What Happened at Srebrenica? Examination of the Forensic Evidence

The Hague ICTY Tribunal and the Popovic Judgment

by Stephen Karganovic

The judgment delivered by the ICTY Trial Chamber in Popović et al. on June 10, 1995, is of some interest in the ongoing Srebrenica controversy. While it affirms all the principal positions of ICTY jurisprudence in this important area of the Tribunal's judicial practice, it does so in some ways that do not follow mechanically the pattern set by its predecessor cases.

In two areas, in fact, the Popović judgment marks noteworthy departures from previous ICTY Srebrenica cases which suggests that the Tribunal has taken some account of criticisms that have been raised of its handling of key evidence used to buttress the official Srebrenica narrative. These are the method of arriving at Srebrenica death toll figures and definition of the character of the retreating 28th Division column in terms of criminal liability for the Srebrenica massacre, including the impact of its extraordinarily high casualty rate on the overall calculation of culpable deaths. But in another, equally contested area, the evidence of the so-called „crown witness" Dražen Erdemović, the Chamber has apparently chosen to ignore compelling criticisms of his credibility and to continue the practice of its predecesors by continuing to draw important conclusions from his questionable testimony.

First, about departures from the established pattern.

(1) The death figures. The major departure, the full significance of which will become fully apparent only with the passage of time and as the remaining Srebrenica related trials (Karadžić and Mladić) are completed, is the fundamental shift in the methodology of demonstrating the number of Srebrenica victims. It should be recalled that right up to the last Srebrenica trial (Blagojević and Jokić) the Tribunal relied on the standard forensic procedure of conducting autopsies on human remains that were found in exhumed mass graves believed to be linked to Srebrenica. Official exhumations began soon after the event, in 1996, and they continued until 2002. They were conducted by international forensic specialists under the auspices of the ICTY Office of the Prosecutor. In relation to the genocide victim figure of 8,000 that was announced at the start, and which sounded rather like a target for the forensic specialists should use to measure their field performance, the actual results of the exhumations were quite meager. By the end of the process, when prosecution forensic teams ceased operating, all they had to show for their labor were 3,568 autopsy reports (which turned out to not necessarily be as many bodies), clearly not even half of the „target" figure.

Significantly, in the important Krstić case, the first in which an ICTY chamber made intimations of genocide with reference to Srebrenica, the court had only about 1,800 autopsy „cases" to work with.[1] That, of course, was not an impediment to the finding of the Krstić chamber that "7,000 to 8,000" Bosnian Moslem males were executed in Srebrenica,[2] but considerable subterfuges were required to cover the striking numerical difference. One of them was simply forecasting future forensic developments. The Krstić chamber nonchalantly expressed its opinion that once the contents of an additional 18 unopened mass graves were disinterred "it is expected that the total number of bodies found and linked with Srebrenica will significantly increase as these sites are exhumed".[3]

The source of this extraordinary conviction is not referenced, but in the footnote the Chamber quotes approvingly the Prosecution's estimate that "the total number of bodies detected in

mass graves is 4,805".[4] Clearly, if the Prosecution's "estimate" were validated, that figure plus the approximately 1,800 cases available to the Chamber at that time would make the claimed 7,000 to 8,000 death toll look like a credible analysis.

These speculations may well have gone unchallenged if Dr. Ljubiša Simić, a member of the Beara defence team[5], had not bothered in 2008 and 2009 to take a very close look at the prosecution's—by then—3,568 autopsy reports, all 30,000 pages of them. What he discovered was startling. One report, or "case", did not equal one body. In 44,4% of the "cases" it consisted of only a few bones or fragments from which no forensically significant conclusions could be drawn. In fact, in 92,4% of those the prosecution's own forensic specialists admitted in their reports that they could not determine the cause and manner of death.

If parameters crucial to criminal liability, such as cause and manner of death, were indeterminable, how could the conclusion be reached that the victims were executed as opposed, for instance, to being killed in the course of legitimate military action? And how could such unsatisfactory evidence serve further to support a grave conclusion, such as genocide?

In contrast to the bulk of human remains offered by the prosecution in support of its Srebrenica case, and which the chamber accepted as ultimately probative of genocide, but which seemed to be devoid of any forensic significance, there were only 442 human remains in the mass graves with ligatures and/or blindfolds. This was the only category in a condition that strongly suggested execution.

Dr. Simić meticulously categorized mass grave remains by degree of completeness and pattern of injury. The picture which emerged from his investigation was most contrary to the prosecution's case, yet it was the prosecution's own evidence that he was dissecting. In the end, he canvassed the number of paired femur bones[6] in the autopsy reports in an effort to determine how many individuals were buried in Srebrenica mass graves, having died of all causes. He found a total of 1,919 right and 1,923 left femur bones. Thus, with a very high degree of reliability it was established that in total there were under 2,000 individuals in all the Srebrenica mass graves exhumed by the prosecution. The patterns of injury were in some cases consistent with combat death, and in others with possible execution.

Plainly, on closer examination the forensic evidence was more unhelpful than helpful to the prosecution thesis (and, by obvious extension, the very thesis that the Tribunal was hard pressed to document) that in Srebrenica there were about 8,000 execution victims. Ten years later, there is no trace of the 4,805 bodies the Krstić court gullibly agreed had been "detected" in the unexhumed Srebrenica mass graves. Body counting in the classical sense had reached an embarrassing dead end.

In the Popović case, the Chamber therefore decided to make an end run around the issue and to shift its emphasis to a new technique—DNA:

"Based on the evidence, the Trial Chamber has found that at least 5.336 identified individuals were killed in the executions following the fall of Srebrenica. However, noting that the evidence before it is not all encompassing, the Trial Chamber is satisfied that the number of identified individuals will rise. The Trial Chamber therefore considers that the number of individuals killed in the executions following the fall of Srebrenica could well be as high as 7.826."[7]

The reference to "identified individuals" indicates the source of the Chamber's data: the International Committee for Missing Persons (ICMP), an NGO with US ties with local

headquarters in Tuzla.[8] ICMP claims to have so far identified 6,414 Srebrenica victims.[9] Superficially, that sounds like genuine progress in the critical area of victim identification. The problem, however, is that during the Popović, where it was officially unveiled, ICMP data was presented in closed session and under severely limiting conditions that gave neither time nor adequate resources to the defence to subject this evidence to a thorough scientific analysis. ICMP strenuously opposes outside inspection and verification of its results on the grounds that it might cause additional pain to the survivors and it requires sample donors' written permission before it will show its raw data to anyone. Needless to say, in the tense and hostile Balkan context, that is virtually the same as denying access.

ICMP's penchant for secrecy in fact seems to go quite far. After Radovan Karadžić's open court complaint that his defence was subjected to discriminatory treatment as a result of ICMP's refusal to show their data, to everyone's surprise it was prosecutor Hildegard Uertz-Retzlaff who revealed that ICMP was no more forthcoming to the prosecution:

"The ICMP did also not provide the DNA to us. It is not that give it to us and not to others."[10]

It strikes one as amazing that even the proponent of this evidence—in this case ICTY Prosecution—should have been denied the privilege of properly reviewing it.

While the Chamber did hear ICMP Director of forensic science Thomas Parsons' presentation of the DNA data[11] it is not clear whether it, any more than the Prosecution, had actually seen it, and even if it had a glimpse, the record does not show that the Chamber bothered to enlist any expert help to understand it.

To summarise, acceptance and reliance[12] upon ICMP's critically unexamined evidence seems first and foremost to be an act of faith.

Even if protestations of privacy on behalf of the survivors who donated blood samples are to be accepted at face value, now that the 5,336 identified victim figure has been enshrined in the official Judgment, it would seem simple and convenient to allay doubts by publishing the first and last names of all the 5,336 individuals involved. That should offend no one's sensibilities as thousands of names of alleged Srebrenica victims have already been carved into a huge slab of stone at the Potočari Memorial Centre to be seen by everyone. The publication of these names of victims supposedly identified by DNA would not only be quite sensational, it would also make further forms of verification possible. No such list, however, is appended to the Judgment.

But the Chamber's biggest problem in this segment is not its failure to name the identified individuals (identification, it should be recalled, means assigning a first and last name rather than a number to each individual.) Nor is it even its cavalier prediction that "the number of individuals killed in the executions following the fall of Srebrenica could well be as high as 7.826", a prognosis for which there is no apparent basis and which is distressingly reminiscent of the Krstić Chamber's failed forecast that almost 5,000 unexhumed but "detected" bodies were on the verge of being discovered. It is, rather, that the Chamber is apparently ignorant of how DNA works and of what it can and cannot do.

That ignorance is reflected in the Chamber's finding that "at least 5,336 identified individuals were killed in the executions following the fall of Srebrenica", which is scientifically impossible. By matching samples taken from the deceased person to biological material donated by the potential blood relative, DNA procedure can establish, with various degrees of certainty,

the deceased's probable identity. But in terms that are relevant to criminal liability it can do nothing more than that. It cannot help determine the time and manner of death. The deceased, whose first and last name as a result of successful matching may have been established, could have been killed in combat, in an accident, or could have died of natural causes. The casual suggestion made by the Chamber, that the 5,336 identified individuals "were killed in the executions following the fall of Srebrenica" is scientifically unwarranted and, as any biology student could inform the Chamber, it is absurd on its face. No one can make such a determination based on DNA data without exposing themselves to enormous ridicule.

But this is a determination which the Chamber simply had to make, because without the time and manner of death claim to go with it, the pompously announced DNA identification evidence is quite useless for conviction purposes.

It can be argued that the Chamber acted most unwisely by embracing the DNA approach without at least consulting a biology student about its usefulness before doing so. Once this segment of the Judgment is subjected to thorough critical analysis, ICTY will discover that it will get even less in terms of genuine conviction evidence than was the case with the apparently jettisoned standard forensic approach. The standard approach at least had yielded 947 potential execution victims (442 with blindfolds and ligatures, plus 505 with bullet injuries). The methodology shift to DNA is incapable of demonstrating a single death in terms of legally relevant characteristics. It seeks to impress with the aura of high tech, but like any bluff it can last only as long as it remains unchallenged or, in this case, unexamined.

(2) The 28th Division column. The status of the 12,000 to 15,000 strong mixed military/civilian mostly male column which left Srebrenica enclave on foot late on July 11, 1995, headed for Moslem-controlled territory in Tuzla is a key factor in the controversy of Srebrenica. Prosecution military expert Richard Butler conceded the mixed character of the column, which under international law made it a legitimate military target.[13] Testifying in the Popović case, Butler reiterated this position.[14]

The legal character of the column and the extent of its casualties are of the utmost importance because in an effort to reach the magic figure of 8,000 column losses are commonly conflated with execution victims. That approach is quite improper because the column's casualties are legally legitimate and give rise to no criminal liability whatsoever. Referring to the column, Jean-Rene Ruez, chief ICTY prosecution investigator, stated that,

"A significant number [of Moslems] were killed in combat. The Zvornik Brigade of the VRS Drina Corps had organized ambushes and that is when it had the most casualties during the entire war. Many were killed while trying to make it through minefields. An unknown number probably committed suicide in fear of being tortured before being put to death. It cannot be excluded that some had shot those who may have wanted to surrender."[15]

In fact, based on statements given by surviving column members who reached Tuzla,[16] and which are also in the ICTY electronic data base,[17] many of the engagement sites have been identified and eyewitness estimates of casualties are available.[18]

These casualties were estimated by prosecution military expert Richard Butler, when testifying in the Popović trial, to have been 1,000 to 2,000 for the period of July 12 to 18, 1995.[19] In a July 17, 1995, UN internal report it is estimated regarding the column that "up to three thousand were killed on the way, mostly by mines and BSA [Bosnian Serb Army] engagements."[20] In the "UNMO HQ Daily Sitrep" for July 18, 1995, speaking of the column it is estimated that 3,000 were "believed to have been killed by minefields, snipers, and ambush

conflict with BSA".[21] So all these estimates and reports, while lacking absolute precision, nevertheless converge on the conclusion that the retreating 28th Division column did suffer significant casualties along the way.

The technical problem which the column presents is two-fold. First, it demands separate analysis and categorization for Srebrenica-related events which suggest legitimate combat and cannot be fitted into the Procrustean bed of genocide, as the neat and simple Srebrenica narrative requires. So, in the first place, politically and psychologically it greatly alters the simplistic picture that has been relentlessly emitted over the years. Secondly, it apparently involves casualties in the thousands that cannot easily be brought within the ambit of war crimes. Given the severe dearth of bona fide execution victims, the presence of thousands of legitimate casualties is at worst an embarrassment and, at best, an opportunity. The opportunity is to simply blend them in with execution victims, thus eliminating the problem and at the same time helpfully raising the victims' total, even if it still remains short of the target figure of 8,000.

It seems that the Popović Chamber has opted to seize the opportunity. It admits that the column was shelled with artillery and hand grenades, presumably causing widespread casualties, and that some members of the column committed suicide. [22] But then it goes on to argue that the column was in its composition (and presumably its legal character as well, though that is never stated explicitly) indistinguishable from the women, children, and elderly Srebrenica enclave inhabitants who had gathered at the UN base in Potočari. Having practically erased the legal distinction, the Chamber then draws the natural conclusion: the column (and by implication its casualties) was part of the "widespread and systematic attack against the civilian population."[23]

There is, of course, no subtle or refined legal analysis here, but the conclusion does serve the Chamber's practical purpose. By erasing the legal distinction between the two groups, it also did away with the necessity for bothersome account-keeping in terms of which victim was unlawfully executed and which was a legitimate casualty. Given the severe shortage of execution victims, the Chamber's practical solution is understandable. But it is certainly not to its credit professionally any more than the misrepresentation of what can be expected from DNA results.

(3) The Erdemović evidence. While the introduction of DNA evidence and its elevation to the status of primary analytical tool for estimating Moslem losses, and the simultaneous downgrading of the 28th Division column to virtually an extension of the civilian population, appear to be departures from the way in which these topics were being approached in previous Srebrenica trials, the Popović Chamber's wholehearted embrace of Dražen Erdemović's evidence can safely be filed in the "more of the same" category. In this particular case, the Tribunal was oblivious to the intense and cogent questioning of Erdemović's credibility coming from various sources. The most prominent of them was Germinal Čivikov's devastating critique, "Crown Witness,"[24] published initially in German, then in Serbian in the Fall of 2009, and now waiting to appear in English translation.

In fact, the Chamber's use of Erdemović's evidence startles with its boldness. The following example, bearing on the identification of defendant Vujadin Popović at a key crime scene, will do.

Here is how the Chamber approaches the issue of identification of one of the principal accused:

”There is no evidence before the Trial Chamber of any other Lieutenant Colonel in Pilica at this time. In light of this, the Trial Chamber is satisfied that there is no other reasonable conclusion available on the evidence but that the Lieutenant Colonel whom Erdemović saw at Branjevo Military Farm and in Pilica town on 16 July was Popović.”[25]

The way in which the Chamber handled the identification of the mysterious “lieutenant-colonel” is curious indeed. His presence in Pilica is assumed, not for some objective reason, but because it was Erdemović who said so. The picture drawn by Erdemović by hook or by crook must be rounded off with an identified lieutenant-colonel on the crime scene, and it seems to matter little who that individual might turn out to be. By happenstance, in the courtroom, in the dock, there was indeed a real life lieutenant-colonel, the defendant Vujadin Popović. The possibility that Erdemović may have invented the lieutenant-colonel as he did a number of other things in his evidence, does not disconcert the Chamber in the slightest. It goes on to render its conclusion:

“The Trial Chamber has carefully considered the fact that Erdemović was unable to identify Popović in a photo line up … However, the Trial Chamber considers that given the traumatic circumstances in which Erdemović met Popović and the significant passage of time since then, Erdemović’s failure to identify Popović in a photo line up does not raise a reasonable doubt as to the Trial Chamber’s conclusion that the man whom Erdemović saw at Pilica on 16 July was, in fact, Popović”.[26]

The impression that the Popović trial chamber is incapable of functioning without reliance on the discredited “crown witness”, Dražen Erdemović, is overwhelming. The Hague Tribunal’s toxic dependence on the evidence of the notoriously false witness Erdemović is reflected in the way the Chamber approached the issue of placing the accused VRS Lt. Colonel Vujadin Popović on the crime scene in Branjevo and Pilica. There was no other evidence but Erdemović’s that could possibly put him there. But the Chamber simply had to engineer a way to make sure Popović was there, and so it did. Otherwise, it would lack a plausible rationale for connecting him to the crime and sentencing him to life imprisonment. If it had to resort to the feeble excuse that the photo line-up crashed because Erdemović was too traumatised to give the proper response, so be it.

The Popović judgment fails as a serious act of juurisprudence on many levels. It reflects institutional arrogance and corruption in the highest degree. Since Srebrenica is the core factual and legal issue that the Tribunal has assigned to itself to deal with and „resolve“, not just in judicial but indeed in moral and historical terms, these and other features of the Popović judgment portend the techniques that the Tribunal will most likely use as it prepares to strike its farewell blows in the Karadžić and, potentially, Mladić trials.

If this is a preview, it fails to impress with the sophistication of its approach. But the Tribunal probably sees no reason to even try to be sophisticated in the fabrication of its evidence or in the formulation of its bogus legal doctrines. It apparently feels invulnerable under the protection of its mighty “hyperpower” sponsors. The issue its willing tools and enablers are not addressing is precisely for how long that protective shield can last. It is, in fact, crumbling before our eyes and they may well be called to account professionally long before they are able to settle comfortably to enjoy the ill-deserved pensions, perquisites, and sundry munificent rewards that have undoubtedly been set aside for them by their masters.

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Notes

[1] The number stabilised at 3,568 by 2002 when further ICTY exhumations were discontinued.
[2] Prosecutor v. Krstić, trial judgment, par. 84.
[3] Prosecutor v. Krstić, trial judgment, par. 80..
[4] Prosecutor v. Krstić, trial judgment, par. 80, footnote 166.
[5] Ljubiša Beara: one of the Popović et al. co-defendants.
[6] The femur is one of the sturdiest skeletal components and therefore least likely to be degraded as a result of exposure to unfavorable external conditions.
[7] Prosecutor v. Popović et al., Judgment summary, http://www.icty.org/x/cases/popovic/tjug/en/100610summary.pdf
[8] Popović Trial Judgment, par. 638 and passim.
[9] ICMP, "ICMP makes 13,000 DNA-led identifications of missing persons from Bosnia-Herzegovina", 26 March 2010, http://www.ic-mp.org/press-releases/icmp-makes-13000-dna-led-identifications-of-missing-persons-from-bosnia-herzegovinaicmp-ostvario-13000-dnk-identifikacija-osoba-nestalih-u-bosni-i-hercegovini/.
[10] Prosecutor v. Karadžić, Status conference, T. July 23, 2009, p. 364, lines 21-23.
[11] Popović Trial Judgment, par. 639.
[12] Popović Trial Judgment, par. 624.
[13] Richard Butler, Expert report, par. 3.21, November 1, 2002, EDS (Tribunal data base) number 03072366.
[14] Prosecutor v. Popović, T. P.20244, lines 19-25, p. 20245, line 1.
[15] Monitor newspaper [Montenegro], April 19, 2001. EDS number 06038344.
[16] For a sustained analysis and discussion of witness statements on column casualties, see: Stephen Karganovic and Ljubisa Simic, "Srebrenica: Deconstruction of a Virtual Genocide" (Belgrade 2010), available on the internet at:
http://www.srebrenica-project.com/index.php?option=com_content&view=article&id=90:any-lieutenant-colonel-will-do&catid=12:2009-01-25-02-01-02
[17] See Stephen Karganovic: "Analysis of Moslem Column Losses Due to Minefields and Combat Activity," Proceedings of the International Symposium on ICTY and Srebrenica, p. 376-391 {Belgrade-Moscow 2010).
Available on the internet at:
http://www.srebrenica-project.com/index.php?option=com_content&view=category&layout=blog&id=21&Itemid=19
[18] In the Krstić judgment, it is conceded that the column was subjected to "heavy shooting and shelling," par. 65.The Chamber did not dispute the conclusion, stipulated by prosecution and defence experts, that "the column qualified as a legitimate military target", par. 163.
[19] Prosecutor v. Popović, T. P.20251, lines 6-8, and 12-14.
[20] ICTY electronic data base number R043-3424.
[21] ICTY electronic data base number R003-8723.
[22] Popović Trial Judgment, par. 381.
[23] Popović Trial Judgment, par. 782.
[24] Germinal Civikov: Crown Witness [Belgrade 2009].
[25] Popović Trial Judgment, par. 1134.
[26] Popović et al., trial judgment, par. 1135.

Global Research, June 20, 2010