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Hidden in full sight: kinship, science and the law in the aftermath of the Srebrenica genocide

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Abstract

Terms such as 'relationship testing', 'familial searching' and 'kinship analysis' figure prominently in professional practices of disaster victim identification (DVI). However, despite the dependence of those identification technologies on DNA samples from people who might be related to the dead and despite also the prominence of the notion of 'relatedness' as a device for identifying the dead, the concepts of 'relatedness' and 'kinship' remain elusive both in practice and in analyses of the social and ethical aspects of DVI by DNA; they are hidden in full sight. In this article we wish to bring kinship more to the fore. We achieve this through a case study of a setting where bio-legal framings dominate, that is, in the trial at the International Criminal Tribunal for the former Yugoslavia (ICTY) of Radovan Karadžić for the Srebrenica genocide in 1995. DNA samples from the families of those massacred in Srebrenica were vital for the identification of individual victims but are now also utilized as 'evidence' by both the prosecution and the defence. By viewing practices of science ('evidence' and 'identification') and legal practices ('justice', 'prosecution' and 'defence') through the lens of kinship studies, we will present some alternative *and* complementary framings for the social accomplishment of 'relatedness'.

Keywords: DVI; kinship; science and law; Srebrenica genocide; International Criminal Tribunal for the former Yugoslavia (ICTY)

Introduction

Disaster Victim Identification (DVI) by DNA profiling relies on matching the remains of the dead with DNA from samples provided by living persons thought to be biological relatives of the dead. Central to the process is the identification of shared alleles across two profiles. This practice is known in professional discourses by phrases such as 'familial searching', 'kinship testing' or 'relationship testing'. This however produces a paradox: as the terminology indicates, DNA-led DVI is dependent,

practically, conceptually and socially, on ideas about relatedness, kinship and family, yet those ideas remain almost wholly unexplicated by those professional parties developing, deploying or using the results of, those techniques. Kinship remains hidden in full view. The parties concerned are numerous, in number and in category, and include victims' families, on-the-ground practitioners, laboratory-based scientists, data processors, aid agencies, police, lawyers, and in the case of those involved in related criminal investigations, prosecutors, witnesses, defendants, judges, and so on.

In this article we explore this paradox through consideration of the identification of victims of the 1995 Srebrenica massacre and the subsequent prosecution at the International Criminal Tribunal for the former Yugoslavia (ICTY) at The Hague of the alleged perpetrators of that atrocity. We shall use the term 'atrocities victim identification' (AVI) to highlight the distinctive aspects of the intentional and organised death of victims of the massacre as well as to alert readers to the links between AVI operations and transitional justice mechanisms. We take one decision of ICTY's Trial Chamber as a case study through which to demonstrate the ways in which ideas about relatedness and kinship remain 'hidden in full view'. This paradox is both conceptually interesting and of practical import given that the 'thin' representations of kinship that are apparent in these bio-legal deliberations also reflect a limited understanding of the importance of the matters being discussed to the families involved. The thin bio-legal framings of kinship are seen to be in stark contrast to the identification and kinship practices of the affected families and communities.

In our contribution to this special issue, we explore the ways in which making kinship visible can help to overcome the conceptual and practical weaknesses of bio-legal framings. We have several aims: to illustrate how thin understandings of kinship are deployed in one particular bio-legal context; to draw out the implications of those limited understandings for the families and communities involved, and to suggest ways in which making kinship visible might improve the experiences of families and communities involved in, and affected by, those bio-legal deliberations, both in this particular case and in other areas of practice and policy. Kinship and identity are historically important concerns in sociology (Lawler 2013) and anthropology (Sahlins 2011) and the links between understandings of genetics, identity and kinship have grown in importance in the social sciences since the 1980s (Hauskeller, Sturdy and Tutton 2013). This exploration will also assist sociological understandings of how we 'do' practical kinship and how we 'do' identity and identification.

Background: atrocities victim identification for the living?

A strong moral justification for DNA identification is serving the needs of families whose relatives are missing (Wagner 2008), though the rhetoric of 'family interest' or 'need' is used with little acknowledgement of the complexity of the notion of 'family' and the complexity of teasing apart the potentially different interests of different family members. However, given that family interests in identification *are* averred as a key reason, it is important that the nature of the presumed connections between the living and the dead are given more scrutiny. There are two aspects to the importance of this scrutiny: the practical and the conceptual. There are practical benefits to be gained from a sharper awareness of the entanglement of DNA profiling and everyday kinship practices, which can inform and assist the improvement of practice and policy in AVI and DVI practices. These can add to the insights from groups such as 'Disaster Action' involved in supporting families and in presenting the 'family perspective' in the immediate aftermath of a mass death

where both grieving and uncertainty prevail.¹ Other, more specialised, practical questions include how mass identification is to be managed in situations where, for example: (a) a match is shown to be wrong; (b) a match is denied by the families concerned; (c) no match can be found because the family members are not genetically related, or (d) evidence of identification is asserted on the basis of knowledge other than shared alleles (Turney 2010; Evison et al 2012). In other words, what is to be done when notions of relatedness are not, wholly or solely, based on DNA profiles (Zerubavel 2012)? How are these apparent disparities to be handled in the management of knowledge and information between practitioners and families (Parker, London and Aronson 2013)? Understanding the consequences of DNA profiling for the individuals, families and communities involved, as well as the wider socio-ethical ramifications of their involvement in such procedures, are areas that require more scrutiny than previously received. This paper aims to make a contribution to that task.

These questions suggest that it is also important, conceptually, to problematize 'kinship' and 'identification' and examine and interrogate the social practices that constitute them in this particular domain. What do the situated practices of DNA identification tell us about everyday, including culturally varied, ideas of families, kinship and relatedness? Trying to answer this question will help us to recognise the mutually constitutive understandings of 'relatedness' and DNA identification practices; that is, how families and kinship are constructed through the practices and discourses of DNA identification and associated socio-legal investigations, and also how those practices of DNA identification are constructed through notions of 'relatedness'. This mutually constitutive nature is visible in the very phrasing of 'relationship testing' and its use, even in situations where, by definition, the presence, or otherwise, of a relationship cannot be known.

These are not completely new questions as they arise in clinical (Atkinson, Featherstone and Gregory 2013) and other social settings where notions of relatedness are shown to involve more than genetic composition.² Ideas for how to characterise these issues can therefore be found from asking how practical kinship is performed in different settings, by different agencies, through different practices, with different goals and consequences for understandings of kinship. In this article we explore in depth one case of situated reasoning that arose as part of the wider process of prosecuting those involved in the Srebrenica massacre.

We focus on the Srebrenica massacre both because it has been a very challenging AVI operation for families, authorities and international organizations and because it has played a significant role in the development of mass death identification practices. The Srebrenica genocide took place during the war in Bosnia and Herzegovina (1992-1995).³ The Army of Republika Srpska or Vojska Republike Sprske (VRS) overran the safe haven of Srebrenica in July 1995 where Bosnian-Muslim or Bosniaks had found shelter. Children and women were transported to Bosnian government-controlled territory, while approximately 8,000 Bosniak men had all identifying documentation removed and were then systematically killed. Their corpses were buried in mass graves by VRS forces who later, in attempts to conceal their crimes, exhumed those bodies and transported them to secondary mass graves. As a result of these cover-up operations, bodies became dismembered, fragmented, crushed

¹ <http://www.disasteraction.org.uk> (accessed 11 June 2014).

² For instance the *Sociology* special issue "Genetics and the Sociology of Identity", edited by Hauskeller, Sturdy and Tutton 2013.

³ The events that led to the atrocity have been described by Stover and Ryan 2001; Stover and Shigekane 2002; Huffine et al 2007; Wagner 2008; Nettlefield and Wagner 2014.

and co-mingled, resulting in body parts from individuals being buried at multiple locations. Consequently, the post-Bosnian war operations to locate and identify mortal remains of Srebrenica's victims proved extremely complex (Jugo and Wastell in press).

The killings and efforts to conceal crimes rendered victims into 'missing persons' in three different ways: corpses were missing until mass graves were found, bodies were 'missing' an identity as they had no individualizing documents, and victims were and are 'missed' by their families and communities (Wagner 2008). The deaths were a hard-to-accept certainty for many survivors, as there were no bodies to bury. In trying to offer relief to survivors, the International Committee of the Red Cross (ICRC) distributed death certificates if appropriate information could be provided, but many families felt "their missing relatives were being written off ... and that information was no substitute for bodies" (Stover and Shigekane 2002, 855). It became clear that a concerted identification operation was required to enable families to bury their relatives and for authorities to issue death certificates. Yet identification proved very challenging because of numbers and also practical, political and legal complexities.

Various efforts were made to detect mass-graves and exhume and identify remains. During 1996, forensic scientists from the 'Physicians for Human Rights' (PHR) identified some mass graves and recovered 517 bodies. However, their legal mandate required them only to determine the ethnicity and causes of death of victims and to preserve evidence in anticipation of future criminal trials; no efforts were made to identify individual bodies for return to their families (Stover and Shigekane 2002, 854; Vollen 2001, 337). Also in 1996, forensic experts from Finland and Bosnia started collecting remains from the 'trail of death', the route through the woods from Srebrenica where many of the men were killed. The ICTY had waived the opportunity to collect these remains because defence lawyers "could argue that at least some of the victims recovered from the trail may have been killed during armed confrontations with the Bosnian Serbs" (Vollen 2001, 337). Both the PHR and the Finnish-Bosnian operations suggest that the quest for legal truth and justice may have hampered the humanitarian needs of victims' families and the wider community.

With an expanding collection of unidentified remains, the PHR initiated the Srebrenica Identification Project in 1997. Before a body could be identified, samples of all victims had to be obtained, as well as *ante mortem* information about the missing people's distinguishing characteristics like "age, gender, stature, clothing and personal effects at time of disappearance, medical and dental history, tattoos and old fractures" (Vollen 2001, 338-339). It was thought that involving family members in processes of collecting such data might "ease feelings of helplessness or guilt for not having done more to find a missing relative" (Stover and Shigekane 2002, 861). However, the pace of identification was painstakingly slow: at the end of 1998, 3,000 body bags had been filled, but only 30 victims identified (Vollen 2001, 339; Stover and Ryan 2001, 23). In 2000, the ICRC, in collaboration with some affected families, published the first of several 'Book of Belongings' containing photos of possessions found with the Srebrenica bodies. Once possessions were recognised, forensic scientists worked with families and typed mitochondrial DNA to conclude cases (Vollen 2001).

The advent of DNA typing technologies contributed significantly to identification. The International Commission on Missing Persons (ICMP), founded in 1996, established two forensic DNA laboratories in the former Yugoslavia; they have been genetically identifying remains since the early 2000s (Huffine et al 2001; Wagner 2008). In order to do this and thereby render anonymous remains into a

"known body", known genetically and known by institutions and families (Toom 2012), two sets of samples have to be reconciled: a victim's remains and biological samples from the dead person's genetic relatives. To obtain the latter the ICMP set up 'family outreach centres' from June 2000 where they collected DNA samples and also conducted '*ante mortem*' interviews with surviving family members to elicit additional social information about the interviewee *and* the missing person, including their relationship and any distinctive medical information about the missing person. Using the two vast databases of DNA samples and socio-medical information, the ICMP first genetically identified a victim of the Yugoslavian Wars on November 16, 2001; in October 2013 it was reported that almost 17,000 missing persons had been identified.⁴ Whilst the focus of the ICMP is on processing and matching genetic profiles it is important to note the role of the additional information in contextualising and confirming those matches, as well as the role of the families and communities in providing samples in the first place. Wagner notes "just as genetic profiles provide signposts for individual identity, so the recollections of family members help to recognise the missing person's remains. Indeed, the technology's success depends simultaneously on the innovations of DNA analysis and the human subjective experiences of remembering and reckoning" (2008, 13). Kinship is, in this instance, not only situated in the practice of DNA matching, but also practised through providing personal items and information, adding individuality to an abstract statistical match.

Identification ended uncertainty and made it possible for surviving family members to commence relating cognitively and emotionally to the death of a *missed* person. It provided families with a narrative about the final moments of their husbands, sons, brothers, fathers and wider circle of family, friends, colleagues and neighbours: when and where they died, with whom, and how. Bodies could then be buried according to religious and cultural customs, including sharing—with family, neighbours, friends—bereavement, mourning, praying and eating to thereby "bring the loss of the individual into the larger community" (Stover and Shigekane 2002, 860). The grieving community established a commemorative site for the genocide victims, the Srebrenica-Potočari Memorial where the first identified remains were interred in March 2003 (Simić 2009). Collective burials of newly-identified victims are organised annually on July 11th, the day that Srebrenica's safe area originally fell. The many gravestones, which are marked with first and family name, date of birth, and date of death, demonstrate that nameless remains can be rendered into an individual's remains again. In other words, kinship is practised not just as a fact of shared alleles; identification, acknowledgement of individuality and commemoration are all part of restoring, recognising and celebrating the kinship link.

'The case study' document: litigation for the dead?

The ICTY was established by the Security Council of the United Nations in 1993 partly in reaction to two key events: the Ovčara farm massacre and the suspected existence of death-camps in central Bosnia (Stover and Shigekane 2002; Nettlefield and Wagner 2014). Its purpose was to hold persons accountable for serious breaches of international humanitarian law, to bring justice to victims, to give victims a voice, to establish the (contested) facts of the crimes committed, to develop

⁴ ICMP statistics, ICMP Conference 'The Missing', The Hague, the Netherlands, date: 31 October 2013.

international law, and to strengthen the rule of law.⁵ We focus on the trial of Radovan Karadžić as he is thought to be one of the 'architects' of, and politically responsible for what has now been deemed to constitute the Srebrenica genocide, legally defined as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" (UN 1948). Karadžić denies responsibility and refers to the genocide as a "myth" (ICTY 2009a) contending that "the people in the mass graves are actually not the boys and men from Srebrenica" (ICTY 2009a). His denial is one of the reasons why the DNA matches presented at the ICTY have been significant evidence and consequently much debated since 2009. There was a very extensive process of negotiation between the accused, the ICMP and the Office of the Prosecutor (OTP) regarding the accused's request to obtain DNA data held by ICMP.⁶

In August 2009, Karadžić announced that he required the entire ICMP database, the logic being that if he could show evidence of errors in the identification of individuals (who for example turn out to still be alive or to not be the person that they were thought, through DNA analysis, to be) he could cast doubt on the whole body of DNA evidence of victims of genocide. The ICMP refused for two reasons: first, informed consent sheets signed by victims' families made no mention that samples and results would be used for the prosecution of those held accountable for war crimes, and, second, the privacy of families and victims would be at stake even if identifying information were erased, as unanticipated family relationships could be exposed (ICTY 2009b). A member of the OTP commented that "the DNA used or included by the donors [i.e. families] may be limited in some respects, but there are still, of course, privacy concerns. It is the person's DNA. It identifies them. And more than that, the entire database which the Defence have requested not only identifies all of the donors, many of whom signed the form stating that their material would be private, but it also ... allows one to reconstruct all of the family relationships which can also implicate privacy interest. So it goes beyond just the individual" (ICTY 2009b).

Karadžić, the OTP and ICMP agreed, in September 2009, that 300 Srebrenica-related and randomly selected DNA identifications would suffice as a means to re-test the ICMP results and procedures. However, disputes ensued between the negotiating parties about, *inter alia*, the method of selection, repeated requests for access to ICMP's complete DNA database, the remit of informed consent procedures, what counts as personal information, and discussions about what it means to randomly select cases from a list. These negotiations delayed the selection of the 300 cases by almost two and a half years. Our focus in this section is the discussion and subsequent decision by ICTY's Chamber to seal or unseal certain evidentiary items, for retesting. A re-examination of DNA matches requires that the accused receives the full file of each identified victim, including genetic information and blood samples from the putative relatives that made the identification possible in the first place. The OTP argued that any files handed over should be sealed, which would mean that confidential information, including the names of putative relatives, would be protected through anonymisation. However, the accused argued that they needed the victims' identities (and therefore the putative relatives' identities) to be made public in order to be able to detect possible wrong identifications.

⁵ See: <http://www.icty.org/sid/324> (accessed 11 June 2014).

⁶ Owing to lack of space we cannot present full details of the Karadžić case nor of the centrality of DNA evidence in this; for further details on the negotiations, see ICTY's court records database information: <http://icr.icty.org/> (accessed 11 June 2014).

The ICTY partly explains and justifies its existence and functions thus: "By bringing perpetrators to trial, the ICTY aims to deter future crimes and render justice to thousands of victims and their families, thus contributing to a lasting peace in the former Yugoslavia."⁷ However, despite providing this central framing for the ICTY, detailed, in-depth understandings of families and kinship were often lacking in their deliberations; that is, kinship was hidden in full view. In the protracted set of hearings and exchanges in which this question of access to sealed or unsealed records was debated, numerous references were made to ideas around genetic identification, relatedness and kinship. In order to see how these references appear in actual practice, and to see clearly the work that they are asked to perform, we now turn to examining in detail one of the documents arising from this process. This is the document in which the ICTY judges give their reasoning and decision on whether the Defence could have access to the unsealed ICMP records; it is entitled, *Decision on the Accused's motion to unseal the ICMP exhibits*, dated April 25th, 2012 (hereafter: Decision Document; ICTY 2012). In selecting this document for a more detailed examination it is important to acknowledge its place within the overall narrative of the Karadžić trial as outlined above. However, beyond that, we make no claims about the specialness or representativeness of this particular document; many others could have been chosen. We were simply looking for a document in which kinship matters featured prominently and explicitly, to provide an example of practical and situated reasoning for the social accomplishment of kinship, that is to display how 'kinship is done', within this arena of bio-legal deliberation.⁸ This is not, of course, to belittle the importance of this particular document (and, indeed, decision) for those directly involved, a matter to which we return later.

In the Decision Document the judges summed up the cases put forward by the Defence and the Prosecution. They highlighted the following points from the Accused: sealing documents violates his right to a public trial as potential eye witnesses cannot come forward if names of the alleged dead cannot be released; there is a public interest in having knowledge of the names of the victims so "errors can be discovered"; any private information can be redacted, and that the possibility of families finding out about the deaths of relatives this way is insufficient grounds for keeping the documents sealed. The judges summarised the key arguments from the Prosecution as follows: sealed documents protect the "legitimate and judicially recognised privacy interests of victims and their family members"; providing their DNA for testing makes those relatives of the missing "unwitting witnesses" to the Tribunal; this process raises the possibility that family members might find out the fate of their "loved ones" in this way which would be inappropriate; unsealing documents may violate the privacy and security of family members who might not want it known that they participated in the DNA identification processes, and, finally, that genetic information "including genetic relationships (or lack thereof) which is private information belonging to the family members", may be publicly revealed. Under "Applicable Law" the judges drew attention to three points: (i) they have a duty to "balance the right of the accused to a fair trial, the rights of victims and witnesses to protection, and the right of the public to access information"; (ii) the judges may "order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused"; and (iii) "The Trial Chamber has previously held that documents should be admitted on a confidential basis only in

⁷ <http://www.icty.org/sections/AbouttheICTY> (accessed 11 June 2014).

⁸ This reasoning is 'situated' in more than a sociological sense; from a legal perspective, the dictum *Quod non est in actis, non est in mundo* ('What is not on file is not in the world') could be said to apply; Vismann 2008.

exceptional circumstances, when they contain information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness."

In their Discussion, the judges say that they do not accept that "simply by donating their genetic material ... family members become unwitting witnesses" to the Tribunal; nonetheless, that the privacy of "the victims themselves" is protected under an existing rule and that, given the "highly sensitive and personal nature" of information relating to the genetic material of the alleged victims, it should be kept confidential to protect their privacy; that, "in an abundance of caution", information from the genetic material of victims' families should be sealed as it may be used to reveal the genetic information of the victims themselves. They regarded as "speculative" the argument that family members "might" not want it known that they participated in providing DNA for identification processes; the judges were "sympathetic" to the view that families should not find out from these proceedings that their relatives are dead, but that the risk of that happening differs for each document. In a footnote, and without further comment, the judges noted concerns that even coded genetic data has "potential for genetic relationships, including lack thereof, to be revealed." As a result of these considerations, the judges ruled that seven sets of files should be classified as public documents (i.e. be unsealed) and four should remain sealed, but that public redacted versions of those four should be made available instead. This outcome was difficult for the ICMP who then had the task of making those records available to the Defence (personal communication, December 2012). We make the following brief, thematically inter-linked, comments about the reasoning in the Decision Document.

Speculative kinship, scientific fact?

These statements reflect somewhat limited understandings of, and empathy for, kinship within the ICTY more widely, as observed by Orentlicher (2010, 100) who criticised them for causing distress to affected communities through the destruction of victims' personal artefacts. However, examination of the situated reasoning in the Decision Document, as well as noting what was *not* said, facilitates more specific observations of their understandings of kinship particularly in the two sections on "Applicable law" and "Discussion". Much use is made of the word 'families' so it could be argued that concern for the interests of victims' families is central to these deliberations therefore reflecting the claims of the ICTY to serve those interests. However, whilst families are present in the Discussion, they have little presence, little weightiness. For example, the range of areas in which their interests were thought to matter are few in number and there is little comment on *how* and *why* those might matter, let alone on how that might affect the judges' decision in any significant way. Whilst the Prosecution arguments about what families might want were labelled "speculative", the judges' responses to these claims were equally speculative. In contrast to this the science that underpins DNA profiling, along with its framings, associations and claims, whilst being given little explicit mention, nonetheless has a presence in these deliberations, precisely because it is unquestioned and not subject to speculation. Indeed, and paradoxically, even though errors might occur in that profiling (hence the request for the records) little in depth consideration is given to this possibility, in these deliberations. The very basis of DNA profiling as a largely reliable and sufficient source of identification, was not questioned.

Decontextualised families

The debate over whether or not family members who gave blood samples become "unwitting witnesses" to the Tribunal has echoes with the suggestion that family members become (also unwitting) "genetic informants" in criminal familial searching cases (Haimes 2006). Its dismissal by the judges as a relevant concern is very surprising and shows little awareness of, or attributes little importance to, the context in which those samples were first given, the motivations of those giving the samples, or the meanings that they might attach to the samples. The ways in which the judges use terminology to distinguish between 'victims' and 'families' allows only limited discursive space to how those involved in the aftermath of the massacre regard themselves. As we have seen, the practices of mourning and commemoration, as well as that of bearing witness to the dead of the massacre, suggests that families and wider communities are also victims. The failure to be aware of this leads to somewhat mechanistic references to families in which they become seen as the means to an end, being primarily referred to as those who provided the original blood samples for the purposes of identification and now being regarded as those whose blood samples are needed by the Defence as part of the process of achieving a fair trial. Neither the immediate context in which those samples were provided, nor the reasons why putative relatives provided the samples, let alone the wider practices in which putative relatives expressed their association, and kinship, with the dead, were given explicit consideration or mention by the judges in their Discussion. It is as if they assumed that assisting identification was a simple, obvious and one-off action that can be taken for granted.

'Discovering' death

Curiously, the above interpretation is supported, rather than challenged, by the concern, albeit limited, that the judges shared with the Prosecution, that families should not discover via the Tribunal that their relative had died. First, this concern is limited in that they thought that the level of risk of this happening was variable given the different periods of time between samples having been provided and the timing of the court proceedings; the longer ago that someone had been identified, the more likely it was that their surviving families already knew that their relative was amongst the dead. Second, it suggests only a limited understanding of how relatives might view the Tribunal; given that some travelled to The Hague to bear witness to their relatives' deaths and to testify (metaphorically and literally) to the importance of the Tribunal, it is possible that this method of "finding out" would be viewed as especially trustworthy. Third, the implication that this might be the first time families actually "discovered", to use the judges' word, the death of a relative is somewhat misleading; again, judging by all the information that has emerged about the communities' experiences of the social organisation (a provocative but appropriate phrase, see Jugo and Wastell in press) of the massacre, most, if not all, affected families must have assumed that a relative was missing for only one reason—that he had been part of that massacre. Even if this were only confirmed by the Tribunal, it is unlikely that this would be the first time the possibility had occurred to family members.

Identification 'for' the dead?

Another aspect of the judges' reasoning, and the ways in which they drew a distinction between victims and families, requires further comment. In their explanation of their decision, they consistently prioritise the interests of the killed victims over those of the living putative relatives. This happens at several different points. First, in referring to the "highly sensitive and personal

nature" of information relating to the genetic material of the victims, they argue that that information should be kept confidential to protect the victims' privacy. This is curious, to say the least, in a decision in which they nonetheless allow the Defence access to the genetic information of living persons; this suggests that they prioritise the privacy interests of the killed victims over those of the living sample providers. Indeed, they consider it an "abundance of caution" to seal the information from the genetic material of victims' families and only do so because it might be used to reveal the genetic information of the victims themselves. This prioritisation of victims' identity and privacy needs over those of living persons was not explained. This also features in another element of the Discussion, in reference to the possible exposure of the existence, or lack, of genetic relationships within families. We have seen that the judges did not discuss this other than to note, in a footnote and without further comment, that even coded genetic data has this potential; they seemed to regard this as an unimportant matter, not requiring further discussion. However, it is clear from the literature on 'genetically anomalous' families that questions of privacy, revelation and discovery are all much more complex matters than this thin treatment of the subject suggests (Klotz 2013).

Neglecting affected communities

Finally, and curiously, there is no mention of the affected communities in this document, despite the charge of genocide which requires an understanding that victims have a collective significance over and above their individual status and over and above their membership of particular families and communities. This omission suggests that the judges only considered victims and their families when arriving at their decision, neglecting the communities within which victims and families are embedded. However, it is clear from what we have already seen, that there are strong collective elements in the identification and marking of the missing and the identified dead. Awareness of the multiple ways in which individuals, families and communities are intertwined through kinship practices is missing from the Decision Document.

It is appropriate to acknowledge that our comments and observations are (to echo the judges) also just 'speculation', but at least they are speculative with reference to the context in which the post-massacre identification practices occurred and were experienced by families; a context in which the judges, in this particular document, showed curiously little apparent explicit interest or awareness. Clearly they had such awareness from their wider roles in the Tribunal, which they could have brought to bear on their deliberations and through that, expressed similar points to those we have made (or indeed a range of completely different points) that indicated some depth of understanding about families' experiences and of their ongoing relationship with the dead people. That they did not express this awareness, suggests that, at the very least, they considered such knowledge to be so "obvious" as to not require explicit mention or that they did not consider such matters to be relevant to their (legal) decision. Had they expressed, let alone deliberated, such matters explicitly, it is possible that they would have reached a different decision. Of course, we are not saying that the judges were actually indifferent to the considerations that we have listed here. Rather, we are drawing attention to the contrast within the Decision Document between the various ways in which the different possible framings of 'what is going on' were expressed: the legal framing is, as is to be expected, present and explicit; the scientific framing is implicit but present, with authority; the possible kinship framings are sometimes implicit and sometimes explicit, but are always limited and without weight and depth; present but without presence. Strathern comments, "The law is the

classic locus for situations where categorical and interpersonal relations confront each other ... the law deals with persons in relation to categories" (Strathern 2005, viii). In the Decision Document, victims and families are unable to escape the confines of those categorical allocations and therefore fail to become either problematized as a questionable terminology or contextualised as actual experiences. We have indicated here other considerations that the judges could have taken into account in their deliberations and through which they could have given greater weight, depth and contextualisation to the views and experiences of the individuals, families and communities concerned.

Discussion: adding kinship to bio-legal framings

AVI practices clearly involve (at least) the triangle of science, law and kinship. Elsewhere, in relation to criminal investigations deploying 'familial searching' we have said, "Just as genetic information [can show] the interconnectedness of individuals, the analysis of questions surrounding familial searching also shows the far-reaching interconnectedness of social and ethical debates in law, medicine and families" (Haimes 2006, 274). If "medicine" is replaced with "science", the same claim can be made about AVI and DVI. Yet this three way relationship is rarely discussed or analysed. The links between law and science are often scrutinized (Jasanoff 2006); the links between science (particularly but not only genetics) and kinship have captured the interests of many social scientists (Hauskeller, Sturdy and Tutton 2013) and the links between kinship and law have received much attention (Strathern 2005; Smart 2010) but discussions of the situated interplay between all three are rare (Pottage 2006). We are not aware of any discussions in the fields of AVI and DVI that have taken this three-way, situated, interplay as its central theme.

That kinship barely received due consideration in the Decision Document is perhaps not surprising given the over-riding dominance of, and potential antagonism between, the two major institutions of science and law. As Jasanoff observes, "The use of scientific evidence such as DNA tests in court ... brings into collaboration two institutions with significantly different aims and normative commitments. In this by no means friction-free encounter, neither science nor law completely retains or completely relinquishes its autonomy" (2006, 329). In the Decision Document, kinship did not figure as a third institution, let alone as an institution with its own "aims and normative commitments". Equally important, kinship *expertise* did not figure in the deliberations; that is, in a setting where legal and scientific expertise was deemed necessary, expertise in kinship and community analysis was missing, despite the fact that kinship and community are irreducible components of that which was being deliberated, and indeed adjudicated, upon.

The absence of a three-way conversation might be partly attributable to the different motivations, justifications and authority that each institution draws on in its reasoning about identification practices. From a 'scientific point of view' (though one needs to be aware of the dangers of such broad homogenising categories) there is an interest in identification as a form of documentation (that deaths have occurred, how many, due to what likely causes) and confirmation that an event happened in a particular way, in order to produce evidence that can then assist the prosecution and defence in a court of law. From a 'legal point of view' there is an interest in mounting a fair trial, with good quality evidence, and attributing "cause and blame" (Jasanoff 2006: 339). For families there might be an interest in both achieving relationship confirmation (that one's relative has died in that

place as a result of that event) and in exercising kinship affirmation, a wish to 'do the right thing' by the surviving relatives. Other kinship interests might include helping the legal process and seeking revenge. It is possible therefore to characterise the different forms of authority that identification practices within each institution rely on: the epistemic authority of genetic science (Williams and Johnson 2008, 1-18); the adjudicatory authority of law, specifically its "relevance and reliability" (Jasanoff 2006, 339) and, for families, the authority that derives from situated, local, specific knowledge that allows claims to be made about kinship over and beyond those verified by either science or law. As Wagner observes, the primacy of a DNA-based identification system "prioritises the missing person's genetic profile over his social being" (2008, 120). From a kinship perspective, such a narrowing down represents an erosion of the "mutuality of being" (Sahlins 2011, 2) and of the "kinscape", described by Atkinson and colleagues as "the constellation of relations and relatedness that are recognised practically" (2013, 1227-8).

These observations should not be taken to imply that ideas around biology and genetics are irrelevant to kinship; far from it: "The common understanding of genetics, and the social practices in which it is employed, continue to be largely based on the assumption that genes cause or are stable indicators for individual characteristics" (Hauskeller, Sturdy and Tutton 2013, 878). These ideas are central to many people's everyday understandings of ordinary kinship and of how they 'do' practical kinship. This can be seen most clearly when cases of genetic 'anomalies' arise in families; that is, situations where persons who thought of themselves as genetically related (or not) to specific others, turn out not to be (or to be). These 'anomalies', once revealed, are rarely ignored; this explains the concerns expressed in the Decision Document about potentially making such information public knowledge and thereby violating the privacy of victims and families. However, as Murphy and Turkmendag indicate, there is a range of "genetic, gestational, social and other forms of parenthood" (2013, 12) and the ways in which those non-genetic relationships are handled vary enormously. As Atkinson and colleagues note, "genes are not distributed in terms of simple packets of information ... there are processes of translation and interpretation that are brought to bear on genetic information ... the management of awareness becomes especially salient in the configuration of relationships. ... Genescapes are, therefore, marked by gaps and absences in the social distribution of shared knowledge" (2013, 1234-5), not least within families themselves. That such efforts go into the management of such knowledge, by both families and state agencies, testifies to the importance of the idea of the genetic connection in normative views of Euro-American families; if the connection or the anomaly were not important, little effort would be needed to conceal or reveal the situation. In matters of relatedness, kinship and identity, "Genetics is relevant, sometimes even important, but not decisive" (Kaebnick and Murray 2005, xx, cited in Haines 2006).

Perhaps it is precisely the complexities and uncertainties of the social ordering and management of genetic information, relatedness and kinship that tempts courts of law, professionals and state agencies to reach for certainty (even though they contribute further uncertainties through their own social processes of ordering and managing information and relationships). The attraction of DNA matching is exactly because it apparently resolves all uncertainty about relatedness through the enumeration of a percentage of shared alleles and can therefore be seen as a "precise" source of relationship verification (Heinemann and Lemke 2013, 819). Genetic tests are "made to matter" by a wide range of institutions who "seek to ascribe status and identity using DNA tests" (Hauskeller, Sturdy and Tutton 2013, 878). However, the relevant science contains within itself its own uncertainty. Scientifically, DNA matching is probabilistic, neglecting "the complexities of the

technology and its internal limits" (Heinemann and Lemke 2013, 819). That factor alone increases the possibility of further questions arising about not only what defines relatedness from a bio-genetic perspective but also (even if that were agreed) how reliable the science is in determining that knowledge. As Strathern says, "uncertainties increase as fast as certainties are established; each horizon exposes more terrain" (Strathern 1996, 49).

The Decision Document is one example of limited understandings of practical kinship, where matters of identification are prioritized over matters of personal identity (Haimes 2006, 274) and where the "phantasm of a fictitious control by technological means" (Heinemann and Lemke 2013, 819) dominates. Nonetheless, the Decision Document has to be recognised as one of the processes through which the "kinscape" is constructed and as one example of the practical recognition of relations and relatedness (Atkinson, Featherstone and Gregory 2013, 1227), even if, as a consequence, it reinforces particular, gene-based notions of relatedness. Recognition of this 'real world' impact of interventions such as the Decision Document points to the analytical weaknesses of setting up too hard a division between the knowledges of, and from, science, law and kinship practices; elsewhere we have contributed to a commentary on the limitations of such false distinctions (Evison et al 2012). Rather, we want to draw in kinship expertise to sit alongside and to inform scientific and legal expertise; to show, for example by drawing on Atkinson and colleagues' "contours of relevance" and "zones of responsibility" (2013, 1229), that thick narratives of practical kinship indicate the importance of knowing who is deemed responsible for, and to be affected by, identification practices by the families and communities concerned, and why. Answers to questions such as: who gives the blood samples; who provides the information about the missing person's whereabouts at crucial times; who claims knowledge about, and who claims the authority to identify, possessions associated with a particular person; who displays photos of the missing, and who chooses which ones; who ensures the burial of the remains; who marks the graves; who gives testimony at the Tribunal, are all indicators of who does the practical kinship of being related to such persons and communities. These actions constitute claims to knowledge and authority, claims that have little to do with the genetic proximity between the dead person and the living person and rather more to do with the relationships amongst those still living, with the hierarchies established through their interactions with each other, both prior to any particular incident which leads to DVI and AVI work being needed and indeed also during the processes of that work. These are the ways in which practical kinship is claimed, enacted and performed, but these identification practices tend to be either taken for granted, ignored or under-appreciated in bio-legal domains. Kinship practices encompass identification practices but are not co-terminus with them.

We had several aims in this paper, one of which was to try to improve the experiences of families and communities involved in bio-legal framings of the awful circumstances where mass deaths occur. We have two simple suggestions that might make a small contribution if only by showing just how easy it could be to foreground kinship in those deliberations where kinship concerns are purportedly being handled. Our first suggestion concerns terminology. For all their invoking of wider associations, phrases such as 'familial searching', 'kinship analysis' and 'relationship testing', when used professionally in the DVI and AVI contexts, actually only refer to the genetic associations between individuals, not to social relationships (Williams and Johnson 2008, 73-74). Since, as we have seen, shared genetic material does not necessarily entail social relationships, our first suggestion is that these phrases are replaced in professional discourses by an alternative phrase, 'shared allele testing' (SAT). This would have several advantages; first, it describes more precisely what is actually being

done when samples are compared; second, it exposes the role of judgement, as well as changes in practice, in the process of determining the number of shared alleles that are thought sufficient to constitute 'relatedness'; third, it exposes the use of 'connection', in phrases such as 'genetic connection', as a metaphor that has to work very hard to enable the social: "Uncovering connections and making connections can both have the force of a moral imperative, in the first case to exploit or conserve but otherwise acknowledge the world as it is, and, in the second ... to make human life work as social life" (Strathern 2005, 11). Finally, and on the same basis, a switch in terminology helps to expose the term 'relatedness' as a metaphor. Our second suggestion reiterates, albeit more assertively, our point above about drawing in kinship expertise to sit alongside—literally—scientific and legal expertise, particularly in settings such as the ICTY, to assist investigating and adjudicating agencies to give more thought to how their deliberations and decisions impact upon, and are experienced by, the families involved. Such suggestions help to demonstrate that kinship, law and science serve as complementary framings for the practical accomplishment of 'identification', 'evidence' and 'justice', even if one of them, kinship, frequently does its work behind the scenes.

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References

- Atkinson, P., Featherstone, K. and Gregory, M. 2013. "Kinscapes, timescapes and genescapes: families living with genetic risk." *Sociology of Health & Illness* 35: 1227-1241.
- Evison, M., Graham, E., Haines, E., Ludwig, A., Maguire, C., Scully, J. L., Toom, V. and Williams, R. 2012. "A comment on the Hill-Turney exchange: from normative antagonism to interdisciplinary collaboration." *New Genetics and Society* 31: 385-390.
- Haines, E. 2006. "Social and ethical issues of familial searching in forensic investigations: Insights from family and kinship studies." *Journal of Medicine, Law and Ethics* 34: 263-276.
- Hauskeller, C., Sturdy, S. and Tutton, R. 2013. "Genetics and the Sociology of Identity." *Sociology* 47: 875-886.
- Heinemann, T. and Lemke, T. 2013. "Suspect Families: DNA Kinship Testing in German Immigration Policy." *Sociology* 47: 810-826.
- Huffine, E., Crews, J., Kennedy, B., Bomberger, K. and Zinbo, A. 2001. "Mass Identification of Persons Missing from the Break-up of the Former Yugoslavia: Structure, Function, and Role of the International Commission on Missing Persons." *Croatian Medical Journal* 42: 271-275.

ICTY 2009a. *Public Transcript of Hearing 23 July 2009*. The Hague: International Criminal Tribunal for the former Yugoslavia.

ICTY 2009b. *Public Transcript of Hearing 17 August 2009*. The Hague: International Criminal Tribunal for the former Yugoslavia.

ICTY 2012. *Decision on the Accused's motion to unseal the ICMP exhibits, 25 April 2012*. The Hague: International Criminal Tribunal for the former Yugoslavia.

Jasanoff, S. 2006. "Just evidence: the limits of science in the legal process." *The Journal of Law, Medicine & Ethics* 34: 328-341.

Jugo, A. and Wastell, S. forthcoming 2014. "Disassembling the Pieces, Reassembling the Social: The Forensic and Political Lives of Secondary Mass Graves in Bosnia and Herzegovina." in Anstett, E. and Dreyfus, J. (eds.), *Human remains and identification: mass violence, genocide and the 'forensic turn'*, Manchester: Manchester University Press,.

Kaebnick, G. and Murray, T. 2005. "Introduction." in Rothstein, M. A., Murray, T. H., Kaebnick, G. E. and Majumder, M. A. (eds.), *Genetic Ties and the Family*, xiii-xx. Baltimore: John Hopkins University Press.

Klotz, M. 2013. "Genetic Knowledge and Family Identity: Managing Gamete Donation in Britain and Germany." *Sociology* 47: 939-956.

Lawler, S. 2013. *Identity: Sociological Perspectives, 2nd edition*. Cambridge: Polity Press.

Murphy, T. and Turkmendag, I. 2013. "Kinship: born and bred (but also facilitated)? A commentary on 'Donor conception: ethical aspects of information sharing' (Nuffield Council on Bioethics, London 2013)." *Medical Law Review*.

Nettlefield, L.J., and Wagner, S. 2014. *Srebrenica in the Aftermath of Genocide*. Cambridge: Cambridge University Press.

Orentlicher, D. 2010. *That someone guilty be punished: the impact of the ICTY in Bosnia*. New York: Open Society Institute.

Parker, L. S., London, A. J. and Aronson, J. D. 2013. "Incidental findings in the use of DNA to identify human remains: An ethical assessment." *Forensic science international. Genetics* 7: 221-229.

Pottage, A. 2006. "The socio-legal implications of the new biotechnologies." *The Annual Review of Law and Social Science* 3: 321-344.

Sahlins, M. 2011. "What kinship is (part one)." *Journal of the Royal Anthropological Institute* 17: 2-19.

Simić, O. 2009. "Remembering, Visiting and Placing the Dead: Law, Authority and Genocide in Srebrenica." *Law Text Culture* 13:273-310.

Smart, C. 2010. "Law and the Regulation of Family Secrets." *International Journal of Law, Policy and the Family* 24: 397-413.

Haimes, E. and V. Toom, "Hidden in full sight: kinship, science and the law in the aftermath of the Srebrenica genocide." *New Genetics and Society* 33: 277-294, see: <http://www.tandfonline.com/doi/full/10.1080/14636778.2014.946004>

Stover, E. and Ryan, M. 2001. "Breaking Bread with the Dead." *Historical Archaeology* 35: 7-25.

Stover, E. and Shigekane, R. 2002. "The missing in the aftermath of war: When do the needs of victims' families and international war crimes tribunals clash?" *International Review of the Red Cross* 84: 845-866.

Strathern, M. 1996. "Enabling identity?" in Hall, S. and Du Gay, P. (eds.), *Questions of Cultural Identity*, London: Sage.

Strathern, M. 2005. *Kinship, Law and the Unexpected. Relatives are Always a Surprise*. Cambridge: Cambridge University Press.

Toom, V. 2012. "Bodies of science and law: forensic DNA profiling, biological bodies and biopower." *Journal of Law and Society* 39: 150-166.

Turney, L. 2010. "The failure of DNA forensic testing: a case study of the 2009 Australian bushfire disaster." *New Genetics and Society* 29: 225-240.

United Nations Security Council 1948. "Convention on the Prevention and Punishment of the Crime of Genocide." New York: United Nations.

Vismann, C. 2008. *Files: Law and Media Technology*. Stanford: Stanford University Press.

Vollen, L. 2001. "All That Remains: Identifying the Victims of the Srebrenica Massacre." *Cambridge Quarterly of Healthcare Ethics* 10: 336-340.

Wagner, S. E. 2008. *To Know Where He Lies. DNA Technology and the Search for Srebrenica's Missing*. Berkeley: University of California Press.

Williams, R. and Johnson, P. 2008. *Genetic Policing. The Use of DNA in Criminal Investigations*. Cullompton, Devon: Willan Publishing.

Zerubavel, E. 2012. *Ancestors and Relatives: Genealogy, Identity, and Community*. Oxford: Oxford University Press.