



**British Institute of  
International and  
Comparative Law**

## Report on the Seminar

### 'Current trends in Contemporary International Dispute Resolution: More Practical Reality and Less Abstract Principle?'

Temple Garden Chamber Series in International Adjudication



On 28 June 2013, the British Institute of International and Comparative Law hosted the event, 'Current trends in Contemporary International Dispute Resolution: More Practical Reality and Less Abstract Principle?'. The panel included Sir Franklin Berman QC (Essex Court Chambers, University of Oxford) as chair, Hugo H. Siblesz (Secretary General, Permanent Court of Arbitration) as keynote speaker, and Dr Philippa Webb (King's College London) as the discussant.

After expressing an appreciation of Temple Gardens for their sponsorship of this event, the second in the series on the subject of international adjudication, Sir Franklin Berman proceeded to emphasise the importance and contemporary practicality of this subject. In laying the foundations for the discussion he reflected upon personal experience at the beginning of his career, emphasising that it was regarded as an article of faith and policy to advance the judicial settlement of international disputes in whatever way possible. This meant endless battles in the phrasing of resolutions of international bodies, like the General Assembly of the United Nations, or in securing the inclusion in international treaties, after negotiation, of a suitable dispute settlement clause. Sir Franklin Berman's point was clear, in the early days of his career international dispute resolution was an aspiration and inspiration; nowadays it is much more a practical reality.

Appearing on behalf of the Permanent Court of Arbitration (PCA), Mr Siblesz began by noting that trends in the resolution of international disputes are inherently linked to trends in international activity. Currently it is hard to imagine an area of human activity with which international lawyers do not concern themselves. This proliferation of activity has prompted concerns that the proliferation of specialized mechanisms for the resolution of disputes will lead to confused and conflicting decisions, and to a disorder that is ultimately to the detriment of international law as a whole.

In responding to this concern, Mr Siblesz sought to draw lessons from the history of the PCA, an organization that is both very old – having been founded literally in another era of international law – and also very new, having gained renewed life as a direct result of the changes to international society in the last 20 years. Mr Siblesz recalled the role of the international peace movement in the establishment of the PCA and noted that many of the loopholes in the 1899 Hague Convention can only be understood in light of the "starry-eyed idealism" of that movement. At the same time, he noted the speed with which the PCA's founders became dissatisfied with their creation and the fact that it was not the court, with permanent judges, that they hoped for. In these sentiments and more recent concerns with the "fragmentation" of international law, Mr Siblesz noted distinct parallels: a fear of multiple tribunals rendering disparate judgments; a desire for a single voice to develop international law; and a hope for



continuity and coherence despite an extended period of inactivity, Mr Siblesz noted the recent resurgence of the PCA, with 164 arbitrations in the past 12 years, in comparison with only 34 cases administered in the first one hundred years of the organization. He then posited that two lessons follow from the PCA's history: first, that the complexity of modern human activity ought to be conceded, a belief in perfect solutions eschewed and that the possibility of inconsistent decisions accepted. Second, that the imperfect creations of international law ought not be discounted as what appears to be a fault may sometimes prove an unanticipated advantage. In particular, when dealing with international disputes that do not easily separate into watertight containers, the value of institutional flexibility ought to be recognized. By avoiding specialization, the PCA is able to freely adapt as the dispute resolution needs of the international community themselves evolve and has come to administer contractual disputes involving States, adopt a mixed approach to transparency that suits the parties and assumed jurisdiction over armed conflicts of an internal character, as in the *Abyei Arbitration*.

A further lesson that Mr Siblesz believes follows from the PCA's experience concerns the value of choice. Choice is important not simply as an abstract principle but in consideration of the reality that parties know their dispute and the particularities that stand in the way of its resolution. Allowing for parties to choose the institution that is perceived to resolve the dispute most effectively provides a competitive incentive for all institutions to put forward their best efforts. Instead of viewing such choice as a slippery slope into fragmentation and disorder, Mr Siblesz deems that this ought to be viewed as an opportunity for innovation. In ensuring the effective wielding of international adjudicative power, a comparative experience of other institutions and procedures may prove invaluable to the process of constant correction and improvement.

In discussing the 2012 revision of PCA's arbitration rules, Mr Siblesz highlighted that there are several innovations that also bear noting. Firstly, aware of the challenges posed by the increasing costs of arbitration, the 2012 PCA Rules take a number of steps to control costs, including provisions for the review of arbitrator fees that go well beyond the recent modifications to the UNCITRAL Rules. Secondly, aware that State-compliance is essentially a voluntary process, the 2012 PCA rules have given new life to an old idea, the obligation to report on the execution of the award now applies as Article 34(7) of the Rules to any arbitration between States.

In drawing his comments to a close, Mr Siblesz reiterated that the challenge for international lawyers is neither to convince States to address their disputes through the 'best' approach, nor design an institution best suited to the particular issues of today. Rather, international law must offer a range of approaches, in the hope that at least one will prove effective in dealing with the dynamic needs of the international community. The PCA's experience evidences that flexible mandates and a willingness to evolve have a value of their own.

Dr Philippa Webb discussed the practical realities behind the rather abstract concepts of judicial integration and decisional fragmentation. Through recourse to the findings taken from her book *International Judicial Integration and Fragmentation*, she suggested that overall there is more integration than fragmentation among international courts. In taking a step back from the specificities of certain cases, Dr Webb analyzed trends in international conflict resolution by identifying the factors that explain and predict integration and fragmentation. Three themes were identified that affect the courts' tendency towards integration or fragmentation. Those were: the identity of the court, the substance of the law and the procedural rules and practices of the court.

For example, in dealing with the identity of the court Dr Webb demonstrated how its temporal nature, whether it be permanent or ad hoc, affects the courts' tendency towards integration. With particular focus on the contrast between the ICJ and ICTY, Dr Webb explained that permanence, due to its association with stability and authority, increases a tendency towards integration.

Dr Webb proceeded to demonstrate that the function of an international court permeates its approach, defines its goals, determines its structure, and shapes its self-perception. Specifically, she explained how the functional 'relativization' of legal rules on a particular issue could easily slip into fragmentation without careful legal



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reasoning. In analyzing the Genocide Convention, Dr Webb demonstrated that the substance of the law, whether treaty or customary, can also influence the integration or fragmentation among international courts. Her final observations underlined the existence of a shared procedural principle akin to informal precedent, and emphasized the crucial value of judicial dialogue in promoting integration and fostering coherence in the international legal system.

Following both presentations Sir Franklin Berman succinctly noted that it was the management of expectations that underpinned this discussion. In drawing upon the speed at which, following the PCA's inception, the mood of the international community shifted from Lauterpachtian idealism to disillusionment, he emphasized the fact that these processes and institution-building take time. Further there is an untenable divergence emerging between the supply and demand of "Lauterpachtian judges", the existence of those with the requisite experience and caliber for the task, and an unbalanced geographical dispersal of those who are available.

Dr Webb agreed with Mr Siblesz that the 'no-best-fit' institutional approach and the value of choice in mechanisms ought to be recognized; however Dr Webb emphasizes that with the inevitable multiplication and evolution of dispute resolution it is imperative for institutions to engage in dialogue, and that they regard themselves as part of an international legal system. In this context Sir Franklin Berman noted that the ICJ, as the primary international judicial body, could itself be accused of not engaging in dialogue with other tribunals, at least on paper. Part of the explanation may lie in a view about whether the institution is primarily there to settle the dispute at hand or develop the law.

Sir Franklin closed by stating that the crux of the issue, apart from institution-building, is that we are talking about a judicial process. Therefore we ought to focus our attention on building up a properly understood judicial process on an international level, whereby tribunals explain and justify what they have done, so that it is clear how the tribunal went from the starting point, i.e. the arguments made before it by the parties, to the final decision.

**Report written by Kio Gwilliam**