



**British Institute of
International and
Comparative Law**

Report on the Seminar

The Influence of Common Law and Civil Law Traditions on the Work of the International Court of Justice

Temple Garden Chamber Series in International Adjudication

14 November 2013

On 14 November 2013, the British Institute of International and Comparative Law hosted the event, 'The Influence of Common Law and Civil Law Traditions on the Work of the International Court of Justice'. The panel included Karim Khan QC (Temple Garden Chambers) as chair and Judge Joan Donoghue (International Court of Justice) as keynote speaker.

To introduce the event's distinguished keynote speaker, Mr Khan drew attention to Judge Donoghue's position as an eminent jurist who has not only made a significant contribution to the development of international law but also, amongst other roles, directly advised two U.S. presidents and was assistant legal advisor for African Affairs at formative points in both South Africa and Rwanda's history. Mr Khan then proceeded to introduce the evening's topic by elucidating that, in referring to general principles of international law recognised by civilised nations, Article 38(1)(c) of the statute of the ICJ embodies the principle that the substantive norms of the Court are neither common nor civil in nature and that, accordingly, it must seek to be inclusive not divisive. However, Mr Khan observed that the legal traditions of the Court can in fact be partitioned into the common and civil, and that such traditions have played a key part in the development of international jurisprudence.

Judge Donoghue began by emphasising that a Judge of the ICJ is in fact a composite of many factors and that, in the context of international adjudication, a Judge's common law or civil legal training can have a clear influence. In acknowledging such an influence Judge Donoghue shared her own impressions of the court and combined them with the insights of comparative lawyers. In taking Anglophone states with British colonial heritage and French continental systems as representations of common law and civil law traditions respectively, Judge Donoghue identified three aspects of the Court's work in which civil law and common law differences emerge: the conduct of oral proceedings, the assessment of evidence and the drafting of the courts decisions.

As background to the discussion Judge Donoghue drew attention to the fact that the UN Charter and the Statute of the Court assign three primary roles to the ICJ: first, to decide disputes between states, secondly, to render advisory opinions at request of other UN organs and thirdly, to contribute to the development of international law. Moreover, Judge Donoghue observed a number of structural idiosyncrasies that distinguishes the ICJ from both common law and civil legal traditions. One of which is the fact that, unlike common law traditions, the Court is not bound by precedent. However the ICJ is similarly distinguishable from civil law traditions in that Article 38(1) of the Statute specifies that the Court may nonetheless look to judicial decisions as sources of law.

Turning to the first aspect of the Court's work, there are two models for the conduct of oral proceedings, the common law adversarial model, in which parties tend to lead proceedings, and the civil law inquisitorial model, in which judges tend to exercise greater control. As Judge Donoghue explained, the overall structure of oral proceedings before the ICJ is party driven. However, beyond this the structural analogy between common law traditions and the Court is minimal given that Judges are almost silent during oral proceedings and the use of witnesses is rare.

Nonetheless, over the past few years there has been a modest shift. As can be observed in both the *Belgium v Senegal* (2012) and *Australia v Japan* (2013) hearings, the Court has begun to actively pose questions to parties in the first round of oral proceedings with a view to a response being heard in second. Judge Donoghue believes that this increased exchange can be explained by an intention to provide greater opportunity for parties to influence the thinking of the Judges.

With regard to the second point of focus, Judge Donoghue elucidated that the ICJ statute does not specify as to the superiority of certain forms of evidence, indicating no preference between documentary or witness evidence. In formal terms this

flexibility reflects a common law approach, as the civil legal tradition is generally sceptical of witness testimony as form of proof. Notwithstanding this formal lack of preference however, Judge Donoghue noted that, in practice, the Court has stated on a number of occasions that it favours documentary evidence over witness statements concerning questions of fact.

The issue of expert witnesses reveals a sharp divide between the common law and civil legal traditions. Judge Donoghue views the Court as leaning towards a civil law system with the Statute formally providing for experts to be retained by and accountable to the Court. However, in practice this system has only been used twice and, as demonstrated by *Australia v Japan* that saw three party-appointed expert witnesses put forward, the Court has shown a common law approach to the evaluation of evidence. The *Pulp Mills Case (Argentina v Uruguay)* saw a third, severely criticised, path in which scientific experts appeared on the team for a party as counsel. The obvious shortcoming of this path, for common lawyers at least, is that these individuals represented an expert opinion but their role as counsel obstructed the provision of an opportunity for the other party to cross-examine them. Somewhat ironically, most complaints in this case were actually voiced by lawyers from the civil legal tradition, with the solutions proposed, therefore, contrasting the approach taken in *Australia v Japan*. In regards to expert witnesses, Judge Donoghue believes that all this practice reveals is that reference to both common and civil law traditions is possible and, ultimately, procedure is heavily influenced by the preference of the disputing parties.

The Court's deliberative process was Judge Donoghue's next point of focus, the point at which the Court takes stock of the law and weighs evidence. It has become apparent that the ICJ typically pronounces that the burden of proof is borne by the party asserting the fact. However the Court remains silent on questions pertaining to how much evidence is required and what standard of proof applies. In that sense Judge Donoghue observes a similarity to civil legal traditions, more specifically the idea that a decision is made based on the Judge's "intime conviction". However, Judge Donoghue observes that the ICJ has not expressly embraced the civil law system and cases such as *Oil Platforms* and *Pulp Mills* are well documented for the critical opinions of common law traditionalists such as Higgins, Buergethal and Greenwood respectively.

Thirdly, Judge Donoghue focussed on the Court's style of judgment, a context in which the two legal traditions appear to diverge extraordinarily. Judgments of the French Court de cassation, typically comprise a series of clauses commencing with "[c]onsidérant que" ("[w]hereas") and are intended to clearly present nothing more than a consideration of legal principles and the result. In stark contradiction, the judgments of the U.S. Supreme Court contain extensive, detailed reasoning with the author identified by name and the opportunity for Judges to write dissenting and separate opinions. Judge Donoghue emphasised that due to the differing systemic effects of judgments in each legal system, the differences in tradition go beyond style. In light of the fact that U.S. judges have a law-making capacity, they are speaking to a broader audience than the disputing parties with the Supreme Court attaching huge significance to justifications accordingly.

In pointing out that the ICJ's decisions take either the form of orders or judgments, Judge Donoghue explained that the Courts typical practice is, as demonstrated in *Georgia v Russia*, for orders of provisional measures to follow the French "[c]onsidérant que" format. However, the three most recent cases before the ICJ concerning requests for provisional measures have seen the ICJ move away from this, somewhat unwieldy, format. In contrast to orders, judgments of the ICJ are typically narrative in style. However, this doesn't necessarily mean that they resemble a common law judgment and Judge Donoghue considers this a contributing factor to the difficulty sometimes experienced when reading such documents.

In drawing her comments to a close, Judge Donoghue believes that the issues to consider when assessing how judgments should look are threefold: first, you have to ask what the court is doing; the Court renders judgments for specific disputes. Upon rendering a judgment there are some occasions upon which securing the compliance of losing parties can be challenging. It is therefore important for judgments to demonstrate consideration of all the arguments and set out reasons that can facilitate acceptance and implementation. Secondly, given the Courts contribution to the development of the law it is paramount that other actors understand the judgments of the Court. Thirdly, Judge Donoghue re-emphasised that the idea of international adjudication is relatively new and that, in light of the fact that only a third of states have accepted it's jurisdiction, the Courts judgments must promote the idea and legitimacy of international adjudication. Upon reflection of these three focus points, Judge Donoghue shared her realisation that, in considering the process of how to achieve these goals, what naturally comes to mind are common law driven ideas, such as the process of distinction. The fact that such ideas continue to form a minority in global legal thought reveals the complexity of the task ahead.

To close Judge Donoghue made two provisional conclusions. First, that this enquiry has renewed her conviction of the importance of being self-aware and reflective as a Judge. Secondly, it is clear that legal traditions can explain why other judges decide the way they do. However, such traditions, whether common of civil, are not divisive in the sense that it necessarily correlate as to where judges end up on merits of case, rather, they are merely an aspect of a Judges background that can impede effective communication in certain circumstances. It is easy to pick either civil or common legal traditions, however, in lending her perspective on the direction in which the ICJ ought to travel, Judge Donoghue emphasised that it is paramount for our lines of enquiry to take an integrative approach, to recognise the merits of both and attempt to identify an international legal adjudicative tradition.

The following points were drawn out of the Q&A session. First, that the Court can and already does cite other tribunals and learns from their practices. However Judge Donoghue pointed out that, as an institution, the ICJ is typically slower to evolve in comparison to the practice of smaller arbitral tribunals. Secondly, it is especially at the deliberative stage that civil and common law traditions come between Judges. For this reason Judge Donoghue expounds that, as a Judge, she has developed sensitivities to satisfy the broad range of Judges, for example, by avoiding explicit reference to the term "burden of proof". Thirdly, the question was posed that, considering the inquisitorial practice of civil judges demanding that the parties produce evidence, a practice that the ICJ has been extremely hesitant to do, are there any civil law practices that you consider might be helpful to the Court? To this Judge Donoghue drew upon her common law background pointing out that in the U.S. system there exists a two-stage test for evidence: first is it admissible and secondly, what weight should it be given? Such a test is pertinent in the U.S. system considering the sensitivities concerning the relationship between the jury and evidence. However in the international system such jury-oriented sensitivities are absent. Judge Donoghue therefore elucidated that there do in fact exist, what is known as, Article 1 deliberations. Such deliberations occur in advance of the hearing of a case, and enable the Court to direct the focus of the parties. In Judge Donoghues opinion, this bears similarity to the civil system and there is great merit in such an approach.

To close Mr Khan opined that there is an evident tension between the role of the Court to establish international law and, despite the inquisitorial preponderance of Judges on the bench, the general reluctance of such Judges to summon witnesses and request the disclosure of evidence. This reveals that, despite being a fundamental part of international legal architecture, the ICJ is still very much in the process of evolution and that as we go forward we hope to see greater efficiency in a number of such respects.

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