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## Judge McDonald on Diversity in International Law: “It Saddens and Pains Me that Not a Lot Has Changed.”

Marwa Farag (Curtis, Mallet-Prevost, Colt & Mosle LLP) · Tuesday, June 1st, 2021 · Institute for Transnational Arbitration (ITA)

The Institute for Transnational Arbitration (ITA) hosted an oral history session with [The Hon. Gabrielle Kirk McDonald](#), interviewed by [Prof. Victoria Shannon Sahani](#). The session, held on March 22, 2021, was part of the ITA Academic Council’s ongoing [Preserving Perspectives](#) project which aims to record the evolution of modern international arbitration in the words of those who have led it. Judge McDonald gave a chronological account of her career, provided anecdotes from her service at the International Criminal Tribunal for the Former Yugoslavia and the Iran-US Claims Tribunal, and ended with a call for stronger efforts to support Black Americans in international law and international arbitration.

Judge McDonald, who described herself as a civil rights lawyer-turned-international judge, was born in 1942. As a child, her family was turned away from apartments located on Netherlands Avenue in New York because of their race, one of the many experiences that led her to become a civil rights lawyer.

She attended law school at Howard University, which she described as “the center for the development of the civil rights campaign to end segregation in the public schools.” Thurgood Marshall was a few years her senior. The experience was “transformative” and “liberating” for a student who had spent most of her studies as the only African-American in class.

Noted civil rights lawyer Charles Hamilton Houston was her mentor. He taught his students that any lawyer who is not a social engineer is a parasite on society. “That tells you what we trained to do at Howard, and it turned out to be the case,” said McDonald. She graduated as valedictorian at a time when there were 142 African American women lawyers in entire United States, taking up a job at the NAACP Legal Defense Fund, the foremost civil rights legal organization in the country.

By the 1970s, she had become a successful employment discrimination attorney. In 1979, McDonald was nominated by President Carter to the district court of the Southern District of Texas, becoming the first African-American female federal judge in Texas and the third in the United States. In 1981, she was asked to recuse herself in a dispute between American and Vietnamese fishermen that involved the Ku Klux Klan. She refused.

“By the time I became a judge, I’d argued many cases in the south before district court judges. We were not well received. You could look at the judge and tell that he would rather you not be there. I

was determined to be different. I looked upon the district court as the people's court," she said.

In 1993, after she had resigned from the bench and was intending to embark on a teaching career, she received the call that began her international career: an offer of a judgeship on the International Criminal Tribunal for the Former Yugoslavia (ICTY). Only a few months had passed since the United Nations Security Council had voted to establish a war crimes tribunal to prosecute persons responsible for serious violations of international humanitarian law in the former Yugoslavia. McDonald had the rare opportunity to design a court from scratch.

Under the leadership of Judge Antonio Cassese – “a difficult taskmaster,” said McDonald – the eleven judges of the new tribunal began to draft the rules of procedure. They debated over issues such as trials in absentia. The civil law judges were in favor, McDonald and others were opposed. After a few days of circling the issue, the judges reached the compromise that no trials would be conducted in absentia, but indictments would be publicized to the global community. But there were more quotidian start-up concerns too: the ICTY had no premises. Eventually, the United Nations located an insurance building, which McDonald and her fellow judges toured to assess suitability. In the absence of a court room, they continued to draft the rules in the old insurance offices. Eventually, the tribunal secured funding for one, and then an additional two, court rooms. In the meantime, in 1997, McDonald was elected president of the ICTY. She resigned due to her ailing health two years later.

In 2001, McDonald was appointed as one of three American arbitrators on the Iran-US Claims Tribunal. She was, once again, the first woman in the room. Her Iranian colleagues called her “Lady Judge,” but she experienced even more discrimination from a third country arbitrator and an American colleague. The third country arbitrator passed her a racist ephemeronduring a hearing. An American colleague disrespected her in “such an egregious way that the full tribunal took up the issue.” Another arbitrator praised her for the “high morality” she showed in response, but McDonald was “saddened that other countries saw what I saw.”

McDonald became the first black honorary president of the American Society of International Law in 2014. One of her achievements was creating Blacks of the American Society of International Law (BASIL), a group which seeks “to increase the number and influence of Blacks in international law in the United States.” Her experience as the only African-American in many international legal settings was a problem. “International law and international arbitration needs to reflect our country,” she said. “US international arbitrators present an image to the world, and the question is, what kind of image are you going to present?”

Yet Black law students **correctly** perceive international arbitration to be a homogenous profession. McDonald cited research by Katherine Simpson showing that out of the 3430 arbitration practitioners at US law firms, only 57 are Black Americans. The **talent is available**, she said, but it is not being called upon.

While the representation of women in international arbitration has improved during her career, the experience of Black women has not. “When I say women, unfortunately I mean white women,” she said. “Although women as a group are doing better, though still not where they should be, race trumps gender, because Black women are still in the lowest of all categories.”

“It saddens and pains me that not a lot has changed,” she said. “I’ve been doing this for 55 years. It wasn’t until I was 23 that the Civil Rights Act was passed. Until then, I was denied, because of my

race, the full rights of citizenship. It doesn't go back to 1863, this kind of attitude, it goes back to 1965. I want to see some change. I'm in the twilight of my life, and I want to see a better world for my grandson."

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