

Project:

**ICTY ORAL History - Documented by SENSE**

An Interview with

Patricia Ann Wald

SENSE Transitional Justice Center

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Interviewee: Patricia Ann Wald (PW)

Interviewer: Mina Vidaković (MV)

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Judge Patricia Wald spent two decades in the U.S. Court of Appeals, but for the last two years of her career (1999-2001) moved to The Hague to be a member of the ICTY's Trial and Appeals Chambers. In an interview just before leaving the Tribunal, in November 2001, Judge Wald speaks about her experiences and impressions from the trials for crimes in Srebrenica, the Omarska camp, and the Lašva Valley.

MV: It is almost two years that you are here, and now on your way back home, how would you describe and compare your expectations and the result of your stay here after two years?

PW: Well, first I would say it's been a remarkable two years. I have probably personally learned more than any other two-year period in my career. When I came over I certainly expected to be a part of a great adventure, a historic process in which new concepts of law, the application of international law, were being developed in a systematic way. And I think I had a bit of an idealistic notion of international law and the role it would play in terms of affecting the norms for war crimes. What I found out in the two years and something I probably should have known as a past jurist in my own country, and that is a tremendous amount of effort at the ground level that requires to put together something like this international tribunal.

If you take the technology that's required in the courtroom, if you take the notion that you have to put together people who have been trained somewhat legally differently, in different systems. Most of all, I didn't understand the importance of linguistics - I am not that good linguist myself, I speak English and minimal French, a few other languages. I simply had no idea of how much effort it takes, having worked in the system where everybody was trained the same way, everybody spoke the same language, everybody understood the rules, but when you have to bring together people from all over the world and you have to conduct proceedings in which the people speak different languages in the courtroom and out, you have to try to come to agreements on what you think is right and then you have to put them in the language that people understand... I would say, it's probably five times harder to put together a judgment in this Tribunal than to put together an opinion, even a very complicated one, back in my own country.

So, I think what I have learned, and what the Tribunal will make a big contribution for whatever comes afterward, whether it's International Criminal Court or other Tribunals, is all of the nitty-gritty kinds of things that have to work in order to make the whole process work. And that I think is something that a lot of people who haven't actually been here don't understand. There's just a lot of effort on the part of everybody, from the Registrar's people to the young legal assistants who come here, to the judges themselves who have to try to work with each other even though they come from very different backgrounds, to the people in the courtroom to get the witnesses there, to translate them. The translators have a terribly difficult job in my view. And it just takes five times more effort to get to the final result in an international court than it does in a home court. I guess that's the biggest lesson I've learned.

MV: You mentioned different systems. Maybe the most interesting question is a combination of different legal systems...

PW: Common law and continental...

MV: Yes. How do you find the situation?

PW: It's a learning experience. My entire background was in the common law system. I had just a slight familiarity from having visited a lot of Eastern European countries, but never working within their systems. I found some interesting things in the continental system. It's not that we in the common law system have got some kind of a monopoly on everything that's the right way to do things. But I think that the difficult thing, and I think that the Tribunal is still wrestling with it itself, is how you take the best parts from one system and combine them with the best parts of the other system so that they make a good fit and not what I would call patchwork quilt, you know, you take the piece of this and piece of that and suddenly, you know...

And sometimes the counsels, I've heard them complain that we still haven't arrived at the perfect result, you know, they are not sure whether we are gonna rule on the basis of the continental law or on the basis of the common law...And I think that the fact that our rules have been amended some 20 times, that we are constantly working toward bringing a fusion of the good parts of the system, but it's very difficult because a legal system is built usually over decades, hundreds of years, and one piece may be like this, but it's because another piece is like this, and they balance. If you take that piece there and put it into another system, and you don't take that piece there, it won't be quite right. So, we are constantly trying to figure out the right way. And I think it's hard on counsel, it's very

difficult to be a counsel in one of these courts where you are trying to work with different parts of different systems. And especially a defense counsel who may only be here for one case or a couple of cases, and not have as much of repetition as the prosecutors who appear in lots of cases here. It's very difficult for them to come out of their own system and, say, be told: "Cross-examination is very important in our system, because we have an adversary system here", and they may not have cross-examined anybody before, and they certainly haven't been brought up with cross-examination the way that our young lawyers are there. I think it's a pretty tough job for some of them. Some of them are pretty good at that though, because I have seen people start out at the beginning of a year's trial and they are not at all comfortable with cross-examination. By the end of the year, they're very good. So, they do catch on. And, of course, we are running training programs now, so are other organizations, to try to do that. But I think it's one of the major contributions that we will make toward whatever emerges as an international criminal court - we will have tried various combinations of the civil code in the common law system. Not all of them work, so maybe they can learn from some of our mistakes, as well as some of our good combinations.

MV: You mentioned the International Criminal Court. Whatever happens with it, there is a kind of improvement in establishing it - more and more countries are ratifying it...

PW: Right... They expect I believe, I hear that they expect to have it up and running within a couple of years now.

MV: But, how would you assess the role of the ICTY, the experience of the ICTY?

PW: I think it will weigh heavily, as well as the Rwanda court, the ICTR. In two ways it will be important. One, there will be some jurisprudence, it won't be binding of course on

any new court, but there will have been some flashing out of many of these concepts and things that are in treaties and conventions but have never been applied before. So that the new criminal court, when it looks to see how it should decide a case, will be in a much better position than this court or the Rwandan court was in the beginning when all they had to look at was the Nuremberg or the Tokyo precedent or the individual cases in individual countries, but a very small body of international humanitarian law in terms of case decisions, as opposed to treatises. But I think that there will be much more of a full-body of that law that they can then draw upon. You know, they may change some, they may reject some, they may accept some. But, they're going to have more jurisprudence.

Let me give you one example. Take the Genocide Convention - it was not drafted until 1948. So, the Nuremberg cases had no chance to interpret the Genocide Convention. It may have been referred to in a few national prosecutions over the years. But, if you think of all of the law and the Genocide Convention, which was basically what was incorporated into two statutes of the ICTY and the ICTR, if you think of all the Rwandan cases and now several that have and are going to be coming out of this Tribunal, you can have a lot of those clauses in the Genocide Convention with judicial interpretations on them for a new court to draw upon. So, I think that will be a major contribution. Now that we are coming to a sort of heavy schedule here, as opposed to the earlier years, you're gonna have five or six trials going on and you gonna have, I don't know, 11 or 12 appeals, then you get a lot of law made from which they can draw.

MV: There is some criticism that the ICTY is controlled by the US. As a US judge...

PW: I have not found that to be true. In terms of my role, I would say there were a

lot of disagreements, a lot of debates, and I certainly haven't won them all, and I think any that I have won was by the pure power of persuasion and logic.

I've heard, I won't say criticism, I've heard the comment made that the US contributed in the beginning. I think they contributed a lot of money and I think a lot of personnel, a lot of which have left but some of which are still in the Prosecutor's office. But, I can honestly say in my two years here that I have never tried to, and wouldn't dream of trying to wield... But, I have no sense we have any extra influence that we can wield when it comes down to deciding how cases are going to be. I think my colleagues would rise up, and I would never do it, if I even suggested that there was any reason why the voice of the American judge should be any different from anybody else's. I can honestly say that situation has never, never arisen. Now, what about in terms of where the money comes from, I mean, I don't deal with that.

MV: But, you don't feel that...

PW: No, I don't feel that I have any more influence here than I did back in my home court where everybody else was an American too.

MV: You were a member of the Federal Appeal Court...

PW: Yes, I was the Chief Judge for five years and I was on the Federal Appeals Court for 20 years.

MV: You decided to leave this place.

PW: Well, the system we have in the Federal Court system is that after you worked for fifteen years or so, and you have reached a certain age, both of which I have passed, you

can retire if you want for the full pension, or you can do less work, you can take what we call senior status, where you do fewer cases. I thought this was a wonderful opportunity to do something completely different, to make a contribution in a completely different field and I thought that was much more attractive to me than just continuing to do exactly the same thing I have been doing for the last 20 years.

MV: You already had some experience with the region, the Balkans...

PW: Yeah...

MV: Obviously you were interested...

PW: Right. I had been working for the past ten years with the American Bar Association CEELI, Central Eastern Europe Law Initiative, so I have visited, grown acquainted with the judges and the lawyers in, you know, a great many of the Eastern... I had been to Bosnia, I'd been to Belgrade, I'd been to Sarajevo, I'd been to Croatia... So, I had some familiarity with the area, somewhat with the legal systems here.

MV: During these two years there were probably some hard moments...

PW: Frustrating, yes...

MV: During the testimonies probably...

PW: Well, the testimonies were very moving, actually, my frustrations, insofar as they existed, came more from just trying to make the system work, than they did from any of the content, which I found very moving. But at the same time very fascinating and riveting in the courtroom. What is frustrating is when the computer is not working and you



have to sign 15 documents to get, you know, a key, or a... You know, the kind of bureaucracy thing, some of which we have at home, but which they have a lot of around here. When you can't just get something when you need it. Those are the kinds of frustrations.

I also find it somewhat different to work in a system where the legal assistants are in a separate bureaucracy, which is run out of the Registry. In our system, every judge gets their own three legal assistants. The judge picks them out, controls them, gives them assignments, evaluates them. You say: Alright, we're gonna do this judgment, you do this, you do this, you do this, bring it back to me. I'll coordinate them and send it out to my other colleagues. But here, you know, the Registry has a legal system with P5s, and P4s and P3s, and you as a judge only get one legal assistant, and the rest of the time you try to figure out who's doing what and how it's coming together. I found that more cumbersome in terms of trying to get the product done. But, it's the system they have been using, I guess, for a long time. Probably they like it and they got used to it, even though I am not. And it is a system that will apparently be carried over to the ICC. I guess I would give judges more control over the legal assistance if I were redesigning the system.

MV: Yes, but from the courtroom... Is there a moment that you will never forget?

PW: Well, I think it's not so much a single moment. Many, many of the hundreds of witnesses in both the Krstić and the Kvočka trial, where the judgment will be released today, you remember them, you can't forget them. On the other hand, you also can't forget sometimes the defendant whom you see day after day after day. I mean the witnesses tend to come, give their story and go. But the defendants are sitting there day after day, and after a while, you feel almost like they... It's not necessarily that you feel one sympathetic or not

sympathetic, but they are like somebody you know, that you see everyday.

And you begin to see the dilemmas, both from the witnesses' sides, who usually suffered tremendous things and have strong feelings about the defendants, and from the defendants' side, who, sometimes, in their own mind, perceive the situation very differently, and that clash of people who had been in terrible situations together confronting each other ten years later in the courtroom is charged. I mean, sometimes you feel like it's electricity in the courtroom, everybody is charged, you feel that if somebody says one more word it may set a spark off and everything will go up. Fortunately, it doesn't happen, people usually stay in control. These are unforgettable times. I mean, I've set thousands and thousands of cases back at home, and a fair amount of criminal cases, but there was something I think just about the number of witnesses, the number of victims, the periods of time that you sort of feel as though you're judging history. You're not judging a case, you are judging a period of history. So, that leaves a strong impression on you.

MV: And for the end: Do you think that the work of the ICTY and the similar courts like Rwanda could really help in preventing these things from happening?

PW: That is a very difficult question. Certainly, everybody hoped for it, but I know of nobody that I've read who's written on the subject who could confidently say "Yes, we will have a deterrent effect." For the following reason, I think - when you hear the witnesses on both sides describe their experiences, the atmosphere in which these horrible things sometimes arose, you realize this extreme volatility and violent emotions that were involved. So you sometimes tend to think: Somebody who's going through these experiences, are they really gonna say "Well, I don't wanna do that, because I might be

brought before the ICTY ten years from now?" So, I think everybody is a little cautious about the deterring effect.

On the other hand, it's purely my own impression that many of the defendants, especially the middle range, even probably some of the highest level ones, never dreamed that what they were doing in that opportunistic moment was going to lend them in the detention cell in The Hague or a prison system far away in some other country for ten years. And maybe, maybe if they're called upon or if other people in similar situations are called upon or find themselves involved in future years, they might just step away from it and say "No. I'm not gonna do that."

Because many of the defendants who come before us lived pretty peaceful lives with their neighbors, they intermarried, their children went to school together, and then suddenly this strange situation comes along, fomented by propaganda and by nationalistic fervor, and they suddenly act like you scratched the surface and underneath of ordinary, peaceful human being is this vicious beast who enjoys watching other people suffer. But, you know, some of them were not like that, some of them just let it happen. I mean they didn't themselves start it, but they didn't stop it. I hope that's one of the lessons of this Tribunal. I think that Dante said in *The Inferno* that there is a special place in Hell saved for those who stand by and let terrible things happen. I think that was what happened. A lot of times they are people who wouldn't maybe have done terrible things themselves, but they let them happen.

MV: Thank you very much.