

Project:

ICTY ORAL History - Documented by SENSE

An Interview with

Fausto Pocar

SENSE Transitional Justice Center

Pula, Croatia

2022

Interviewee: Fausto Pocar (FP)

Interviewer: Mirko Klarin (MK)

Location: The Hague, The Netherlands

Date: 29 November 2005

MK: What was your personal motivation to leave the career of academic, or even a kind of international law diplomacy, and to become judge in International Court here in The Hague.

FP: Well, I was essentially a professor of international law at the University of Milan, although in the last 20 years I did a number of international activities, in particular in the human rights field as a member of the Human Rights Committee under the Covenant on Civil and Political Rights and as a representative, from time to time, of my country to some meetings at the United Nations in particular. I also acted as the Representative for the High Commissioner on Human Rights for Chechnya in '95 and '96. So, this activity in the field of human rights pushed me when I was asked whether I would be happy to be appointed to the Tribunal. Pushed me to accept. Because, first I had a experience in judicial matters in dealing with cases under the Optional Protocol to the Covenant and most of these cases were individual cases related to fair trial. And I started regarding this Tribunal and international justice in general as an additional guarantee for the protection of human rights. Normally, protection of human rights is given by under the conventions, including the European Convention, against states, but the punishment of the individual perpetrator, the agent of the state that perpetrates the crime, is a matter for the state, simply. So, the

international community would not intervene in that, usually. The new step, done by international criminal justice, is to take that aspect also into account. So, it is because of that, that at the end I thought it was perhaps a good experience to see also that side of the protection of the human rights.

MK: One of the hot subjects of the human rights during the '90s were the events in former Yugoslavia, so I suppose you have been very well informed - as an academic as a human rights activist - what was happening there during the that period.

FP: I did follow the events in the former Yugoslavia closely, although not professionally. I followed them both in, well, to certain extent also professionally, in that I participated in the drafting of the United Nations Declaration on the rights of person belonging to minority and that was a declaration that came to life in '92, '93, when in parallel with the situation in the in the Balkans, which minority issues was clearly a sensitive one. But, in general, I followed what happened through the activities of the Commission on Human Rights, the Special Rapporteurs, the Commission of Inquiry, so I was quite familiar from the outside of what was happening in the Balkans, actually.

MK: So, you came here at 2000 and you took the new role as a judge and you were being in one trial chamber and one important trial, for crimes in Foča, and after that you were member or presiding the different appeal chambers in deciding different appeals. Did you learn more about the events in former Yugoslavia? Did you learn something about those wars which you didn't know the moment when you came here as a judge?

FP: I would say yes. Because not only through the pleadings of the prosecution or the defense, that of course brought new elements that are not normally covered by other

documents or reports, But I would stress that what I learned more was the human side of the conflict. That is the aspect of the people. More about the people involved in the in the conflict. Especially in the Foča trial. Listening to witnesses this aspect comes inevitably, as I imagine in other trials, but it was the only first instant trial in which I sat in this tribunal. This aspect comes clearly to evidence. And it is an experience which is really enriching from the human side and important for the legal side. Also, for the judge to deal with the situation. To have to decide this aspect of the conflict.

MK: Following the war on the TV in the media, you have seen the victims, but here for the first time you met the perpetrators or alleged perpetrators. So there were two kind of people you met here.

FP: It's different reading in the newspapers, or even looking at the television, and talking to the people in person. Of course, we do not talk in court with the with the accused directly, but we talk directly with the with the witnesses. And there are moments in this trial, which I will never forget from the human point of view.

MK: Can you recall one particular moment which is like the deepest impression on you?

FP: Well, it's difficult to select one because all bring a different experience. Perhaps, if I could try to isolate one, it's the testimony not of direct victim, but of a mother of a victim that almost collapsed in court, in the courtroom, when dealing with the rape of her daughter that at the time of the day was 12. And then the daughter disappeared afterwards. It has been a really difficult experience for everyone in the courtroom and, well, sadly we never forget that. And I have the photo of the girl with me, I keep it with me. I never

separated from it.

MK: Are there any differences between the Tribunal you found here in February 2000 and Tribunal today?

FP: Well, I would say the legal work has not changed much, but if one compares the Tribunal six years ago, it was at the beginning of the year 2000, and that was the moment when the Tribunal really started working at full speed. Before there were cases, of course, and the Tribunal worked, but the rhythm of work was not as high as it is now, and it went increasing on from that moment on. There had been the reform with the change in the number of the judges, with the ad litem judges. There has been the addition of the two judges from the Rwandan Tribunal to the Appeal Chamber, that strengthen the links with the Arusha Tribunal, we have more unity to our jurisdiction. And there have been changes in the procedures. One important one, that is really in the front line now, is the referral of cases back to the authorities in the region. And I think this is a major event, because, at the end, the Tribunal is discovered at a certain moment and suggested the Security Council to discover that there is the principle of complementarity, that is the basis for the International Criminal Court. We apply it in a certain way, we had the principle of primacy of the Tribunal, is still there, but we are now seeing that an international court cannot do everything and that it's better to build up a local judiciary that will take cases as appropriate. Of course, the high ranking accused according to the Security Council resolution will remain here, but the medium and low ranking accused that can be probably tried locally, either by domestic courts, merely domestic courts, or, as in Sarajevo, by the

State Court, which is a mixed tribunal.

MK: Have you noticed any important change in the attitude of the international community, especially in the atmosphere of the countries under your jurisdiction, toward the Tribunal in those six years? I think there have been...

FP: Well, I have the feeling that there has been changes also in that respect, because it's my feeling that countries in the region were at the beginning very hesitant, to say the least, to cooperate with the Tribunal. There was no, or a very limited, recognition of the Tribunal. It is my perception that nowadays the recognition of this tribunal and of its role is much more significant in the region than it was years ago. So, in that respect I think this helps the Tribunal also, because Tribunal can work only with the cooperation of states. If states do not cooperate, the Tribunal is in difficulty. But, also, this establishes a link with the countries in the region, because after all the role of this Tribunal is to come, to play, to give a contribution to establishing trust and confidence in the region and to promote peace and reconciliation in the region. This is the goal.

MK: Let's talk a little bit about completion strategy and its challenges. Is it realistic to expect that all the deadlines will be met with 2008, 2010? I think previous president Meron has already expressed some doubt openly in the Security Council that maybe those deadlines are too short, so the goals may be too ambitious.

FP: This is an assessment which is difficult to make. It is my feeling that, if these situations remain as it is and if some factors as are as they can be assessed now, the completion strategy could be achieved by, say, the end of 2009 perhaps for trials, and then the appeals will follow, maybe in a short time. So, there will be not the great difference

between the decisions, or the indications, made with the Security Council and today. But that depends on many factors. And these factors are essentially that we don't have too many new contempt cases, for instance, arising out because this increases the work of the Tribunal; that the referrals to local jurisdictions are all accepted; that the joinder of cases that would reduce the number of trials is all accepted by the chambers, which is really not easy to predict for the cases that are under consideration now. And, I would say most importantly, that the remaining fugitives are surrendered, come to the Tribunal. Just to give some figures, the indictments cover 161 fugitives, if I am correct, and of these up to now about 130 have already appeared before the Tribunal, and another will appear, they are here and can appear. But there are seven, only seven, actually in numbers it's not much, of the indictees that are still at large. If the arrest of these fugitives is made in the next weeks or months, the completion strategy can be respected, but it's clear that the later these people are arrested the later the Tribunal may finish his job.

MK: And what will happen if those fugitives do not appear let's say in the next two years or even in the until the end of 2009? Will somehow Tribunal continue its legal personality.

FP: Well, that's a decision to be made by the Security Council, for this lies in the hands of the of the Security Council. What the Tribunal has always stressed is that the Tribunal cannot close its doors until the main, these fugitives that remain, are arrested. To close the Tribunal without having tried these high-ranking people, in a way would constitute a failure for the for the Tribunal. I would say more, the failure for the international community, because the Tribunal has been established by the Security

Council and would not show that impunity is really deterred. If high ranking people can remain at large, then, of course, others may be tempted to do, to proceed the same way, counting on impunity. Whether the Tribunal can close and be reopened for such cases, this is something that might be considered, but I must say, within the Tribunal we haven't considered that. We are still confident that these fugitives will come before the Tribunal.

MK: What are you planning to do to push those who are in the position to deliver those people?

FP: Well, as you know, the Tribunal has no own force to enforce any decision. We can only actually appeal to both the countries in the region and the international community as a whole, in particular the Security Council – and other bodies, maybe the European Union – to take action in order that these persons are transferred to the Tribunal.

MK: That's in your power. According to the Statute, you are the one who is supposed to report non-compliance to the Security Council.

FP: Absolutely, absolutely. And I will report in that sense. I will have to report to the Security Council on the 15th of December now, and I will appeal in that sense that the international community should secure that these people are surrendered to the Tribunal.

MK: But you have appealed, you or your predecessors, they have appealed for years and years, but without results. So, it's obvious that appeals itself are not sufficient. And how satisfied you are with the position of international community, especially with the conditionality policy of the European Union which, I think, has provoked some changes in the position of those countries?

FP: Well, it's not for the, I think, for the Tribunal or its president to assess the policy of other bodies, be it the European Union or other international organization that have a role in the region. It's not for us to say what they should do. But, our point of view and my point of view is that the bodies that have a role in the region should behave in a way that ensures that these people are surrendered. How they do it is for them to decide.

MK: We already opened the subject of the referral of the cases to the national jurisdictions. How confident you are that those jurisdictions will continue the work of the Tribunal? How confident you are that there will be justice for the victims after the Tribunal?

FP: Well, I'm rather optimistic in this sense. I think that both the governments in the region and this tribunal – not only through its judicial work, but through its programs of building a judiciary and helping the judiciary to develop in the region – has done a lot in that sense; in improving the capacity of the local judiciary; in dealing with war crimes and crimes against humanity and, in general, with international crimes. And in that sense I really hope that when this tribunal will close the domestic courts, the domestic authorities, will continue to take up cases that may not have been dealt with by the Tribunal, which is fairly possible, of course, and monitor the situation and bring those who they find being allegedly perpetrators to justice and try them in an appropriate way. Perhaps still some support by the international community to the local judiciary will be necessary, but I am confident that even when the Tribunal will be closed the support of the international community to local judiciary will not stop and there will be still some cooperation in order that the local domestic justice may function.

MK: But, the judiciary capacities are one precondition for the prosecution of war

crimes. The second one is, well, political will, moral will, or readiness to face the past. Do you think that there are those conditions now in the former Yugoslavia?

FP: Well, it's probably difficult to make a full assessment because certainly there are factors that come from the international community as such, but there are also internal domestic factors that concur to this. How far, it depends on the pressure of the cases that have been dealt with locally, depended on the pressure of the international community and how far from local developments, and it's difficult, probably, to quantify. I have the hope that the percentage will move more and more towards the local goodwill in that direction and a local will to make accounts with the past in order to face a better future. And that's really what I hope that all the countries of the region may come soon to have a really better future.

MK: Just these days we have seen, yesterday exactly, the beginning of trial to Saddam Hussein in Baghdad. What do you think, which lessons from the Tribunal, especially from the trial of Slobodan Milošević, can be useful to the court in Baghdad in the trial to Saddam Hussein, if any, of course?

FP: Well, the conditions of the trial against Saddam Hussein and the conditions in which works this tribunal are different, of course. I think this tribunal has shown that international criminal justice may work and be done correctly respecting the principle of fair trial and be seen to be done. I would hope that the court in Baghdad would, after the trial is carried out, finished, would come to the same conclusion. But there are difficulties in that. What I'm not sure of is not that an international court would be preferable in general – because nobody challenges the right of a country to try perpetrators in the country at any

level, even the head of state, for crimes committed in the country itself. So, that an Iraqi tribunal would try an Iraqis is perfectly normal under any... – But is the situation in Iraq such as to allow for a fair trial, in fact. That I 'm not sure of because the security situation in Iraq. We already had a case of a council assassinated. Is the protection of the judges, is the protection witnesses, is the protection of council sufficiently insured? These are questions to answer. I hope that, if the trial goes on, these questions could be answered in a positive way, but my position would still be wait and see, actually, can a fair trial be insured in these conditions.

MK: Especially In the last year or two, we have had some complaints or criticism on the length of the trial of Milošević, that it has become unmanageable, and so on. Are you surprised that suddenly this trial is somehow reevaluated in the light of the Saddam Hussein trial, that everybody now says it should be done the way it was done for former Yugoslavia and Rwanda and not the way they are doing that in Baghdad now?

FP: Well, as I said earlier, this tribunal has certainly shown to have been able to administer justice in the cases were brought here in a fair way and with the full respect of principal “due process”. This may have result in trials that were a bit longer than people would have expected. But one has to take into account the difficulties in acceding to materials, in having the witnesses at the international level. On the other hand, the conditions under which this tribunal has worked in an international environment were such that could allow the Tribunal to respect the principle of fair trial. And justice is a matter of fair trial, irrespective of the alleged crimes. Whatever the crimes are before the judge, the judge must – this is for me as an activist in human rights is a must – the trial must

be fair. If a court does not succeed in ensuring fair trial, we can close.

MK: And the final question. You took your position as president of the Tribunal on 17th November. It was a very important date, the 60th anniversary of the Nuremberg's trial. How do you see the parallels between the Nuremberg Tribunal and the trials and this tribunal? What lessons from Nuremberg did you take and where did you go much farther than the Nuremberg?

FP: I have the feeling that a comparison between the ICTY and the Nuremberg Tribunal is difficult to make. It would be not generous either to the one or the other. One could criticize Nuremberg for not having respected certain principle of fair trial, but, on the other hand, the context in which that court operated and got to finish a trial in one year, in less than one year – were conditions that cannot be reproduced now. First, that was a tribunal established by the Allies in an occupied country. So, it was a tribunal that was not backed necessarily by the entire international community, as it is this tribunal. Moreover, in getting the evidence that tribunal, rightly because it worked in an occupied country, had access to everything – did not depend on international cooperation. Our Tribunal depends on international cooperation. It's the first time in history that the tribunal works with that international cooperation. And last, I would say that tribunal was not bound to follow certain principles that were not principles well established at the time and that are well established now. Principles of due process and fair trial were not expressed in any document at the time of the Nuremberg Tribunal. Even the Universal Declaration of Human Rights was adopted in '48, not to mention all the other instruments of the United Nations on trials and conditions. So, for instance, at the time there was no appeal in Nuremberg.

That was acceptable perhaps in that situation. Today to have a criminal trial without appeal would be simply unacceptable for everybody. And the number of other guarantees that exist now did not exist at the time, so that tribunal could work really in different conditions. This is not to put any, pass any negative judgment on Nuremberg, but simply the context was different.

MK: Thank you very much.