

Project:

**ICTY ORAL History - Documented by SENSE**

An Interview with

Louise Arbour

SENSE Transitional Justice Center

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Interviewee: Louise Arbour (LA)

Interviewer: Mirko Klarin (MK)

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*Despite Belgrade's categorical stance that the Tribunal has "no jurisdiction" to investigate crimes in Kosovo, Chief Prosecutor Louise Arbor announced in November 1998 that she would not only continue Kosovo investigation but would also climb the ladder of responsibility as high as the evidence would let her.*

MK: After your announcement, the Belgrade authorities have repeated their official position that the Tribunal has no jurisdiction over Kosovo. One of their arguments is that in the Agreement reached between president Milosevic and ambassador Holbrooke there is nothing about the Tribunal's role in Kosovo. What are your arguments to claim otherwise? And is your jurisdiction subject to any negotiations?

LA: No, it's not, in fact. It's a matter of total insignificance, in my opinion, that there is an absence of any provision in the Holbrooke-Milošević agreement on that point. The jurisdiction of the Tribunal and my full authority to investigate come from the resolution of the Security Council creating this Tribunal. Nobody, except the Security Council, can modify that. And it is clearly not a matter for anybody's consent, including that of the government of the FRY. The SC acted under Chapter VII. This is a power structure under which the SC essentially can override the consent of a sovereign state in the case of an environment which creates a threat to international peace and security. So, president Milošević's consent

was not required when the Tribunal was set up. He had no say in the structure of the Tribunal, that's very clear. I'm sure, if he has, he would not have approved. But the fact of the matter is he wasn't asked, he didn't have to be asked, he didn't have to consent to the structure and the jurisdiction of this Tribunal. And it is not open to him or to anybody else except the SC to either confirm the jurisdiction or modify it. So, this agreement has absolutely no significance to our jurisdiction.

MK: But if you don't go to Kosovo, will that be the end of the Kosovo investigation?

LA: Of course not. We've had this ongoing investigation. We will continue through all means available to us. In fact, we chose, we always choose to be non-confrontational, not to seek conflict with any of the authorities. We've had investigators in Kosovo, in the field, before, but if we were completely denied access, which will be grossly illegal and I'm sure would not be tolerated by the international community, but even with that kind of impediment we will have all kinds of means to advance these investigations, I hope, to completion.

MK: What would be the sense of Kosovo investigation, if you are able to conduct one, if those you may eventually accuse will enjoy impunity and immunity under the protection of their government, as other accused have, so far?

LA: In anticipation for that unfortunate possible consequences, as you know, concurrently with my investigation in Kosovo I reactivated the concerns I had over the arrest and surrender to The Hague of three accused who have been subject of the Rule 61 hearing, international arrests warrants and who have been served on the Belgrade authorities, I believe, in 1995. The three JNA officers who were originally the co-accused of

Dokmanović. And I took this initiative of requesting the President of the Tribunal to seize the Security Council of this matter again, precisely to layout appropriately all the consequences of our actions, so to ensure that if indeed we do find sufficient evidence that crimes within our jurisdiction have been committed and that we bring an indictment, I wanted to anticipate the potential reluctance of the authorities to execute these warrants. This matter is still pending in the SC. I'm hoping that we will continue to receive from the Council the support that has been forthcoming up till now in reaffirming our jurisdiction.

MK: In addition to Kosovo, you have ongoing investigations in other parts of the former Yugoslavia. Are you satisfied with the cooperation of authorities of other states and entities with your investigators? Especially if those investigations are dealing with the crimes allegedly committed by the forces under command and control of those authorities?

LA: Now you've touched on the real issue. As you know, we are now quite a complex, large operation. It is very difficult to give an assessment of the cooperation of various states or entities because it tends to be a more complex matter than a question of an overall assessment. As you can well imagine, I'm sure this is not news to you, governments are just like people, they behave in what they perceive to be their best self-interest. Sometimes they are misguided, they misjudge their own best interest. But for the most part, they do things when they think it serves their purposes and when they think it doesn't serve their interest, they don't do it. So, not surprisingly, most governments are reasonably well-inclined to cooperate with us when they perceive it serves their interests. So, for instance, if we have investigations involving victim groups to which these governments are sympathetic because of their ethnicity or any other reason, they tend to be actually pretty supportive,

even cooperative. When we investigate in a manner that they perceive to be contrary to their interest, for example, when we appear to them to be targeting suspects that they would like to shelter from scrutiny, they tend to be considerably less cooperative. So, I think it is important to understand that, in the background. And of course, we've had different levels of cooperation on questions such as arrest and surrender and, as a different matter, on access to evidence. Croatia is a very good example, where there was surprisingly and well-appreciated good cooperation on the question of helping in the voluntary surrender of a series of Bosnian Croats who came voluntarily and, I was told, with a considerable amount of cooperation on the part of the government of Croatia, in expressing that it would be supportive of this initiative. On the other hand, and I've said on many occasions, access to evidence, you know the litigation we had in Blaškić case, this is a matter of public record, so the question of our entitlement to access evidence in Zagreb has been extremely unsatisfactory. I don't think it's a form of cooperation that satisfies the minimum standards required in the Statute. So, in a sense, it varies depending on the issue. But it is very clear that cooperation has been sometimes very poor.

MK: Two years ago, taking the position of Chief Prosecutor, you promised to give “priority to the people who should be the most accountable”, i.e. leaders. But, with the exception of Karadžić and Mladić, and in some lesser extent Blaškić and Kordić, we have not seen, so far, any real leaders among the accused. Why?

LA: You may recall that since I have taken office you haven't seen a lot of indictments either. So, in part, you have not seen any concrete indications that I am pursuing this kind of policy because I have made it a practice, and so far I have been successful in every case, of

persuading the court to grant me a non-disclosure order for the indictments that I have confirmed. That is one issue. The second point that I think is important to appreciate is that inevitably, and I am committed to this strategy, that we must pursue our investigations as far up the chain of command as the evidence will lead us. I think that's what the SC expected of us when we were created. That, unfortunately, is going to be at the investigative state a considerably slower process than it is to indict perpetrators that you can find essentially on the scene of the crime. So, inevitably that process is considerably more laborious, it's a lot more difficult than a basic, scene-of-the-crime investigation and bringing charges against actual perpetrators. The evidence is not as forthcoming, the evidence is not as accessible, and the evidence needs a huge amount of sophistication in understanding either military, paramilitary, political structures to understand appropriately the chain of command. And finally, what is even more complicated is that we know, and it's true in that conflict, it's true in the Rwanda conflict, that what appears to be the command structure on paper or as a matter of law is not necessarily what it was in reality. And of course, we investigate to a criminal standard of proof, so we have to be satisfied that we understand what the paper command structure was, but where the reality of the real power was. So these investigations, we are still working exactly on that strategy, but they take considerable time, sophistication, and energy to yield results, but they will.

MK: London High Court has ruled that Pinochet was immune from arrest because he was the head of state at the time of alleged crimes. Can the heads of states under your jurisdiction count on the same kind of immunity when they became "former"?

LA: No, of course not. You see, this is the interesting thing about these developments

taking place, including that particular case. And I should add that it's also very interesting, the Pinochet case because it's also illustrative of the tensions between the political aspirations of states and their willingness to defer to their judicial institutions. So you see the play between a Spanish judge whose action may or may not suited his government all that well, addressing himself to English courts whose decision may or may not find favor with that government. In mature democracies that's very healthy. The protection of very fundamental human rights finds their proper environment in the courts. It's interesting now to see the judicial and political play, both on a domestic and international level, on these issues.

MK: But why the doctrine of the immunity of former heads of states does not apply to the Tribunal?

LA: Oh, it's explicit! But certainly, in the two ad hoc tribunals, the position is explicit: "The official position of any accused, whether as a head of state or government, shall not relieve such person of criminal responsibility nor mitigate punishment." In fact, quite the opposite, Article 7.3 of the Statute provides for the responsibility of commanders and persons who had superior authority for the acts of their subordinates, as you know, "if the commander knew or had reason to know that the atrocities have been committed". So I think that in the international forum now and in the future these questions of immunity will not be an impediment, even if they remain so in local courts. And we don't know. And what's going to be decided in England, by the House of Lords, the hearings are today, the decisions will apply to England, but it's not necessarily the case elsewhere that the same immunity, assuming they are upheld, would be found applicable. So, it's a whole body of law

that is developing. But clearly, in an international forum, this will not be an obstacle.

MK: Thank you very much.