manner of death providing evidence of criminal acts. The ICTY had neither the resources required to undertake a large-scale identification of victims, nor the time (Cordner and McKelvie, 2002). Consequently, the identification of victims justifies the intervention of international medico-legal teams able to compensate for the work of local teams that are short of means, personnel and structures destroyed or out of order because of the war. Thanks to such international help, from the 30,000 people who were missing after the war in Bosnia in 1995, 15,000 had been exhumed until 2003 and around 9,000 (30%) identified (Cordner and Coupland, 2003).

- A mission for historical purposes independent of any judicial process, where the process of forensic investigation and documentation can help create an accurate record of past crimes, which is able to challenge false interpretation of facts related to the armed conflicts. These investigations can give an objective perspective on past facts if such investigations are not selective. Indeed, although the role of forensic pathology in the construction of history is unquestionable, as illustrated by the investigations of the Katyn forest massacre (Raszeja and Chroscielewski, 1994), this construction in spite of stringent methods remains dependent on the exhumed sources. A biased selection of exhumations can lead to overrepresent the victims' number of war crimes and underrepresent other types of death such as acts of war or natural death (Sprogøe-Jakobsen et al., 2001). In the same way, a selective investigation of

mass graves could lead to a relative underestimate of the number of Serbs who were victims of war crimes as their nationality was considered responsible for the wars by the dominant public opinion in Western countries and for whom the medico-legal investigations were not favoured (Lorin de la Grandmaison and Durigon, 2001). Such evidence-based history allows a common reading of history, which is an essential condition to envisage a reconciliation through truth and reconciliation commissions.

Such alternatives in accord with medical deontology seem a better way than current challenged international justice without any cultural, spatial connection with the territories where war crimes were committed.

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