International Law at the Crossroads: The Role of Judge Patricia Wald

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I had the honour of working for Judge Patricia Wald as her law clerk at the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1999 and 2000, and it is my privilege to write in tribute of her for this volume.

It is hard to describe Judge Wald without resorting to clichéd superlatives. But simply put, she is everything one could ever hope for in a judge. Fair, wise, brilliant, hard-working, compassionate, funny. Awe-inspiring. These attributes made her a star on the D.C. Circuit, but it was the great good luck of the international community that she was willing to give up her comfortable, life-tenured perch in Washington to jet off to The Hague.

The ICTY really needed a judge like Judge Wald in 1999. I mean no disrespect to the other judges on that court, most of whom have been wonderfully talented, and dedicated to justice. What I mean is simply that the Court – and international criminal law – was at that moment in a particularly important and particularly precarious state of development. Judge Wald’s presence on the ICTY at this critical juncture did much to add to the Court’s credibility and effectiveness.

I want to start by describing where things stood in 1999, when Judge Wald joined the ICTY. As readers of this journal know, modern international criminal law has operated in fits and starts. In the 1940s, landmark trials before the International Military Tribunals at Nuremberg and Tokyo held senior officials responsible for atrocities committed during World War II. But these proceedings generated controversy even at the time. Some argued that the Nazi war criminals did not deserve trials and should simply be shot, while others contended that the trials were an example of victors’ justice. Nevertheless, the trials succeeded at, in the words of Nuremberg Prosecutor Justice Robert Jackson, ‘establishing incredible events by credible evidence’.

There was some optimism in the immediate post-World War II era that a permanent international criminal court might be set up, perhaps in connection with the 1948 Genocide Convention, which noted that persons charged with genocide could be tried by states where the crimes were committed “or by such international penal tribunal as may have jurisdiction.” But that idea fell victim to Cold War deadlock. It was not until the 1990s, after the fall of the Berlin Wall and the breakup of the Soviet Union, that international criminal tribunals again became a realistic possibility. The terrible violence accompanying the breakup of the former Yugoslavia led the U.N. Security Council to create the first ad hoc criminal tribunal, the ICTY, in 1993. As Aryeh Neier, the head of the Open Society Institute has said, the Security Council did “the right deed for the wrong reason.” The international community was unwilling to take decisive military action to stop the ethnic cleansing in the Balkans, but was horrified by reports of mass slaughter and concentration camps where rape was being used as a tool of war. The creation of the Tribunal was a way for the Security Council to satisfy public criticism by doing something, but it was unclear whether the Tribunal would be anything more than a symbolic gesture.

Many predicted that the ICTY would be an utter failure. One fatalistic newspaper op-ed in late 1993 noted “[T]here are no defendants in the dock. Nor can the court try anyone in absentia, so not a single guilty verdict will be pronounced. . . . Given its limitations, why bother?” A Newsweek article in January 1995 asked “[w]hat are the odds that Milosevic or anyone else in the former Yugoslavia will be hauled before a court?” “Long at best,” the article answered, suggesting that “[w]hat the United Nations has created is the shell of an investigative force – without a staff, budget or any clear authority to do more than shuffle papers.” “It’s a question of political will”, opined one anonymous source, “I think they’re hoping that the crisis will go away.”

The Tribunal got off to a slow start. It was underfunded and understaffed. The Tribunal was given a boost by the arrival of its first Prosecutor – Richard Goldstone. In the fall of 1994, the court issued its first public indictment, and in April 1995, Duško Tadić, the first defendant to be tried, made his initial appearance in the

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4) See Holger Jensen, Rocky Mountain News ([Publisher?] 18 November 1993).
6) See ibid.