

TRIBUTE TO HON. PATRICIA M. WALD

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It is a true honor for me today to pay tribute to a great judge, lawyer, and friend, Judge Patricia Wald. I must confess to feeling like a bit of an interloper on the *New York University Annual Survey of American Law* as although I suppose I am, *stricto sensu*, an American lawyer, I have spent the bulk of my career working outside the United States, working with international law or some kind of mixture of different legal systems. Thus, while I understand that Judge Wald is a great American lawyer and jurist, I know her as an international judge and lawyer *par excellence* (of course, an international lawyer must throw in the obligatory French or Latin phrase or two).

I vividly remember the first time I met Pat and Bob Wald as they arrived on a dull, cloudy Dutch day in the early hours of the morning in 1999. Pat was coming to Holland to fill out the judicial term of the retiring Gabrielle Kirk McDonald, the only American judge on the International Criminal Tribunal for the former Yugoslavia [ICTY]. McDonald was president of the tribunal at the time, and I was serving as her *chef de cabinet*. While Bob and Pat probably figured Gabby had asked me to meet them at some ungodly early hour, it was actually the other way around, for I knew about Pat Wald. I had read some of her opinions and knew that she was simply one of the top judges in the United States. I had told other judges and staff, who were a little nervous about a new American judge, particularly as McDonald was well regarded and respected, not to worry because this new judge was going to be an intellectual powerhouse and a great judicial mind. If I had any worries in this regard, they were quickly dissipated in the forty-five minute ride from the airport to The Hague, for Pat already knew the ICTY jurisprudence, knew the Geneva Conventions, and had keen insights into the *sui generis* procedure that the tribunal followed. I quickly realized that I actually had undersold her to my colleagues.

From there, Pat quickly became the leading judge on the then fourteen-member court. She was dealt a bad hand in terms of the

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panel that she was assigned to—the only panel that worked more in French than English and with colleagues who lacked both her experience and intellect. Nonetheless, she quickly made her mark both in terms of her reputation and in terms of the jurisprudence that flowed from her pen. While Pat spent only two years at the ICTY, she is still spoken about as the best judge in the tribunal's history. This is from grizzled prosecutors like Mark Harmon who has tried many of the most difficult cases at the ICTY. From time to time, when I was Deputy Prosecutor, Mark would stop me after a frustrating day in the trenches and say, "David, why can't we have judges like Judge Wald?" I heard the same from defense counsel and court staff.

However, it was not simply her reputation for the way she handled herself in the courtroom for which she was so admired. She wrote some of the seminal judgments at the ICTY, which in many ways established important landmarks not just in the ICTY, but also for other international tribunals generally, and the International Criminal Court in particular. There were a number of such decisions, but I will mention two in particular that are illustrative of her great contributions. In the *Krstic*¹ case, Pat sat on a trial panel that rendered the first genocide verdict in the history of the ICTY. The case involved the massacre at Srebrenica where 8,000 men and boys were systematically killed over a few days in July 1995. While another judge read out the decision, those of us in the know were fully aware that the judgment was primarily of Judge Wald's making. It was a groundbreaking and powerful decision. Although it was modified on appeal, it is her judgment that resonated with legal professionals and victims, and the factual findings were subsequently endorsed by the International Court of Justice.

A second decision worthy of special note was the *Kupreskic*² case. This case was perhaps not as significant factually as the *Krstic* case, but it was of great importance to the credibility of the ICTY. In that case, the Trial Chamber had convicted individuals of horrendous crimes but had, in essence, relied on the testimony of one eyewitness account. It was a difficult decision as the alleged crimes were appalling, but, as Judge Wald who was the presiding judge on appeal put it in the Appeals Chamber's summary of its decision:

1. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001), *aff'd in part, set aside in part*, Case No. IT-98-33-A, Judgment (Apr. 19, 2004).

2. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶¶ 775–84, 801–04 (Jan. 1, 2000), *aff'd in part, rev'd in part*, Case No. IT-95-16-A, Judgment, ¶¶ 218–23 (Oct. 23, 2001).

The Appeals Chamber was guided by two principles. First, “the function of this tribunal is to decide the guilt or innocence of the individual accused according to standards of procedure and evidence that commend themselves to all civilized nations.” Above all, “it has striven to follow the principle laid down by the First Chief Prosecutor at Nuremberg that we must ‘establish incredible events by credible evidence.’”³

Thus, Judge Wald found that such evidence was not enough to convict certain defendants. It was a tough decision because of the awful facts; but it was no doubt also awkward in terms of collegiality as, with only fourteen colleagues, she had overturned the decision of respected colleagues who did not take it well. Nonetheless—and I say this as a former prosecutor—it was the right decision, right in the law, and it sent a clear message that the ICTY was a court that would apply the highest international standards.

I mention these two cases, although there were many more, as illustrative of the great and lasting impact that Pat Wald has had on international justice. These early ICTY decisions were formative in the field of international criminal law, establishing norms that will guide the field for many years to come.

I am pleased to say that Pat has continued to keep a hand in international law. She has flown off to Arusha, Tanzania to train the ICTY and the International Criminal Tribunal for Rwanda [ICTR] appeals counsel; and when our appellate lawyers came back and debriefed me, they said that the best and toughest questions always came from Judge Wald. Moreover, Pat continues to help in any way that she can to promote the law and international justice. She has done so at my request a number of times and continues to do great work for the Open Society Justice Initiative, which she chaired for a number of years, among other groups.

It is really this generosity of spirit, even more than her great intellect and considerable legal skills that I find appealing. While her former clerks will all talk about how hard Pat works—I think the term “slave driver” may have been mentioned once or twice—they also speak of how much Pat has supported them and helped them, and I can attest to this as I have both seen it and experienced it.

It is her spirit, her modesty, and her commitment that I truly admire. In the recent presidential campaign, I know she personally

3. Press Release, Int’l Criminal Tribunal for the former Yugo., Appeals Judgment Rendered in the “Kupreskic & others” Case, P.I.S./629e (Oct. 23, 2001) (emphasis in original), *available at* <http://www.icty.org/sid/7944>.

went and knocked on many doors for Barack Obama, including eight days in freezing Iowa and many more days in other similarly inviting places. She did it without fanfare, and I only know the story because I got notes from a former ICTY staffer who had run into Judge Wald in places like Delaware.

In closing, I have seen Pat's skills up close recently. We have served on a Task Force of the American Society of International Law, looking at the question of what the relationship should be between the ICC and the United States. Somehow, Pat and I found ourselves outnumbered, but as I stewed, Pat skillfully was able to bring about a conclusion that carried the day—or should I say saved the day?—by achieving a consensus that seemed impossible when one looked at the ideological lineup. As part of that process, there was a question that emerged about double jeopardy and the ICC. Pat gave some ideas and referred to a case at the ICTY that set out the relevant principles, and I worked out the details with our staff person. However, when I looked back at the case, there was a dissent that summarized the principles perfectly. It was vintage Pat Wald: brief, rigorous, and to the point. More importantly, from a personal point of view, it was also quintessentially Pat, drawing no attention to herself and letting you figure it out for yourself.

In a world full of self-aggrandizement, self-promotion, and pomposity, it has been an inspiration to know someone of the caliber, both intellectually and personally, of Pat Wald. Many congratulations, Pat, on the receipt of this well-deserved honor.