

Project:

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An Interview with

Claude Jorda

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Claude Jorda, ICTY judge from 1994 and its two terms President (1999-2003), talks in a farewell interview with SENSE in February 2003 how the tribunal – despite facing many obstacles since its inception - managed to survive and prove that international criminal justice is possible.

MK: How did your farewell with colleagues at the Cassation Court in Paris go and what did they say to you on the occasion?

CJ: The sentence was: That's very nice ... I was the General Prosecutor at the time. That's very nice, Mr General Prosecutor, but you know, fortunately, you will come back to us at the Cassation Court very soon, because that Tribunal won't work. That was it.

MK: And what did you reply?

CJ: I said: "Perhaps, but what I know is that, throughout my career, every time that I undertook something with determination, I managed to achieve something."

MK: It wasn't only these judges in Paris who were skeptical. Two months ago we heard here at the Tribunal the testimony of Mrs. Madeleine Albright who said that no one in the Security Council believed that what they created on 25 May 1993 was ever going to work.

CJ: You remind me of what Madeleine Albright said, who was nevertheless someone who believed a lot in this Tribunal. We have worked a lot. We haven't, and I'm saying this for those who are watching and listening to us, we haven't succeeded in everything. One needs to have the modesty to say it. And there will be a lot to do for those who will succeed me. We have succeeded in some things, not succeeded in others, and I am ready to talk about them.

MK: What are the main reasons that the Tribunal has survived despite the low expectations at the beginning?

CJ: I think we've been successful in making a judiciary service work. It seems to be easy in your country, in mine, it is the primary mission of a tribunal. However, this was not so easy. What is a national court? It is an institution that dispenses justice with fair trial standards, protected rights of the defense and of the accused, and which quite simply, when it comes to criminal cases, has them investigated, prosecuted, judged, condemned and the sentence served, or else acquitted and released. This is the basic mission of a tribunal. What was difficult in this Tribunal was that at the start there was nothing. We had no rules of procedure, there was no budget, and above all, there was political interference in this Tribunal, which still persists, but was very strong at that time. And we must acknowledge that we owe it to the first cases, which were not important ones, that we were able to test the feasibility of a judicial system comparable to a national system.

We must also bear in mind that it was from this point of view that the first prosecutor was able to prosecute the executors. Sometimes he was criticized, but with hindsight, we realize that it is thanks to these executors that in Dayton we were able to say:

“Finally, this Tribunal is functioning.” You will laugh, but we will never know just how much we owe Mr. Tadić.

It should be noted that the Tribunal is a resolution of the Security Council, it created the Tribunal on the basis of Chapter Seven. Well, Chapter Seven stipulates that the Tribunal could be abolished when peace is restored, and peace was restored in December 1995. Fortunately, by then we had started to operate, and we were able to show to the whole world that we had eleven judges - in fact, there were only six because the other five were in the appeals chamber – so, six judges and two chambers that were working on the first cases. So, when Mr. Tadić arrived, the whole world could see that we were in working order, in order of battle.

We had what makes up a tribunal, that is to say, there were rules of procedure, there were professional judges from all continents and legal systems, there were the accused, there was a prison, there were investigators at the prosecutor's office, there was a prosecutor to prosecute, and so there was no reason for this to stop. Another important issue is the inherent power of judges, that is crucial. You see, we can close a business that is not working, we can eliminate a public service if it is no longer justified, but a tribunal is very difficult to abolish, and we were a tribunal that was functioning.

Later, we were faced with much more complex and sophisticated problems, I'd call them the first-generation problems. We can quite well divide our work according to mandates, they do not strictly correspond but in general, terms can help your viewers. The first mandate from 1993 to 1997 was the mandate to establish the Tribunal, to show the world that it is not impossible, that it can work. The first mandate was our responsibility,

yes, it is working. If you want to abolish us, you can, but you cannot abolish us on the pretext that it isn't working. Abolish us if you want, but we've proved that it does work.

The second mandate from 1997 to 2001 was the period when the problem was no longer the very existence of the Tribunal, but rather how to make the Tribunal work while grappling with political interference. The problem of the second generation was cooperation - cooperation concerning arrests, cooperation of states, of all states, not just the states in the region. You know, I've always said this, when we have problems with cooperation, the distinction between virtuous states and less virtuous ones is much more nuanced than we imagine. Because what we hear is: "Cooperation - it is the bad Balkans who do not cooperate, and the other states..." This is not true. It's much more complex than that. So, the second period 1997-2001 was a period of complexity. We realized that the problem was no longer to make the Tribunal just work, it was to make it work according to high international standards, with detentions that are increasingly long, with an administration of evidence that is more and more complex, with the problem of strategic evidence, of the so-called sensitive evidence. These were problems that were becoming ever more complex.

And now we are faced with the questions as to where the Tribunal was going, or where we were at that point. This is the problem of the third generation, which corresponds to the end of my first term as president. I am presenting a strategy, a policy for the Tribunal, and that is the current mandate. This policy by no means aims to say: "We are going to close the Tribunal." Not at all, the Tribunal has the work for several more years. What it aims is simply to define where the Tribunal is going. To put it bluntly, is there a

commander on the plane, is there a captain on the plane? We have to show that the Tribunal has a strategy. This is what I am trying to do.

MK: You mentioned the first Chief Prosecutor and the first accused. What other personalities marked those different stages in the work of the Tribunal? Which indictments and which verdicts would you single out as the most significant?

CJ: As regards judgments, it's hard for me to say. But this is my last interview with you, and you know that I deeply admire your work.

I must say that I find that the Tribunal must have immense gratitude for Professor Cassese, the first president of this Tribunal. It was he who carried the Tribunal with his passion and his conviction. We helped him, the first judges who were there, we were there with him, but he was the flame of the Tribunal.

I also feel a lot of gratitude to Louise Arbour because she is the prosecutor who redirected the criminal policy towards the highest officials. You know that's my obsession - the most senior officials. International justice concerns the most senior officials because it is they who were the planners, the architects, those who, if they are not judged, do not allow national reconciliation.

I've mentioned Louise Arbour and Professor Cassese, but all the judges have contributed a great part to this Tribunal, although not everyone in the same way. We come from very different legal cultures. I am a very active civil lawyer. When I preside over a trial, I am a president of civil law kind, I challenge, I draw the maximum from the Defense or the Prosecution. This does not mean that the other judges do not do the same, according to

their culture.

The difficulty in an international tribunal is to bring together very different legal cultures, very different habits. Not only do we often not speak the same language, but we do not use the same expressions and we have habits rooted in our countries. This will make you smile, but we were left to create our rules of procedure. This is not a good thing. The future permanent criminal court has been wise to foresee that the code of criminal procedure should be done beforehand. We did what we could with that and we have amended it 22 times. I'm not very proud of that, but we encountered difficulties that we hadn't foreseen. In January 1994, when we made our Rules of Procedure and Evidence, none of all the eleven judges who were there had any experience in international criminal procedure, including me. And so, each of us arrived at the meetings with our respective code, someone with the American federal law, I with the French Code of Criminal Procedure, another with the Pakistani law, the Egyptian law, and each of us said: "In my country we do it like that." It was difficult to conceive a culture of trial that corresponds to an international trial. This is what is difficult. We still have these difficulties; they are still very important.

MK: Let's move on to your personal experience here, not as the President of the Tribunal, but as a judge who conducted some trials. What was the most dramatic moment in the courtroom for you?

CJ: The most dramatic moment I have known was in the Jelisić case when one of the victims pointed at the accused and said: "Look at me!" Now, that was so impressive. On the other hand, I must say that on the judicial level I had great satisfaction in the Blaskić trial

because I dealt with great lawyers. I wouldn't say the names, not all of them were great lawyers, so I won't say a name. There were truly great lawyers on both sides, but I won't go any further on that. And it is there that I felt in all its fullness what an international trial is. On the other hand, I've always found that our trials were too long, you know, I still find our trials to be too long. I have put a lot of effort into trying to shorten the trials, but this is one of my failures, I have not been able to shorten the trials as I wanted. I have had a lot of failures. I have succeeded in several things, but I have not succeeded in everything.

Actually, this is also good because you have to leave work for other presidents.

MK: We mentioned Erdemović and Jelisić, two of a total of nine accused who have pleaded guilty in these nine years. Both before you. Do you think that this is enough to have only nine defendants plead guilty in nine years, or do you think that the Tribunal could have done something more to encourage the defendants to face their responsibility?

CJ: It's a very delicate question, I must say. I do not come from a national system that practices this procedure, although I must announce that we are going to introduce it, it's in the recently proposed legislation, which only goes to show that everything is possible. There is something that bothers me about this guilty plea, in that it always comes following an exchange with the prosecutor's office. This bothers me a bit. Then again, I find that the Tribunal is struggling with concerns of expeditiousness on the one hand, and with the imperative of national reconciliation on the other, which in my view is the most important. All my action is focused on the idea of whether my Tribunal will contribute to national peace and reconciliation. So, this can answer your question. If guilty pleas are really going to speed up trials and make things faster, I would consider them to be a good thing. What I

don't like about this is if the prosecutor's office makes promises it can't keep, but otherwise I believe that it can be a step forward in relation to national reconciliation.

MK: You mentioned reconciliation. It seems to me that this reconciliation is working much better in the detention unit than outside. As far as we were able to find out from the detention unit, both from the accused themselves and from their lawyers, a truce has been made in the detention unit, but the war continues in the courtroom by legal means. How do you look at it?

CJ: First of all, I'm happy to know that in the detention unit things are going well. I hope this is not happening only in the detention unit and I think that gradually the peoples of this region, that you know well, will get used to the idea that it is better to make peace than to make war. As they all want to join the European Union, we can hope that thanks to this the war is behind us rather than before us.

On the other hand, you have raised a question that concerns me a lot and brings us back to the expeditiousness of trials and the Tribunal's completion strategy. Everyone believes, or at any rate could say, that I wanted the Tribunal to close its doors. Not at all. I have never said that. I simply said that the Tribunal must have a strategy, and this strategy is a strategy that also aims at the reconciliation of peoples. If we are to continue to have trials in fifteen or twenty years, then I think we will not contribute to national reconciliation. This is my point of view, my personal opinion, not the position of the Tribunal. I believe that justice goes hand in hand with peace and reconciliation, but on the condition that it goes roughly at the same pace. If justice has to intervene twenty years later, it's not good at all, we reopen the wounds and do not close them. This is why in all my

strategy you can see that I am always saying the same thing. I say to the judges: "Let's speed up the proceedings!" I say to my colleagues: "Let's reform the judicial practice, let's do it faster! Let's show to the whole world that it is not inevitable for a trial to last twenty or twenty-five months." Perhaps yes for the high-ranking officials, but not for second-level executors.

At the same time, I'm saying to the international community: "Trials must be held in these countries once they have established democracy." We will perhaps start with Bosnia and Herzegovina and I have been very happy since last Friday when I signed an agreement which advances the creation of a special chamber in Bosnia and Herzegovina. So, why not do it in other countries as well? But at the same time, I'm also saying to the international community: "Help us arrest the highest officials because it is not in fifteen or twenty years that we will be conducting these trials." In fifteen or twenty years we would only reopen wounds and not close them. That's my concern and that's why I am sometimes caricatured.

I am happy to tell you, I did not do all this policy. After all, you know that this policy has always been approved by the Security Council. You asked me about my legal satisfaction. My satisfaction as the President is that I have not put forward a single reform proposal that has not been adopted unanimously by the Security Council. I can tell you that the debates at the Security Council are never simple. But I have always been unanimously approved by the Security Council, and I have been to the Security Council four times.

MK: Sometimes one gets the impression that some in the international community, in the Security Council can't wait to see the Tribunal closed. Do you feel that kind of pressure? Do some people in the international community feel that the Tribunal has already

surpassed its role?

CJ: No, I don't think so. To close the Tribunal? I don't think so. On the other hand, one does feel certain impatience in the international community, and this is legitimate. Why? You remember the chronology of events; I was elected President in November 1999. As early as January 2000, I proposed a plan to my colleagues and I went on to present it in April 2000, and then I got the Security Council resolution in November 2000.

Well, I understand a certain impatience on the part of the international community because it is saying what I have just told you, it is saying that the Tribunal must accomplish the mission entrusted to it. And this brings us back to the different missions of an international criminal tribunal. These missions are the following: we must first bring to trial, judge the high-ranking officials in order to prevent recidivism. This is the first mission. Then, we must bring justice to the victims, and we must also work so that History, with a capital "H", is not repeated. These are the major missions of an international tribunal. So, when we look at these missions, we see that we have not succeeded in everything, we have not prevented recidivism, for example. But we have been able to judge cases, to make the Tribunal work. However, to make the Tribunal work does not mean to make it work indefinitely. It is an ad hoc tribunal, not a permanent international criminal court. So, gradually, the countries which achieve democracy must make their judicial institutions work. However, they can't always do it. I have just been to Bosnia and Herzegovina and I know very well that we cannot, in the current state of affairs, entrust the cases to Republika Srpska or even to the Croat-Muslim Federation. It's sad, but we really can't, and therefore we mustn't. That's why I think a lot about this special court, this special chamber. You will

notice that this special chamber will be a national court with international elements, and we will gradually pass the baton on to them.

I believe that the judicial function is a function of sovereignty. When a state accedes to sovereignty, it must have its judicial function. On the other hand, we must not allow what we could call a parody of justice. We must do justice to the victims, to the many victims, to the thousands of victims, there are thousands of potential criminals and tens of thousands of victims. So, the Tribunal must exist until we have accomplished our mission. Simply, our responsibility is to accomplish our mission regarding the officials who must be tried here, and also help the local courts to fulfill their duty of justice.

MK: You mentioned in recent years, when you talked about your reforms and your strategy, that all first-instance proceedings could be completed by 2008. Do you still think that is realistic? Particularly bearing in mind that not all indictments have been filed yet.

CJ: I think that if the Prosecutor's investigations are completed in 2004, we can assume that the first-instance trials could end in 2008, 2010. I'll present this in terms of mandates: 1993-1997, 1997-2001, 2001-2005, 2005-2009. I think that the fourth term could see the end of first-instance trials. We would need a fifth term to finish some complicated court cases, the ones concerning a few high officials, and then at that point, all the forces of the Tribunal, all the judges, both ad-litem and first instance, should be used to recompose the Appeals sections, we will need to amend the statute for that, and then we could try to finish it up. Obviously, one of the fundamental conditions are arrests, arrests must be made as quickly as possible, I have always said that. In all my speeches to the Security Council, I said: "Yes, we can finish within this time frame, but on condition that the

fugitives are arrested as quickly as possible.” If Mr. Karadzic is arrested on 15 December 2008, say, he will not be tried by 31 December 2008, that's for sure. So, there is an obligation of the international community.

MK: Let us talk now a little about the criticism of the Tribunal, which primarily comes from the countries of the former Yugoslavia, but also has some supporters in the international community. One is that the Tribunal is biased, that it is politicized, and you yourself have mentioned political interference. The Tribunal is said to be an American institution. How do you, as a Frenchman, feel at the head of an American institution?

CJ: No, it is not an American institution, we had the support of the United States, but I'll remind you that we have had the support of many other countries. And I would like to say again that I have had the unanimous support of the Security Council since 1999, and my predecessors also always had the support of the Security Council. I would also like to say that the Security Council is not always as united as it is believed, but as regards the Tribunal it has always been united, I actually enjoy the support of all the permanent members. So, it is not true that the Tribunal is an American institution. May I also remind you that, as regards the arrests, we need other countries which are responsible for certain sectors in Bosnia and Herzegovina and other western countries.

I'll tell you, the states in the region are critical of the Tribunal, it's true, but they haven't shown us that they can conduct trials themselves. I have been to Bosnia and Herzegovina and found that the courts of Republika Srpska and of the Croat-Muslim Federation were not able to conduct trials. I mean, I say this all the more from a professional viewpoint, because when I went to Bosnia and Herzegovina in June 2002, I met

all the judges and all the prosecutors, and I was able to see that we could not entrust Republika Srpska with conducting war crimes cases. They're all willing to do it, but only as long as they bring to trial the opposing party.

And as regards Croatia or the Federal Republic of Yugoslavia, these criticisms do not seem justified to me. Croatia cooperates irregularly, sometimes it does cooperate, sometimes less. As for Serbia and Montenegro, which was the Federal Republic of Yugoslavia until recently, you know that it is the last country that should complain about the work of the Tribunal because so far, they have not shown that they have the capacity to conduct trials. At this point, I don't know how Mr. Milosevic would have been tried if he had been put on trial in Belgrade. I'm not sure it would have been in his best interest.

Therefore, the criticisms of the countries in that region do not seem, at present at least, to be totally justified. As for the criticisms from other countries, I would not go back to the criticisms concerning the slowness and the cost of the trials, on this level I do accept the criticisms. You know that I have always done everything possible to make the trials less expensive and shorter.

Political criticism, there can be none with regard to the judges. The judges come from legal systems, they are judges from five continents, and they are not involved with any party to the conflict, you know that. The only problem we may have is the judges who may belong to countries that have participated in peacekeeping operations or interposition forces. As far as I am concerned, it is well known that I have never hesitated to summon senior French officials as witnesses in the trials we were talking about earlier.

Now, can the Prosecutor be subjected to political criticism? I would say first that the

Prosecutor is not a judge at all. The Prosecutor has options, she can choose the procedure, the criminal policy and she takes responsibility for that, of course. I underline that we have the accused from all sides and, as I once reminded Mr. Kostunica, as far as I know, the largest number of fugitives are still in the Federal Republic of Yugoslavia at the moment. The criticisms must be differentiated.

We are not an American or a Western tribunal, not at all. We are a tribunal that is made up of totally independent judges and I challenge anyone to go and review the decisions we have rendered and say whether our decisions have been political or not. We are a tribunal, I'm saying this for your viewers, which is able to condemn, to acquit, to release provisionally, it is a tribunal which judges according to great international standards. However, the Prosecutor is different from the judges.

MK: Are you distancing yourself from the Prosecutor in that way?

CJ: No, I'm not distancing myself from the Prosecutor. She has a mission that is different from mine. We have common policies; we have a common political strategy for the Tribunal. As the Security Council has asked her, she aims to prosecute the most senior officials, and that suits me totally. As for the rest, she drafts the indictments, she drafts them conscientiously, according to the information she has obtained and the progress of her investigations. I'd like to point out that all the indictments must be confirmed by a judge who does it conscientiously, and so far, the indictments have always been confirmed. They are not always confirmed as easily as it seems, there is a dialogue between the judge and the Prosecutor's Office which results in the confirmation by the judges. She has a job that is different from mine, she has her policy but this policy is still under public control, we can

see publicly what she is doing. You can look at the whole long list of indictments and you will see that the policy of various prosecutors has always been to aim at the highest officials. So, before the states start criticizing the Tribunal, I'd invite them to first also do their mea culpa: Have we always helped? Have we always helped the Prosecutor? Have we always helped the Tribunal? When we have answered these questions, we will see more clearly the relationship between politics and the Tribunal.

MK: My last question. You came to The Hague in January 1994 for a couple of weeks and stayed for more than nine years. You will remain for at least another three years in The Hague as a judge of the permanent International Criminal Court. What is the Tribunal's contribution to the creation of the International Criminal Court, and what experiences of this Tribunal will you try to transfer to the ICC? Which are the ones you will take care not to repeat?

CJ: That's a very good question, Mr. Klarin. I will answer it with great pleasure. I would like to help the International Criminal Court avoid the mistakes that we made here at the beginning due to inexperience. First, a hesitant penal policy, that is to say, penal policies which are not clearly defined towards the high officials. I believe that international justice, justice for the victims of the most serious crimes committed against the human race, must above all deal with the planners, the architects of ethnic cleansing or genocide. It doesn't depend on me, of course, but I think I will repeat it everywhere if I am asked. Then I believe that simpler, more readable, more transparent procedures are needed because justice, in general, is intended to be exemplary. You punish a thief to prevent him from stealing again, but this is even more important in international justice. If you want to prevent the greatest

crimes against humanity from happening again, these trials must be conducted as expediently and as clearly as possible, so that the action of justice can be seen quickly. If not, you encourage the criminals to continue, and you discourage the victims from resisting the criminals on the other hand because they say: "Oh, I will never obtain..." So, I believe that action is possible, and this action has already started.

The Tribunal, because it knew how to function, has enabled in part the creation of the International Criminal Court. It's not just that, of course. But if you look closely, you will see that this is an old dream of humanity coming true – namely, to create a permanent court, a court which pre-exists the crime, whereas an ad hoc tribunal is created only after the crimes. So that's a fundamental difference. Well, it wasn't possible to create this Court for fifty years, for a lot of reasons. And you will notice that from the moment we showed, here in The Hague, that an international justice system was possible, was doable, we gave immense hope to NGOs, immense hope across the world that it is possible. And so, I believe that we must continue to work in this direction. I would like, when I am at the Criminal Court, I would like to say to my future colleagues, to prosecutors: "We must avoid repeating certain mistakes, we must have clear procedures, a clear criminal policy." That's what's important. Will we get there? It's a new challenge, my new challenge.

MK: Good luck.

CJ: Thank you very much.