

Project:

ICTY ORAL History - Documented by SENSE

An Interview with

Morten Bergsmo

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Interviewee: Morten Bergsmo (MB)

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MB: On the 9th of May 1994 I started working for the Yugoslavia Tribunal's Office of the Prosecutor as the first lawyer in the Office, of course, after the deputy prosecutor Mr Graham Blewitt, who was there and who had been tasked with setting up the Office. And the reason was that I had worked for the Commission of Experts for the ormer Yugoslavia as a legal advisor and I had worked on several of the studies undertaken by the Commission, and I also worked on the archive of the Commission, which was an old-fashioned archive that was structured according to a basic taxonomy that we had insisted on implementing throughout the archive. So we have very carefully had the assistance of the Commission, pack and ship the archive to the ICTY Office of the Prosecutor. And this was the first bulk of material that came into the possession of the ICTY Office of the Prosecutor after, of course, the reports of the Commission which had been made available to the Office.

These reports included the Prijedor study which had been undertaken by one of the commissioners, Judge Hanne Sophie Greve, with my assistance, and which had been prepared as a draft case file for a Prosecutor's Office in the sense that there was an analytical narrative describing the events in Prijedor from before the war until the establishment of detention facilities and the alleged conduct at that time, the alleged conduct that had occurred in those facilities. And then there were several volumes with

supporting material, anonymized, potential witness statements that have been organized by thematic headings so that you could read the material in a structured manner. And all the statements that had been taken and collected through the work on this project were attached. So the the Office of the Prosecutor had a coherent report, had a systematic analysis of potential evidence and had the raw data which it could go to. This material was made available already in May 1994. And as the first members of the staff arrived in May, June, early July, this was the material which everyone started reading. That was an educational process, because we then received wonderful colleagues from around the world but at that early stage none of them had expertise on the former Yugoslavia and most of them had not visited the former Yugoslavia

So the first thing they would read often was the analytical report in the Prijedor study, then they would go to the systematic presentation of quotations from statements, several hundred pages, and then they'd return to the draft statements. And some started, such as Mr Clint Williamson, an American career prosecutor, to look at the statements already in June. He was very keen to move into the material and to understand the material. But there was no formal decision to start an investigation until the 4th of July 1994. This is when it was decided to open the first investigation. And not one but two teams joined to work on the Prijedor investigation, out of which came several years later the Prijedor cases, the Bosanska Krajina cases, the leadership cases against the leaders of Republika Srpska.

MB: And also the cases against Bosnian Serb leaders, the leaders of Republika Srpska, they analytically have grown out of the Prijedor file. And this is a history that is yet to be written. But what one had attempted to do in the Prijedor study was to identify

patterns in conduct and not only to look at violence, but to look at the organization of the violence, what facilitated violence on such a large scale in detention facilities and during operations in villages around the countryside in Prijedor, and the way interrogation was organized. So we had during the study systematically sought information trying to understand the way the Bosnian Serbs used the existing municipal and regional administrative structures, also within the security apparatus, but also created new structures. And we had a specific emphasis on civilian structures.

And then we looked also at potential insiders. And it was actually during the time we worked on the Prijedor study for the Commission of Experts that the main insider witness in the whole history of the ICTY was identified and the contact was established with that person - witness P. Witness P was the person who managed to explain to the ICTY Office of the Prosecutor the administrative anatomy of how the bosses in Republika Srpska used sociopolitical structures to facilitate the violence. One cannot overestimate the importance of the insights conveyed by witness P, who unfortunately later passed away, after the person had testified in several cases and contributed in several cases. So, I think that this is a contribution by the Prijedor study and the work of the Commission of Experts which is not... It was out of the initial work of the two teams on Prijedor that we recognize the need for analysts. It was out of the work of that team that there was a request to the government of Norway to second five persons, including a demographer and a statistics expert, which laid the foundation for the analysis unit. It was out of that work that we realized that we need to have an organizational unit inside the Office of the Prosecutor that can look at document collections and archives without being involved in the day-to-day work of the investigation teams. The whole idea of an analysis unit which became so important for the

work of the Office of the Prosecutor, grew out of that investigation and was linked to the recognition of the potential importance of documentary evidence which the Prijedor study was based on. This was an exciting time because there were not many people in the Office of the Prosecutor in June, July of 1994. In May it was Mr Blewitt and some administrative staff, and then I came as a young lawyer, as the first, and then came various prosecutors and investigators. And notably a group of secondees from the United States' Department of Justice, no less than 23 persons. And they started arriving in June and July. And they were, most of them, career actors from the United States' criminal justice system, and they wanted to organize the work in the way that they had become used to as professional investigators and prosecutors in their domestic offices, and not to try to do things very differently. Although at that time there was great uncertainty as to there would ever be trials, whether persons would ever be apprehended, because the war was ongoing, but they were insisting that one should do the work in as normal way as possible. So there were some formal procedures in terms of handing over and passing over the entire file of the Prijedor study and the other files of the Commission of Experts to the Office, where the Office and these career investigators and prosecutors they would say: Well this is all very interesting, it is interesting to hear what you have to say, Morten, but we now have to look at everything again.

So they started with a narrative in the Prijedor study, they went to the sort of analytical presentation of the evidence and then they moved to the statements. And the actual independent information gathering of the ICTY Office of the Prosecutor was when we started to contact the potential witnesses and they were then approached officially by the Office of the Prosecutor and statements were taken. And these were the first statements

that were taken by the ICTY Office of the Prosecutor. And that was also for these sources of information a new form of interaction with justice, a more hopeful form, a more resourceful form, a form linked to a court with judges, a building in The Hague. So for many of the sources of information July, August, September of 1994 was an important time because they would be approached and they would for the first time have an opportunity to speak to a representative of a serious criminal justice agency. So, during the summer of 1994 and into the fall of 1994 all the operational resources of the Office of the Prosecutor were absorbed by making the Prijedor investigation take roots and go forward in a professional manner. And when Justice Goldstone arrived and assumed his role as Chief Prosecutor, he fully condoned and supported this tentative work that had started before he was there in The Hague, and he lent it its strength through a number of decisions that he made and then added other investigations to the Prijedor investigation to make sure that it would be a multi-pronged effort from the start.

So, one of the other cases that started very early was linked to the corridor and to Brčko and crimes that were committed around Brčko, and that was led by one of the other American prosecutors who didn't join teams one and two. So there were in July and August several other investigations that opened, and some of them led to results quite quickly, and there could be indictments quite quickly. But the big effort that year was on Prijedor.

MK: When Justice Arbour came she withdrew something like 19 indictments against some she considered small fish in the Prijedor indictment. So at the beginning the material, the evidence which was produced by the Commission was exploited completely, but then they started a little bit a more selective approach to the indictees.

MB: Yes, and that's natural, that you, when many other investigations had been opened, and not only in Bosnia and Herzegovina, that there was a need to rationalize the portfolio of cases to make sure there would be enough resources to bring the cases that could go to trial, to a successful conclusion. But you are right, Prijedor was the laboratory, and remained the laboratory for many many years. It was through the legal analysis linked to Prijedor, trying to understand these patterns I refer to and the role played by various organizational structures, that the thinking on suitable modes of liability started. Because it was felt soon that perhaps command responsibility doesn't really capture the kind of meeting of minds that had made the operations in Prijedor possible, perhaps ordering doesn't really capture, perhaps these traditional modes of liability don't describe the reality well enough.

And this is where I think it is important to recognize the contribution by one of the judges Antonio Cassese in a legitimate setting, bringing up the doctrine of common purpose which led to the jurisprudence on joint criminal enterprise. But this intellectual work was started in connection with Prijedor. It was started when we were trying to find the most suitable and appropriate established form of criminal responsibility to capture what had actually occurred there.

And of course later a joint criminal enterprise became a major area of litigation, legal argument, research and publications, and is considered one of the main contributions in law by the Yugoslavia Tribunal. But it came out of wrestling with facts and trying to understand complex facts, where perhaps historians will say that we in the Office of the Prosecutor we were not broad-minded enough, we were not creative enough, it was

actually the judges who reminded us of older principles of law that were encompassed by the statute of the ICC and that actually suited the facts better than what we had in mind in the early days in the Office of the Prosecutor.

MK: So as the member of the Commission of Experts involved with the preparation of Prijedor dossier how satisfying are you with the way the Tribunal has used those materials in prosecuting those who are the most responsible for those crimes?

MB: I was only an assistant to the Commission, seconded by the Norwegian Foreign Ministry. I was very young so I was not a full member of the Commission like Judge Greve with whom I had the pleasure of working, and before her professor Torkel Opsahl. But looking back, it is extraordinary what those persons who came forward and were willing to give information to the Commission of Experts and later to be interviewed and become witnesses, what they have brought about in terms of international justice development. Because the Prijedor and Bosanska Krajina cases have formed today the core of the legacy of the Yugoslavia Tribunal, factually and legally and analytically. And many of the achievements of the analysts at the International Criminal Court's Office of the Prosecutor today they build directly on the work that was done by analysts at the ICTY Office of the Prosecutor. So the influence of the sacrifices made by these victims who came forward, in terms of the law, in terms of working methods, in terms of developing the whole profession of international criminal justice, has in my opinion been very significant. And that is of course humbling and it feels very meaningful to have been able in some modest way to contribute to that.

MK: Have you been to Prijedor?

MB: Yes, I have visited 102 of the opštinas of Bosnia and Herzegovina as part of my work for the Yugoslavia Tribunal. I wanted to inform myself properly of the history and geography and culture and society of Bosnia and Herzegovina and other republics of the former Yugoslavia. And fortunately I could visit Prijedor several times.