

Project:

**ICTY ORAL History - Documented by SENSE**

An Interview with

Theodor Meron

SENSE Transitional Justice Center

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Interviewee: Theodor Meron (TM)

Interviewer: Mirko Klarin

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Theodor Meron, Judge of the ICTY from 2001 to 2011, its President for four terms (2002-2011) and then for three terms (2012-2019) President of the IRMCT. In an interview with SENSE in October 2003, Judge Meron spoke about the balance sheet of the ICTY's first ten years and its contribution to the development of international criminal justice.

*The Balance Sheet of The Tribunal's First Ten Years*

TM: In the first place, we have proved that international investigations and international prosecutions of people who are alleged to have committed war crimes can be done in an efficient and credible way. In a way that commands international respect, that is not political, that can be respected by all those who are involved - either in the area and, even more important, by everybody outside of the area.

In addition to that, the very fact that after 50 years of deficit in international criminal tribunals, since Nurnberg till 1993, here for the first time a tribunal is being created. In the beginning, it has tremendous difficulties in trying to survive, but it surmounts those difficulties, both because of the way that it organized its work and because of growing international support. In the meantime, it establishes a model of a tribunal that can conduct several trials a day in a credible way by very respected judges and, in addition to that, create a body of procedural rules which give the substantive

international law, which has articulated here the necessary underpinnings and credentials for criminal lawyers everywhere.

I think that we have investigated and prosecuted and judged those people in a very efficient way, in a serious way. Those cases also have demanded very considerable time and we can talk separately about the problem of slowness, because we are doing everything to speed the process up to a greater extent. But I think that this has been a very successful proposition. However, the difficulty has been that because of the cooperation of governments which was less than optimal we have not for quite a few years not managed to obtain custody at The Hague of some of the principal alleged offenders. Even now we do not have Karadžić, Mladić, Gotovina.... It took years to get Milošević here. But I think that over the last few years we have seen considerable improvement because now we have more and more very senior people who are being prosecuted, who are being tried, who are being sentenced. And this is a very good side development of this court.

### *Alternative Tribunals*

TM: How do we deal with those who are alleged to have committed war crimes and who cannot be tried at The Hague because of the completion strategy, the deadline, the limited resources that we have? I do not believe that this should result in impunity for those who have committed war crimes.

I think that what we need there are alternative tribunals. What I have in mind is not international courts, but courts in the area, courts in Bosnia-Herzegovina, courts in Belgrade, courts in Zagreb, who could try some of those who cannot be tried before our tribunal because of our limitations. Now, in order to have that, there is of course one

necessary condition. That condition is that the courts in the area must apply the entire panoply of judicial guarantees and due process, and human rights, and not be tainted by any national, religious or ethnic bias.

So, these are the conditions and I do hope that slowly, as the area moves towards normality, we will see more and more readiness and more and more capability to try in the area of former Yugoslavia some of those people whom we cannot try before our Tribunal. And I can tell you one more thing. Trials before national courts in the area have certain additional advantages that we do not have. Because trials which are conducted in the area itself, close to the victims, close to the crimes, have a greater resonance for the victims than trials which are conducted 2000 miles away.

### *Denial*

TM: I think that the denial, self-denial about what happened, is perhaps receding into the past. It is not as important factor as it used to be. I think there is a question of political goodwill: Are countries really prepared in the area to prosecute and to try their own for having committed war crimes vis-à-vis others? I think that there is a positive development there. I'm not suggesting that we are already there. But in addition to all of that, for those trials to occur we must have a guarantee that those trials are conducted according to international standards, according to international norms of due process, human rights, and judicial guarantees.

I think we are moving there. Take for example the Sarajevo chamber. I myself have been very much involved together with Lord Ashdown and Bernard Fassier in the creation of such a chamber and we are really moving. We have made considerable progress. There is

no question that as time goes on and we move from the stage of planning to the stage of implementation, we will make sure that the tribunal has in place all the necessary legal provisions on substantive law and procedural law to enable that tribunal to function.

At the same time, you must remember that there is no intent, there is no desire on our part, or on the part of the Security Council, or on the part of the international community, to send for trial to Sarajevo the most senior cases of accused that we have. People of considerable seniority who are to be tried before our court - will be tried before our court, will be tried before our Tribunal. The situation in the former Yugoslavia continues to be fragile, continues to be tense. For example, it is my sense that while I will be happy in due course to transfer some cases to the courts in Sarajevo, I would not be as yet ready to send cases for trial either at the entity or the cantonal level courts, because there I am still not convinced that we could have trials which would be free from the possibility of bias and prejudice.

#### *Belgrade and Zagreb?*

TM: In Belgrade it's still a work in progress. They are about to begin. When I was in Belgrade a couple of weeks ago on an official visit, I visited the premises of that court and I found it quite promising. I met the general prosecutor and I met the prosecutor for war crimes, who will be charged with prosecuting war crimes trials before that particular chamber. I do believe that there are enough people present on the territory of Serbia and Montenegro to provide that court with a lot of employment, a lot of people who should be prosecuted. What is encouraging is that the law that Belgrade developed on war crimes, laws that are going to be applied by that chamber, is a law which takes into account

international comments and observations, including by the OSCE, and by the International bar association. So the law as it now appears, the law as adopted, meets international standards and criteria. We must make sure that enough attention is paid to this tribunal to encourage it and to make sure that indeed international standards are complied with.

As regards Zagreb, I do think that the authorities of Croatia have enhanced the necessary legal provisions, but I do not believe that they have started organizing the type of special chambers that we have been talking about with regard to Sarajevo and on a different plane with regard to Belgrade.

The role of this Tribunal with regard to the tribunals in the former Yugoslavia will be primarily a role of assisting in the development and making sure that they have the necessary legal infrastructure to function properly, but it is not envisaged that we would be a supervisory body. I think the United Nations Security Council has never envisaged that we would be in charge of tribunals in the former Yugoslavia. That would not be an appropriate role for us. The role for us would be helping in the establishment, and as time goes on, as those tribunals develop more and more, we would be considering sending some cases of lower-level defendants from here for trial there.

### *Legacy*

TM: I think that what we have established is not only the credibility of international investigations and prosecutions, we have also developed for the first time since Nuremberg a credible body of jurisprudence, case law, developing, articulating and specifying legal principles in a way that national jurisdictions can and will benefit from. So, the greatest legacy of this Tribunal, when we eventually finish our work, will be in this body of

jurisprudence that we will leave to all courts, international and national. And with regard to national courts, I have myself always believed that the future is in some kind of synergy, some kind of a mix of international and national courts. And there is no question that, if international justice is going to be credible and effective, most cases of war criminals in the future will have to be tried by national courts, not international courts. Simply because the capacity, the capability, the resources, the budget, the personnel of international institutions will always be very limited.

### *Justice and Political Will*

TM: The absence of international trials between Nuremberg and 1993, resulted, and you are quite right, primarily because of lack of political will. And that lack of political will in itself was triggered by a lack of sensitivity to crimes which were going on. So, for instance, after the crimes in Cambodia no tribunal was even attempted at that time. What is the difference then? The difference is that thanks to the media, to NGOs, to the open society there is a much greater sensitivity towards war crimes than we have ever seen. In other words, there is pressure on the government, there is pressure on the international community to put an end to the practice of impunity. But, all these things are interconnected. The fact that today, for example, we have the body of jurisprudence, makes establishment either of other tribunals or the activation of national courts, very much easier. Because jurists will not say now "We are not sure about the international law that is to be applied." That law is now in existence.

### *Victims, Justice and Guilty Pleas*

TM: I think that by creating a record in a very detailed way of proceedings before

our courts, proceedings before professional judges that have heard the evidence in great detail, we in fact created a record of those terrible events and crimes that have happened in the '90s in the former Yugoslavia and by so doing we gave the victims a certain sense of vindication of justice.

So, I would go even further and say with regard to this recent momentum that we have obtained on guilty pleas, that they have been amazingly important for the victims. Because here for the first time you could see that somebody who was accused of having perpetrated terrible acts is willing to express a recognition of what happened, accept some measure - preferably a big measure - of remorse and regrets for what happened, and this may give the victim more than a finding of guilt when the accused time after time after time proclaims that he is innocent. In other words, this is a departure from denial. He says, "Yes I did it. Yes, I am sorry. I am very sorry that I have committed those crimes." So, morally this is very significant.

You know, there was an article a few months ago in The New York Times, after one of the guilty pleas, by a person who was a relative of people who were murdered at Srebrenica. He said, "For the first time since the beginning of the trials at The Hague, I feel that I am coming to peace, that I am reconciled with the terrible events, because this particular person - instead of proclaiming time after time after time that he's innocent - accepted, acknowledged responsibility and said, 'I am sorry.'"

In moral terms, acknowledgment of sorrow and regrets is extremely important. Now, of course, guilty pleas, in addition to that, serve additional goals of the international community. They speed up our work, they speed up our trials, and the important thing here



is that also people who are waiting to be tried will be tried faster, so their human right to a fast, speedy trial, is being served. So there are very important goals here which are being served.

Personally, while I do understand the hesitation perhaps of some - whether going that way of pre-bargaining or plea agreement is the most desirable thing - I do support that. I think it's a good thing. Provided it's done properly, and provided that we remember that, eventually, it is not the agreement between the prosecution and the defendant that is binding. The judges continue to be independent and they will decide what kind of punishment to impose.

This in itself basically produces a very important record, because it is a record which is not contested. In a particular guilty plea, the defendant stands up and the judge reads out to him 25 pages of indictment: point A, point B point C, point D, point E, and the defendant says, point after point, "Yes this is true your honor, I did it, your honor." Perhaps the record will not be as detailed as the record which you would see over a trial which lasts 4, 5, 6, or 12 months. But nevertheless, the essential points will be there and they will be there in a particularly effective way. Because rather than come out from the mouth of a witness they will come out from the mouth of the accused who says "Yes, this is true."

### *Lenient Sentences*

TM: Well, I already explained to you why I favored the momentum that has been developing on guilty pleas. I cannot speak specifically about leniency or severity of sentences imposed in any one particular case, because those things are determined by judges who have read the record. Please do not forget that after a guilty plea judges hold

special sentencing hearings, which take into account mitigating circumstances on the one hand and aggravating circumstances on the other. I am completely comfortable with the idea that judges do a very good job.

But again, looking globally, the fact is that it is entirely appropriate and desirable that in some cases the prosecution would be able to obtain testimony of a low-level defendant against a very senior defendant. And perhaps without those plea agreements, such testimony would be more difficult to obtain.

Let me add one more word. You come from a civil law system. In countries like mine, the United States, the criminal law system would collapse where it is not for the practice of guilty pleas from time to time. Because we would not have enough judges in the country, not enough courtrooms, not enough juries, to conduct cases, except after such a tremendous delay that in fact, that delay itself would amount to a denial of justice.

And there is one very very interesting development in Europe. France, which is a leading country of the civil law system, has now before the legislature a proposal to adopt some kind of a system which would be similar to the guilty pleas that we have in the United States. And that is also known in other common law jurisdictions. So, France is going in that direction. I think that in the future we will see that as a development which will become more and more central.

### *Creating a Record*

TM: I think that we are here to try people and to do justice. This is our primary goal. But having said so, I think that we recognize that we also have the mission of writing a

record or creating a record - not writing history. But our work, our determination of facts, our elucidation of facts, creates this sort of record that you would like us to establish. I think we have established this extremely well. I think the future historian, who would want to write the history of what happened those years, will find more than he or she would want to read.

### *Reconciliation*

TM: I'm glad that you are raising that. Have we succeeded in promoting reconciliation? Promoting perhaps yes. Have we been very successful on that, I don't know, and will tell you why.

I think that we will be able to contribute to the reconciliation of the peoples of the area much more when we have tried here Karadžić, Mladić, as well as Ante Gotovina. I think our historic mission of trying people, of creating the record, of reconciliation, will not be completed if we cannot try here the principal people who are accused of being responsible for those terrible crimes, for those terrible atrocities.

To the extent that the international community will help us more - and we will see before long, as I very much hope, we will see at The Hague, before a judge, people like Karadžić, Mladić, and Gotovina - I think that our function of reconciliation will be much more effective.

### Completion Strategy

TM: There is no quarrel between me and the desire to move fast, and perhaps one day before long to complete our work. But, where I come out very clearly is this - the

completion dates of the Security Council should not be applied in a rigid, mechanical, in a blind way. They should not result in impunity. To the extent that we complete our work, some of the related cases must be not forgotten and must not result in impunity, but must be tried by the courts in the area.

I'm not suggesting that political considerations are absent from this calculus that we are discussing. Yes, some members of the international community would like to move on, and they understand that it's impossible to move on before we have completed our historical mission. But they focus primarily on the expense of running the Tribunal and I agree with you, the expense of running the Tribunal is not insignificant, but it is the best investment that the international community could make towards establishing peace and reconciliation in the Balkans, consistent with notions of justice and without justice that peace and the reconciliation will not be achieved. So yes, I think that there is perhaps too much focus on the costs and the expenses. I could think of many ways in which money could be spent less efficiently and constructively than we are spending it.

My speech in the Security Council contains a very clear and relatively accurate, relatively because you can never be a prophet, you never know how things will develop. There are lots of assumptions that have been made about the number of people who will be arrested, how many fugitives from justice will be brought here, how many guilty pleas we are going to have here, but I gave the Security Council certain clear indications.

I told the Security Council that we may well be able to complete the trials of all those who have already been arrested, and who are in Scheveningen awaiting trial or have been allowed to leave The Hague on provisional release. This should work out quite well. We

should also be able to try many of the fugitives from justice under existing indictments. And I said that if Mladić and Karadžić arrive at The Hague by a certain date, not too late in the process, and since they already are cited in the same indictment if they are tried jointly we would be able also to try them within the completion strategy of 2008 for trial courts.

What I did say to the Security Council that to the extent that the prosecutor will submit additional or future indictments, beyond the indictments that have already been issued in the past, those additional indictments cannot be accommodated within the completion target date of 2008. But even that we must say sort of softly. There are so many unknowns here. How many of the new indictments that you will issue will actually result in people being arrested, brought to The Hague? Still, I felt it, as a new president of the Tribunal, I have to give a very clear, a very honest, very transparent statement to the Security Council. I'm glad to say that in her statement before the Council, the Prosecutor stated explicitly that she does agree with my figures and calculations. So, at least we gave the United Nations Security Council a clear picture of what they can expect.

### *Justice After The Tribunal*

TM: Our historical mission will not be accomplished unless certain people are tried. And it must be quite clear that when we have finished our role, people who have committed acts of violence, who have committed war crimes must be tried. People who are waiting, hoping that we will close our doors before they are arrested and tried, are making a big mistake, because we will not close our doors before the principal offenders have been tried.

As regards others, I see the future, as I said before, in a greater development and constructive development of criminal courts in the area: in Bosnia-Herzegovina, in Serbia

and Montenegro and in Croatia. And I am sure that the international community will expect the countries in the area not to say: We are finished, but to continue to investigate and prosecute those who have committed crimes against the international law.