

Project:

**ICTY ORAL History - Documented by SENSE**

An Interview with

Carmel Agius

SENSE Transitional Justice Center

Pula, Croatia

2022

Interviewee: Carmel Agius (CA)

Interviewer: Mirko Klarin (MK)

Location: The Hague, The Netherlands

Date: 23 November 2015

*Maltese jurist Carmel Agius, ICTY judge since 2001 and its President since 2015 speaks of painful impressions from Tribunal's courtrooms and from his visits to the region of former Yugoslavia where crimes are still denied and any attempt at reconciliation suppressed.*

MK: What was your motivation to come and become a judge of the ICTY?

CA: It's a very simple, short story. In 1995 I started representing the Maltese government in the negotiations which were taking place at the UN in New York for the setting up of an international criminal court. I continued in that capacity, going for these meetings, until one day in late 2000 I was approached by the minister of justice. There was already an announcement by the Secretary General of the UN, calling for nominations for the Tribunal, for the ICTY, and the minister asked me if I was interested in being nominated. I asked how much support I would receive from the government, because it's not easy to get elected, particularly if you're coming from a small country like mine that never elected anyone to anything, let alone judges at the time. And I got the commitment of the government they would assist me. And that's how it came about. They kept their word. I was helped in more ways than one, and eventually I got elected. Of course,

I was very much interested in joining the ICTY as a judge because of the general interest I had in the subject of international criminal justice, which was being discussed during the negotiations for the ICC statute. I signed the final act of the Rome conference in

1998 on the ICC, so you can imagine, I had a big interest.

What did I know at the time about the ICTY and the events in ex Yugoslavia? A lot. And I can explain to you why. First of all, I am the type of person who on a daily basis, different times of any day, am following the news, what's happening. And that's irrespective of whether I am at home, abroad, on holiday. I'm watching the news, I'm following the news all the time. So I knew exactly what was happening in Yugoslavia from the very beginning of the war. Incidentally, in Cuba in 1990, in August, I had met the then minister of justice of Yugoslavia. I can't remember his name. We were sitting down, having a drink together, and he told me: "I am going back to my country, and I am afraid we are going to have a civil war". And I didn't take him seriously at the time. Later on, starting from late 1991, it was obvious that that was going to happen. So I followed the news regularly, I knew what was happening. In 1993, I knew that the Tribunal had been set up but I never imagined that I would end up being a judge here, also because I had not yet started working in representation of the government on the negotiations for the ICC.

What did I know about the ICTY before I joined it? Also a lot. Because in the meantime I started following what was happening at the ICTY, particularly when I was dealing in the ICC negotiations. Plus, Hans Holthuis, who at the time was the Registrar, was an old friend of mine. I used to meet him in New York where he used to come and represent the Tribunal during the negotiations. As well as judge Richard May. Judge May, who was the expert of the Tribunal amongst the judges on the matters of procedure, used to come to the meetings in New York, and he used to contribute. And during the discussions we had in New York we always discussed what was happening here, in the Tribunal and it's not a

question of trying to copy, but we tried always to learn from what the judges of the Tribunal were doing here, particularly in the matters of procedure.

MK: You came here in 2001, it's almost 15 years. Did you expect to stay so long in The Hague?

CA: First of all, I did not expect to get elected, to start with. And when I got elected, I knew that there would be another election in four years time. When I got elected, as a result, some experienced judges, who had given important judgments in this Tribunal, ended up not being elected. So I said to myself: "Probably that is what will happen to me in four years time. They will sort of pay me back." So my first reaction was that I will not resign as judge in my country, I will keep a position there, of course, without getting paid because I wasn't doing any work there. But I kept my post there, my position. I was number two in the hierarchy in my country.

So I came here. I liked the work, there was no question about it. So when it came to the reelection in 2004, I asked for support to be renominated. The government agreed to nominate me again, once more gave me the support, and I was reelected. Now, during the second term, by 2008, etc, it was obvious that there won't be any further elections, that our mandates basically would be renewed from year to year. There was no point in electing new judges, trying to restart some of the cases that were already ongoing. So, still it's 15 years now, I can almost not believe it. We have another two years before we close down the Tribunal and then I'm looking forward to go home, and relax.

MK: You were the presiding judge in three cases - Brđanin, Orić and Srebrenica Seven, a mega trial with seven accused. What were the most memorable moments from

those trials?

CA: To be honest with you, I spent the first years of my career as a defense lawyer, and then since 1977 as a judge, in my country. And I am never really impressed by what happens during the trial as such. Because I'm trying to detach myself completely from the feelings and the interest of either the prosecution or the party. The system we have in Malta is pretty similar to the one in the UK. Therefore you're just like a referee. So, I can't say that there were particular moments when I was impressed. However, there were instances when I was impressed. Not positively impressed. Impressed for other reasons. And that was when we went on the onsite visits. When I arrived here, no trial chamber had been on an onsite visit in any of the cases that had taken place. I was the first one to ask for an onsite visit to take place. That was in Brđanin. I had initially some problems. I was also informed that the previous judge had tried and her request was turned down.

However, at the time when I asked there was president Meron, during his first term. I spoke convincingly to him, and he saw the importance, and accepted. And we visited certain places where allegedly some victims had been detained, some places where some victims were killed, where some victims were tortured. We saw Srebrenica. I remember how depressing it was. And I've been to Srebrenica since then several times and I still find it very depressing, one of the most depressing places on Earth. So these are the instances that left an impression on me.

I also can say that one factor that has left an impression on me is that, although there has been remarkable improvement across the whole area, much remains to be done. And there is still a lot of hatred. There are moments, particularly in Bosnia-Herzegovina when I

feel uncertain about the future. To be honest with you, I feel more positive in other places, I see more progress. In Bosnia unfortunately, if I were to describe it, it's as if you're walking on bed of ashes with red burning coal underneath. And if you run fast, you don't notice it, but if you slow down, or stop, you immediately realize that you will get burned, and hurt, injured. So these are the moments. I remember in Orić we visited all the areas where supposedly the raids by the Muslims took place. In Popović we visited Žepa, where certain meetings took place, where certain killings took place. We followed the route taken by the convoy. Of course, we visited again Srebrenica, the UN compound in Potočari. These left an impression on me, because when you then see the videos that were taken at the time, if they are available, you can then imagine the situations in a much more vivid way.

MK: In Malta, you dealt with criminal cases, not war crimes, not genocide, so I think that some witness testimonies must have had an effect on you.

CA: For example, one of the pieces of testimony that left a mark on me, and I can safely say also on other judges that were sitting with me, was in Popović, when the prosecution showed the video of the Scorpions' killing of about six or so poor Muslims, cold-bloodedly. As a magistrate and a judge in Malta I attended autopsies, post-mortem examinations, I saw people being cut to pieces, opened up, examined, etc, so I am trained. But when I saw that video, I didn't eat that day and I didn't sleep that night. I can mention another instance. During the Popović trial, during the massacres that happened on one particular sight, we had a description of a scene as if it was coming from an apocalypse. A little boy, supposedly, who is standing together with the others that are being machine-gunned. And this little boy walks forward towards the soldiers that are with

machine guns, and he is taken away, and he survived. This boy came to give evidence. Again, I mean, you see that the boy, I won't mention his name because I don't even remember if he was protected or not, I think he was, is traumatized. He is still traumatized now. And that leaves an effect on you. I remember the testimony of a woman who had been raped by several soldiers. She was completely abandoned by her family, looked down upon by her family. She had to leave her country, migrated to a country in the western world. Her brother came to give testimony, not instead of her, but he gave us the details etc. You know, these are the tragedies of life. Of course, in Malta I dealt with very difficult cases, but nothing of the sort of cases you deal with here.

And I could continue, there were many witnesses that left a mark, amongst them witnesses that were obviously lying. And here I don't distinguish between ethnicities, believe me, witnesses from all ethnicities lied, decided not to speak the truth. Most of the time I would know if they were telling a lie. I would know. Because I am trained, I almost feel it immediately. But again, that's a matter always to be decided by the three judges, and we used to decide whether to give credibility to the... But in matters that are so delicate, involving the life and death of so many thousands, to be able to come here and leave with what you pretend to be a tranquil consciousness, having lied to the Tribunal, to save your own skin, or to try to save the skin of one of the accused, to me it's beyond comprehension. Unfathomable.

MK: Why never in those twenty years, and you said that so many witnesses were lying, no one has been indicted for contempt because of the false testimony?

CA: Many reasons. First of all, I think there were people that were indicted for false

testimony, but I stand to be corrected. But the thing is - it's not easy, we have enough cases here. On the same score, we would have brought more cases from ex Yugoslavia. So the answer to that question is that the whole process becomes complicated and that's not the main reason why we were set up. We were set up to try, as quickly as we can, the main perpetrators, those most responsible for war crimes committed in ex Yugoslavia.

MK: As a judge, you know that the role of the court, of the trials, is to be a deterrent. So, if you had indicted one at the beginning...

CA: Yes, but we would have continued and most of our time and money would have gone to those cases. I can mention contempt cases. Again, I mean, we had to limit a number of contempt cases because obviously... There were many instances that could have qualified for contempt but you have to choose. So, your next question...

MK: Sometimes in the courtroom, you have an impression that the trial is the continuation of war by other legal means. Tensions between the accused, the defense, the prosecutor, between a witness and the accused. How do you see these tensions?

CA: Not like you. To you it seems to be very important, to me it's not important at all. To me, this is more or less melodrama. And I told you, in court I'm a different person, in court, I am the judge. I have always been the presiding judge here in these trials. And to me, these incidents attract the attention of some people, attract the attention of the media, attract the attention of some lawyers who have an interest. To me, they are not important. For the presiding judge and the judges "let's get moving, this is not part of the trial". The part of the trial is the witness and let's not waste time on this, I call them, stupid incidents. There was even one instance, one newspaper reporter from Serbia, who came there to

shower me with praises and telling me how great I was and how he would be writing an article on me. I mean this is all rubbish. We don't hold trials to hear this nonsense and I never gave attention to this. So for me, they mean absolutely nothing.

MK: Let's go to the relationship between the ICTY and the region. How do you see the effects of the trials both on the victims community and the perpetrators community? Do you think that the region is still in a very deep denial in spite of all established facts during the trials?

CA: Yes, I do acknowledge that there is still a lot of denial, across the entire ex Yugoslavia. That's unfortunate because that's not what everyone had hoped for. But nationalism is still rife, and it is still rife in all the areas, and in all ethnicities. It will take maybe two or three more generations until people realize that it doesn't make much more sense to deny the past and continue living in the past. I can give an example referring to Germany. There are still some people in Germany now, 70 years later, and that's more than three decades later, and more than two or three generations later, that still would not admit the holocaust and would not admit the big crimes committed by the Nazi regime. But they are a minority. Germany set an example on how to deal with its past even if its past hurt, even if its past was painful to live with and to reckon with.

In ex Yugoslavia much has taken place, a lot of people have tried to do their best, to make the present and past generations understand that they need to reconcile and live together in peace as they used to before the conflict in the 90s. Much has been done. Much has been done directed to achieve exactly the opposite. And much is still being done directly to achieve the opposite. I mean, I wouldn't like to give specific examples. There are many, as

I told you. I traveled far and wide in ex Yugoslavia. Sometimes I feel really sick at what I see. Really sick, because it's a sheer determination to make sure that there is no reconciliation from the political perspective. This is what frightens me over there. Because all the republics will benefit immensely if they live in peace. There are areas, I don't know if you have been there, but I have been there, there are areas where they still talk of a possible fresh conflict between the ethnic groups. It's something that they talk about, and it's sickening because these people have not learned. I mean to come to this as well but in reality what I would like to see and what I failed to see is more prevailing conviction, belief, about the cruelty, savagery, and a tragedy of war. I don't think it is understood.

You have still got a lot of people who want nothing but revenge. You have still got thousands of people who believe that they will never obtain justice. You have people who understandably feel extremely hurt and frustrated that they don't know where their dear ones are buried, after so many years. These are all persons who are still living and it's difficult to talk to them. Last time I was in Srebrenica I had a long discussion with a university student, and I was almost taken aback because the only thing she is not interested in is reconciliation on the ground. She doesn't want to hear about it. And she is afraid even of the idea that there might be reconciliation, say in a generation's time, or two generations' time. So this really is important for me, because I take an interest in what is happening in ex Yugoslavia, as a judge and now as the president of this Tribunal, and I wish to be still alive when I see things really improving in that country, in that region, sorry.

MK: At the same time those working in the opposite direction are blaming the Tribunal: "Why didn't you reconcile us?"

CA: We have no duty to reconcile you. Whoever says that the Tribunal has the responsibility to reconcile, to secure, achieve reconciliation on the ground, I think it's stupidity. We do not have that responsibility. If you look at the Statute we have the responsibility to try and work towards peace and security in the region but that's not reconciliation. Reconciliation, first of all, has been interpreted in many different ways in many different parts of the world. In some places, particularly in some South American places, reconciliation means forgiving you completely, presenting you with a clean sheet of conduct, impunity and immunity from prosecution. That's in some countries. That's not the reconciliation that I'm talking about. Real reconciliation on the ground must come from your intellectuals, from your university professors, from your school teachers, from your politicians, from your clerics, religious people, from historians, who have the responsibility to reflect the truth of what happened.

And if there has not been reconciliation on the ground it's certainly not our responsibility. I won't point a finger to any of these people in ex Yugoslavia, although I am definitely not shy at pointing a finger to the mainstream of certain politicians in certain areas who I think are most responsible and who resist every attempt towards reconciliation. Many have tried. The EU has tried its best. There was a time when the efforts were working. Nowadays I don't think we can say that there has been much success. Because as I told you, I don't see reconciliation happening any time soon. But I am definitely never going to accept that the ICTY contributed to that.

Some people think that the ICTY is responsible because it acquitted this one, or it convicted this one but didn't sentence that person to enough years of imprisonment. That it

convicted people that a certain ethnic group to which those accused belonged expected acquittal but they were convicted. So the Tribunal is blamed for this, the Tribunal was blamed for that. The Tribunal is not responsible for it. The Tribunal was set up to try those persons that are mostly responsible for what happened in ex Yugoslavia during the war, for the most serious crimes, genocide, crimes against humanity and war crimes and the Tribunal does not look at the political face or the ethnic background of who is being tried. And we have convicted people from all ethnicities, we have acquitted people from all ethnicities and that's how it should be. In fact, one way of putting it, although I don't wish to take much time on it, one of the finest development - you know that a court of justice and legal system has reached a level of maturity is when, in spite of what the people think or expect, if a person is not considered guilty of the charges brought against him, that person is acquitted by the court, by the legal system. That is the apex of what a good legal system, a good system of justice, administration of justice should aim for. Unfortunately, if you acquit someone here, it becomes a cause for demonstrations, for protests, etc. It shouldn't be that way. And that certainly doesn't contribute, it's not our judgment that doesn't contribute towards reconciliation, it's the reaction on the ground.

MK: The Tribunal has acquitted many guilty persons but didn't condemn any innocent...

CA: When I became a judge in 1977 one of my mentors in Malta, a senior judge, told me: "You know, it's very important that it doesn't matter, it's not a big tragedy, if someone who is guilty is acquitted, but it is a big tragedy if someone who is innocent is found guilty". And that has been inspiring for me, throughout all these years.

MK: It's my impression that everything is going so slowly at the Tribunal.

CA: What can you do?! We've tried to streamline the procedure over the years. I've been chairman of the Rules Committee for many, many years. We introduced all the amendments that we needed. But this is a tribunal with its own characteristics. You have a system which was introduced in the beginning, which you've made simpler, but it's still takes time. It still takes time. And what can you do, for example, if Hadžić is sick? If Mladić can only attend a sitting 3 times or 4 times a week? If Karadžić is in the same situation? What do you do? If Karadžić is faced with 20.000 new pages of documents that he needs to study, what do you tell him? "No, no, you have until tomorrow morning to read them all, and then we continue." You can't do that. So this is not an ordinary tribunal, an ordinary court like you have in your country like I have in my country. In my country, a murder case will last two weeks if it's a complicated case and that's it.

MK: The first trial, Duško Tadić, I was here, in 1996, lasted for seven months. Everybody was shocked at how long it lasted. So they immediately decided to streamline the procedure.

CA: There are many, many other factors that intervened in the meantime. For example, at the time, we had absolutely no cooperation from the ex republics of Yugoslavia, so we didn't have documentation, except the ones which our investigators managed to lay their hands upon during the investigations on the ground. Then you have to have them translated from your language to English and French, then you have to find the witness. Unlike what happened during Nuremberg trials for example, we had to send scouts looking for these witnesses, trying to find them, convincing them to come and give evidence. It's a

complicated system.

MK: If you don't want to speak about the failures I will not ask about the achievements. But what is, according to you, the most important legacy of the ICTY for the region, not for international justice?

CA: One of them is a corollary of our legacy to international justice because it applies also to the region. I told you a few minutes ago that people in Bosnia in particular are talking about the possibility of another war. And serious talk, not just gibberish. I think we have forewarned them that there will be no impunity for anyone. And anyone who will again wage war and commit war crimes, or even worse still crimes against humanity or the worst crime of all, genocide, will not escape the justice. In 1993, and this goes to the credit of UN, in 1993 the Security Council embarked on a very daring experiment when it decided to set up this Tribunal and a year after, our sister Tribunal. It was a touch-and-go for sometime because accused don't fall from heaven.

I can say it that the first accused brought over was a small fry until we started really gathering momentum. We are already in 2001 when I arrived here, that's when it started really going. But the governments have learned a lesson that you can escape once, you can escape twice but you can't continue to escape all the time, and eventually, all of them decided to cooperate with the Tribunal. And that was when we got as much documentation as was necessary to try and complete our mandate here and of course prolonging the cases at the same time. So, whoever may be plotting another conflict in the area should know that he or they will not get away with it. That is my main legacy.

Now, the other legacy is that I think we have convinced the governments in ex

Yugoslavia to learn from this Tribunal and perfect their domestic system and try to prosecute as many people as possible, from all ethnicities for the crimes that were committed during the conflict. Am I happy with the result? No, it could have been much better and I'm sure you would agree with me. But a lot of work has been done, and a lot of people have been tried, some convicted, some acquitted. And again the same problem arises then - discontent, general discontent. Sometimes these special courts, or tribunals, or chambers are criticized, like the Tribunal is. But I think there was a sincere effort on the part of the governments in Serbia, Croatia and Bosnia to do something. I also can say that there was the carrot of joining the EU which currently for Serbia is very attractive and achievable. For Bosnia, it will take much longer. But I think that if Bosnia comes to terms with its problems and starts governing itself as it should, the process of joining the EU eventually will be pretty much accelerated. One of the conditions definitely, although I don't speak for the EU, one of the conditions will certainly be to see more justice being administered on the ground when it comes to war crimes committed during the conflict.

So do we leave a legacy? I think we leave a legacy. And also I am full of praise for Outreach and its program and while we are at it, I wish to take the opportunity to thank the EU because you may not know that just a few weeks ago, the EU approved again the funding that we requested for Outreach for the next two years. Outreach is very important and helping the local population understand better the responsibilities and also the role this Tribunal has played over the years. The worst thing that happened to this Tribunal is that it has been misrepresented very badly by various actors and protagonists in ex Yugoslavia, even demonized, sometimes, even demonized, but anyway, I can't say more than that.

MK: Thank you very much for that answer. The last question was related to the trials in the region - will there be justice after the Tribunal, but you have answered.

CA: Yes, I think there will be. Let's put it like this - my answer to you is there would certainly be less justice now and in two years time in ex Yugoslavia had this Tribunal not come into being, had the concept of impunity not been instilled in the hearts and souls of the people that administer justice in ex Yugoslavia, had not the various republics of ex Yugoslavia taken up the responsibilities of setting up special courts. There would have been much less justice, in fact, there would have been no justice. No justice. There is, according to me, a high measure of justice. Maybe not high enough to satisfy the high expectations of everyone, but there you are. I think it's mainly thanks to us, and what we did here and in ex Yugoslavia that certain positive steps were taken over there to secure a better administration of justice and better justice for victims.