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REFLECTIONS FROM THE “PRESERVING PERSPECTIVE PROJECT” INTERVIEW WITH THE HON. GABRIELLE KIRK McDONALD

by Jessica Sblendorio

I. INTRODUCTION

In March 2021, the ITA’s Academic Council organized an interview with Judge Gabrielle Kirk McDonald as part of the Preserving Perspectives Project, an oral history speaker series to detail the modern evolution of international arbitration through established arbitrators and jurists. The interview was conducted by Professor Victoria Shannon Sahani of Arizona State University Sandra Day O’Connor College who also serves as the Vice-Chair of the Academic Council of the Institute for Transnational Arbitration. Judge McDonald characterized herself first as “a civil rights lawyer that became an international judge.” She began her judicial career in 1979 with the US District Court for the Southern District of Texas. Throughout her career, Judge McDonald has overcome cultural and racial barriers and successfully left her mark on two international tribunals, serving as judge and arbitrator respectively for the International Criminal Tribunal for the Former Yugoslavia (ICTY) and later the Iran-United States Claims Tribunal (IUSCT). What is evident from the reflections of Judge McDonald on her career and experience is that even in impossible or difficult circumstances, it is possible to build a better and more inclusionary future for lawyers in international law.

II. EARLY BEGINNINGS AS A CIVIL RIGHTS LAWYER AND FEDERAL JUDGE

Professor Sahani first began the discussion by asking what inspired Judge McDonald to become a lawyer and what her experience was at Howard University in the early 1960s during the civil rights movement. Judge McDonald described her experience at Howard University as “transformative” and “liberating” as she was often the only African American student in her classes in other schools. Following her time at Howard University, Judge McDonald joined the NAACP Legal Defense Fund in 1966 where she learned to apply the law and was at the forefront of arguing important cases focused on civil rights and discrimination. With a strong track record of



success for her clients, Judge McDonald was nominated by President Carter to serve on the US District Court for the Southern District of Texas, becoming the first African-American female nominated to the federal bench in Texas and only the third African-American woman to be nominated as a judge in the US.

During her tenure, Judge McDonald heard a number of high-profile cases and reflected on one particular case that involved a dispute between Vietnamese fishermen and members of the Ku Klux Klan (KKK).¹ During this case, Lewis Beam, the Grand Dragon of the Texas Chapter of the KKK, called upon Judge McDonald to recuse herself and testified that Judge McDonald was prejudiced against the KKK because of her past experience representing African-Americans and stated that all African-Americans are prejudiced against the KKK. Judge McDonald ultimately denied the motion and affirmatively stated in response to the motion that it was clearly based on race and noted that she would be fair.² The impact of this particular case was significant and ultimately resulted in the closure of the paramilitary camp of the KKK because the existence of such an organization as a private militia was prohibited by state statute.

What is particularly noteworthy about Judge McDonald’s recollection of this case is that it was imperative to ensure that a fair trial was given despite the accusations that Judge McDonald was biased against the KKK as the defendants. Despite the challenging circumstances and racial undertones that were at the forefront of this case, Judge McDonald did not shy away from her duty to provide justice and fairness in what were tenuous circumstances and with prejudicial litigants appearing before her. As noted by Professor Sahani, Judge McDonald’s ability to dispense judgement under difficult circumstances was clearly a “testament to integrity” and her “high caliber as a jurist.”

¹ Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan, 543 F. Supp. 198 (S.D. Tex. 1982).

² Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan, 518 F. Supp. 1017, 1021 (S.D. Tex. 1981) (“A litigant in a federal court is not entitled to a judge of his choice, he is only entitled to a fair and impartial judge. This defendant as well as all defendants who appear before this Court is entitled to nothing more and will get nothing less.”).



III. BUILDING THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND EXPERIENCE AT THE IRAN-US CLAIMS TRIBUNAL

Shortly after leaving the bench, Judge McDonald was tapped in 1993 to be one of 11 judges from different legal systems and traditions on a brand-new international tribunal—the ICTY—in which the group was given the rare task of designing and implementing a procedural and evidentiary system for a new international tribunal. Judge McDonald remarked on her experience of identifying the space for the court and the drafting process for the rules and evidentiary procedures, including the compromises that had to be made to formulate the rules for the ICTY. Moreover, after being elected president of the ICTY in 1997, Judge McDonald was instrumental in expanding the infrastructure of the court. She recognized that the number of individuals held in detention and a single courtroom were insufficient to accommodate for the ICTY’s growing day-to-day activities. As part of this initiative, Judge McDonald successfully approached the UN Security Council and was able to secure additional funding for the hiring of three more judges and the ability to add additional trial chambers.

Following her departure from the ICTY, Judge McDonald was nominated to serve as one of three American arbitrators on the IUSCT in 2001. In recalling her experience at the IUSCT, Judge McDonald discussed the cultural barriers and gender bias that she faced as both a woman and African-American arbitrator on the court, including the fact that her Iranian counterparts would not shake her hand and how she was referred to as the “lady judge” in some of the hearings. One particular instance that Judge McDonald recalled as being an issue was working with a colleague who had never worked with an African-American woman before and disrespected her in such an egregious manner that the tribunal had to become involved. This particular individual took the position that he was not responsible nor involved and Judge McDonald recalled the “sense of privilege that he adhered to his denial.” Furthermore, Judge McDonald stated that prior to her departure from the IUSCT a third-country arbitrator congratulated her on her “high morality” and gifted her a book with an inscription noting her intelligence and morality—she noted that this was a way of saying that what had happened was not right and it did sadden her that those



other countries saw the same gender and racial bias she saw.

In both of her roles as judge and arbitrator on two different international tribunals, Judge McDonald had to navigate cultural, gender and racial barriers and bias from among colleagues and those from other legal systems and countries, as well as work on building new international institutions and relationships. Although the legal marketplace, at least in the US, has become more diverse over time, there is still a strong inequality based on gender and racial bias within the industry. Judge McDonald’s experiences, particularly as being the first woman and African-American in all of her prominent roles as an international jurist, demonstrate the types of obstacles that arise for those that face not only biases in the legal marketplace but across different legal cultures and traditions. Such instances of bias and prejudice in the legal industry can overshadow the important work that institutions or individuals do and detract from the clear intellect and legal prowess of those individuals, like Judge McDonald. However, Judge McDonald also details the importance of being vocal and addressing such issues head-on and to persevere in challenging circumstances and gives examples of how individuals can chip away at those barriers through her experiences.

IV. THE CREATION OF BLACKS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (BASIL) AND DIVERSITY AND INCLUSION IN THE INTERNATIONAL ARBITRATION COMMUNITY

After a long and distinguished career, Judge McDonald was nominated to serve as the first African-American honorary president of the American Society of International Law (ASIL) in 2014. In this role, Judge McDonald was instrumental in advocating for increasing the number of black lawyers in the field of international law and ultimately helped form the Blacks of the American Society of International Law (“BASIL”). The purpose of BASIL was not only intended to increase the number and influence of blacks in ASIL as an organization but also in the field of international law generally in the US. Although Judge McDonald’s experience in arbitration was limited to the IUSCT, she stated that her experience showed how change could occur once the leadership (in this instance ASIL) decided to focus on increasing the number of black Americans in international law. With respect to BASIL, the focus was to encourage law students and young professionals to explore careers in international



law, a field that has historically been Caucasian. BASIL did the same for international arbitration through engagement with Young ICCA.

In her remarks, Judge McDonald stated that more efforts were needed in the international arbitration community in order to increase diversity and cited an important statistic from 2020 that drove home this point—of the 3,430 international arbitration practitioners at the top 500 US law firms, only 57 were African-American. Even within the last ten years, the number of organizations and individuals addressing diversity and inclusion in the international arbitration space has changed dramatically. Organizations, such as Racial Equality for Arbitration Lawyers (“REAL”) and the Equal Representation in Arbitration (“ERA”) Pledge have gained traction and put diversity and inclusion at the forefront in the international arbitration community. In order to effect change, it is important that the next generation of lawyers learn from the past and continue to push through gender and racial barriers to make the field of international law and arbitration more diverse and inclusionary. As made clear from the statistics cited by Judge McDonald, such change takes time but the efforts being made in the space must continue.

Moreover, in addition to the advocacy and creation of groups promoting more diversity and inclusion within the industry, it is important that such efforts are incorporated into the process of arbitrator selection—both during the party-appointment process and at the stage of choosing a chair among the party-appointed arbitrators. An example of committing the decision-makers for arbitrator selection to considering diversity and inclusion is the ERA Pledge, which has amassed 4,929 signatories since 2015 and has been signed by arbitrators, States, arbitral institutions, individuals, and firms. Such ongoing efforts and advocacy for diversity and inclusion are critical in presenting an image of diversity in the international arbitration community and also to attract the next generation of talented practitioners to the field of international law and arbitration.

V. CONCLUSION

What is evident from Judge McDonald’s long and distinguished career as an international jurist is that her perseverance in the face of adversity and ability to



break down cultural barriers contributed to her success and lasting impact as a jurist. Professor Sahani captured this sentiment best by stating that Judge McDonald “changed hearts and minds of people who had never worked with a black woman before” and could grow to appreciate her intellect and counsel. The experiences of Judge McDonald make evident that strong advocates are needed to set examples for more diversity and inclusion in international law and arbitration, which includes the creation of strong communities like BASIL, REAL and the ERA Pledge to push forward the agenda to address such barriers head-on with the next generations of leaders.

It is never easy being the first or breaking down barriers, but the remarks by Madeline Albright, cited by Professor Sahani to describe Judge McDonald at an ABA Central and Eastern European Law Initiative dinner in 1999, provide a clear message to drive forward change and continue addressing barriers within the field of international law and arbitration:

Her example reminds us that we can understand that there will be limits on what we can accomplish without ourselves limiting unduly what we attempt and that in doing so that we may achieve more than was ever believed possible. We may seek justice; we may serve the cause of peace and we may do our part in creating a future that is better than the past.



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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

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