

Project:

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An Interview with

Gabrielle Kirk McDonald

SENSE Transitional Justice Center

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Interviewee: Gabrielle Kirk McDonald (GKMCD)

Interviewer: Mirko Klarin (MK)

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President of the Tribunal Gabrielle Kirk McDonald spoke in the November 1998 interview about her efforts to ensure co-operation of the states of the former Yugoslavia. Not only by threatening sanctions for noncompliance, but also by pointing out the benefits of co-operation in bringing justice to war crimes victims.

MK: A year ago, in our first interview, although admitting that “it may sound naive”... you said that you “have to try to convince leaders in Belgrade, Zagreb and Sarajevo to cooperate with the Tribunal and execute its orders - not by threatening them with the consequences of non-compliance, but by “telling them the benefits of cooperation.” Did you try and with what success?

GKMCD: Well, I said that it was naive or it was not naive, is that what I said?

MK: You said it may sound naive.

GKMCD: It may sound naive. Well, maybe it did sound naive because I think now, the experience has shown me that we have to do both. (...) I wouldn't use the word threat so much, but I think it must be made very clear to the Federal Republic of Yugoslavia that we mean business and that we will insist upon compliance with our orders. And that's why I wrote the most recent letter to the Security Council, and why I addressed the Security

Council now. Of course, the Tribunal does not have any enforcement powers, but I will do everything within my power to bring the matter to the Security Council and make it very clear to the Security Council that we are insisting upon cooperation. But that does not mean that we don't use the other as well, that is by again attempting to let the people of the former Yugoslavia know what we're doing and let them see the benefits of cooperation. I don't think anyone wants to be isolated. No one wants to be considered that they are citizens of a state that stand out among all of the states in the former Yugoslavia as not having enacted implementing legislation. And so I think more information needs to be brought to the people so that they can understand what the Tribunal is about, how the Tribunal functions and that it does provide fair trials.

MK: In the last two months you have had intensive correspondence and communication with the Security Council. You wrote two letters you just mentioned, you also addressed the Security Council in person. And finally last week you sent a report to the SC about Tribunal's work this year. Are you satisfied with the Security Council's response?

GKMcD: The Security Council has not responded to the letter that I addressed to it referring to the three indictees who had not been arrested. So, they have not responded to that request, so I cannot tell you whether I'm satisfied or not. I am hopeful once again, and I hope that I am not shown that I'm naive again, that the Security Council will take this matter very seriously because we were created by the Security Council, we are its creation, we are its child, so to speak, we are the result of their belief that a court was the best way to help to bring about international peace and security in the former Yugoslavia. So, I'm very hopeful that they will respond very favorably.

MK: But they have responded in the last latest resolution 1203, paragraph 1419 - very strong support to the Tribunal. What do you think, do you think so?

GKMcD: It's a sentence. It's a sentence that reminds the Federal Republic of Yugoslavia that they have an obligation to cooperate, but it does not focus on their failure to cooperate and their non-compliance as evidenced by their failure to execute three arrest warrants.

MK: Does the fact that only the "FRY case" was reported to the Security Council, mean that you are satisfied with the level of compliance of other states and entities? What happened with the binding orders issued to Croatia for the production of documents related to the Blaškić case? Did the Bosnian Federation produce the requested documents, and what about some 25 accused still living, or hiding, in the Republika Srpska?

GKMcD: Well, I think actually there are maybe 30 indictees who remain at liberty, those who have been publicly indicted.

MK: Three are in Yugoslavia, two in the Croatian part of Bosnia.

GKMcD: Okay, you're absolutely correct. Well, you've asked me if by only complaining about the failure to execute the three arrest warrants, does that mean that I am satisfied with the performance by all of the states and entities in the former Yugoslavia and the answer is no. What I was doing in that instance was focusing on a particular case of non-compliance and trying to have that matter resolved. With respect to the binding orders as they're now called for evidence, there is still an issue pending before the Appeals Chamber with respect to the binding order that was issued by Trial Chamber One,

addressed to Croatia, and the Appeals Chamber referred the matter back to the Trial Chamber for resolution and if it cannot be resolved then the Appeals Chamber will consider it. So I cannot really talk about that particular issue since it is a matter that the Appeals Chamber is seized of. But what we've seen in the Republika Srpska when Mr Dodik was the prime minister we did see improved relationships and that's evidenced by the fact that we released one indictee provisionally based on a bail bond that was offered by the Republika Srpska and by a guarantee that the indictee would return for trial. And the prosecutor has opened an office in Banja Luka as well. So, there has been a thawing perhaps I should say of the relationship with the Republika Srpska. But still much is left to be done. And that's something that I want to focus on.

MK: Today you are going to Belgrade where - officially - You are considered the President of an "illegal institution", created in contravention to international law. That's exactly how, few days ago, the Tribunal was described by the Yugoslav Minister of Justice. Who, do you think, is in collision with international law: the Tribunal or the Yugoslav Minister of Justice?

GKMCD: Without a doubt, we're not an illegal institution. We were created lawfully by the Security Council. So, there is no question in my mind about our legality. As you know, that issue was raised in the first case, in Tadić, and the Appeals Chamber examined thoroughly the way that the Tribunal was established and found that we were legally constituted. So, there's no doubt in my mind that we're legal. If anything, what I would tell the Minister of Justice is that the position that the FRY has taken that they will not extradite persons - and they use that term extradite, which is incorrect because the word is transfer -

they will not transfer persons who are citizens of the Federal Republic of Yugoslavia 'because their constitution prohibits it'. Well, that's illegal because, clearly, under international law the requirements of compliance and cooperation with the Tribunal supersede and are superior to any state's constitution. So, you cannot hold your constitution up and say: This prohibits extradition. You're not extraditing persons who are indicted to the Tribunal, you are transferring them pursuant to an order issued by the Tribunal, a tribunal created by the Security Council, for which there is a mandatory obligation to cooperate.

MK: You have reacted very strongly on media reports that Agreement on Kosovo, reached between president Milosevic and ambassador Holbrooke, contains no explicit provisions to ensure the FRY's compliance with the Tribunal. Why do you think such provisions are necessary? You have very explicit provisions about the duty to cooperate in a legally much more binding document - the Dayton Peace Agreement - but still to no effect?

GKMcD: I don't know that I've reacted strongly. I hope that that was the message that I sent because I meant to react strongly because I'm very strong about it. Sometimes omission constitutes commission. In other words, the failure to recognize the obligation is somehow an implicit agreement between individuals that there is no obligation. I'm mostly concerned or very concerned about the statement that was issued by the President of the Federal Republic of Yugoslavia where he speaks of trials being conducted by the national courts. But once again clearly, the Tribunal has primacy and clearly, the Tribunal has the right to ask for a deferral of those proceedings. And there is an obligation on the part of states to comply with that request for deferral. So, you're correct, we don't need a

reiteration in the agreement as a sort of vindication of our authority, but I am concerned that the omission may be in implicit acceptance that there is no longer a role for the Tribunal. And clearly, there is a role, a legal role, and we have not finished our business. We have a long way to go.

MK: During last summer, there have been two tragic incidents in the Detention unit, with the death of two detainees. There were, also, reports of the other detainees' dissatisfaction: they sent you a letter to that effect and you had a meeting with them. What has been done to prevent similar tragic incidents in the future and to improve conditions in the Detention unit?

GKMCD: I had three meetings with the detainees as soon as I returned from leave. I don't know that you can ever prevent a person who is in custody from committing suicide. I don't know that you can ever prevent a person anywhere from committing suicide if they're bent on doing that. It's very difficult to stop that. What we have done, however, is to meet with the detainees and they had a list of, I think it was 13 different complaints - the Registrar and myself - and discuss them. I have written the detainees and advised them that we have made some movement with respect to the situation. One of our primary concerns as a Tribunal is to obtain greater control over the physicians who provide medical services. And when I say control I don't mean to do their job of course, because we're not in the medical profession, we're in the legal profession. But we need to have physicians there on a more regular basis. And that has been agreed to so that we will have two physicians. We will have a physician who will be there two times a week on a regular basis so that detainees will know when they're coming and they can make appointments if they wish to.

And of course, the other arrangements will continue in place. And also we have a psychiatrist from the Federal Republic of Yugoslavia who visits the detainees on a regular basis, and a psychologist, also from the Federal Republic of Yugoslavia who visits the detainees on a regular basis. And we are also going to institute English lessons which the detainees requested. So, we're moving to address some of the concerns. The Registrar is still meeting with the Dutch authorities to see what we can do about addressing all of the concerns. But, the exchange, I think, was a very fruitful exchange. And the detainees also wrote an open letter in which they indicated that the reports about the conditions had been overstated. So, that's where we are and I think we're making every effort that we can. I take the matter very seriously, Mr. Klarin. Too many people have already died as a result of the conflict and we don't need to lose a single life.

MK: According to all accounts, coming from their lawyers, the detainees - Serbs, Croats and Bosniaks - are living in harmony with each other. Can you confirm that, and how do you explain that the process of inter-ethnic reconciliation is faster behind the bars?

GKMCD: I'm glad that you mentioned that because I have heard the same account. As a matter of fact, it was told to me during one of my visits. I don't know that I can explain it really. I have a thought and that is: when people live together and get to know each other, sometimes they realize that their differences are not as great as perhaps they thought, that they have more similarities than they have differences. That's the only explanation that I can give. They're living in a detention unit where we have 24 cells, we've recently added 12 cells, and of course, that's a closer relationship. And I suppose they have in common the fact that they are being detained for crimes that they allegedly have committed in the Former

Yugoslavia, so that gives them something in common. I think it's a wonderful testament to the fact that people can live in peace and harmony, you know. Some reports are that people in the former Yugoslavia have been at each other's throats for thousands of years, you know. People say that to the Tribunal, they say that to media persons. That may be another question you have: How can you expect to turn it around? They've been fighting for years and years! Well, this is where my optimism, my idealism, which I hope is not naive, comes into play. I think that a difference can be made and it's a long story that perhaps you don't want to hear, but it has to do with accountability, because there have been conflicts in the past, but there never was accountability. Instead what happened was they just stopped and then they swept things under the rug and said "fine, we're not going to talk about this." Well, you don't end divisions and you don't mend wounds by not talking about them. The way that you resolve that, or one way you resolve it, is by having trials and by having individuals who are charged with the crimes tried. Because individuals commit crimes, not groups. And people need to understand that they have been vindicated, that at least someone has recognized their suffering. And there needs to be developed an account and historical account of what happened. And from my participation in the trials and the other proceedings, I've come to the conclusion that that just has not happened. We cannot accomplish all of that, that would be naive. But we can make a step in the right direction and eventually the national courts will take over this process, which is the goal - not for the Tribunal to forever try these cases, but for the national courts to take over their responsibility and impose the rule of law to help to bring about reconciliation

MK: In an atmosphere of suspicion which surrounds the Tribunal in the former Yugoslavia, the admission of crime may have very important effects not only for the victims

but also for the co-nationals of the accused. But so far, we had only two guilty pleas. First by Dražen Erdemović and last week second one by Mr Goran Jelisić. It seems that the Tribunal is not properly advertising the benefits the accused may have if admits to the crime and cooperate. What is more important to you: to punish the perpetrator or to establish the truth in such a manner that nobody can deny it? After Jelisić admitted to at least 12 killings, nobody in his ethnic group can deny that some nasty things happen in Brčko in May 1992.

GKMCD: That's a very good point that you've raised. I don't know that the Tribunal can do much about specifically advertising the benefits of a plea of guilty, but, as I've indicated, the Tribunal has a lot to do, and I hope we're assisted by people like yourselves, in making clear what our institution does, and that would include the submission of guilty pleas. But, you're very correct that an admission of guilt under some circumstances may be better than the judges finding guilt because we're still faced with the criticism that the judges are biased. And so we have to overcome that criticism because people have to have faith in the decision-makers if they are to have faith in the decisions. And that's a difficult process, but one that I'm ready to take on with all of my energy. But, once you have this admission, that is more helpful. I suppose it could be asserted that 'well, this is just one individual who's admitting and maybe he is not telling the truth'. People who don't want to accept the Tribunal will find any excuse to undermine our activities, but I think that admission of guilt is a different consideration than a finding by a Trial Chamber.

MK: Thank you very much, Ms. President.

GKMCD: You are quite welcome.