The proliferation of dissenting opinions in international law
A comparative analysis of the exercise of the right to dissent at the ICJ and the IACtHR

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Introduction

1. The proliferation of dissenting opinions in international law

During the last decades, international law has witnessed the phenomenon of the judicialization of international relations and, relatedly, the proliferation of international courts and tribunals.[1] The judicial settlement of disputes was previously confined to certain specific fields and actors.[2] The changes that took place in the legal practice before, throughout and after the Cold War, however, resulted in an increase in the adjudication of international disputes also beyond the inter-state context. Karen Alter explains that these changes refer to the crystallization of the vision of subordinating power politics to an international rule of law. This happened in stages from The Hague Peace Conferences, through the succeeding imposition of a liberal order at the end of World War II and the emergence of human rights projects at the end of the Cold War.[3] Ran Hirschl and Cesare Romano add to these changes the adoption of multilateral treaties containing justiciable provisions[4] and the amplification of the number of institutions consecrated to ensure compliance with these provisions.[5] In this order of ideas, these changes that took place in the legal practice,[6] the creation of judicial institu-

1 Robert O. Keohane *et al*, 'Legalized Dispute Resolution: Interstate and Transnational', (2000) 54 *International Organization*, 457; Daniel Terris, Cesare Romano & Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Oxford University Press 2007), 6; Jan Malír, 'Judicialization of International Relations: Do International Courts Matter?', (2013) 3 *The Lawyer Quarterly*, 208; Karen Alter & Liesbet Hooghe, 'Regional Dispute Settlement', in Tanja A. Börzel *et al* (eds.) *Oxford Handbook of Comparative Regionalism* (Oxford University Press 2016), 540; Mikael Rask Madsen, 'Judicial Globalization and Global Administrative Law: The Proliferation of International Courts', in Sabino Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing 2016), 282.

2 Gleider I. Hernández, 'The Judicialization of International Law: Reflections on the Empirical Turn', (2014) 25 *European Journal of International Law*, 919, 920.

3 Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014), 114 – 117.

4 Ran Hirschl, 'The Judicialization of Politics', in Robert E. Gooding (ed.) *The Oxford Handbook of Political Science* (Oxford University Press 2011), 253, 263.

5 Cesare Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', (1999) 31 *New York University of International Law and Politics*, 709

6 Karen Alter, *supra* note 3, 113 – 160.

tions and the expansion of the jurisdictional powers of some of the existing courts,[7] resulted in the judicialization of international relations.

In the case of the creation of judicial institutions, it should be noted that as part of this phenomenon, a multitude of international courts and tribunals in the field of international investment law (*e.g.* the Iran-United States Claims Tribunal), trade law (*e.g.* the World Trade Organization Dispute Settlement Mechanism and the East African Court of Justice), law of the sea, (*e.g.* the International Tribunal for the Law of the Sea), international criminal law (*e.g.* the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court), and international human rights law (*e.g.* the European Court of Human Rights and the African Court of Human and Peoples' Rights), has been created.[8] Hence since the end of the Cold War, more than 25 new international courts and tribunals were established.[9] The proliferation of international courts and tribunals therefore constitutes one the most important and profound institutional changes, in international law and international relations of recent times.[10]

One of the aspects that has been noted with regard to this proliferation phenomenon, is the diversity in the institutional settings of each of the international courts and tribunals. This corresponds with the formation of specialised systems (*e.g.* international human rights law, international criminal law and international investment law), each of which consists of specialised rules, principles, and judicial institutions.[11] Hence, each of the specialised international courts and tribunals is created with distinctive characteristics tailored to the rules and principles of the regime in which they operate and which they are required to apply.[12] Consequently, all international courts and tribunals differ in (some or all of) these characteristics

7 Pierre-Marie Dupuy & Jorge E. Viñuales, 'The Challenge of 'Proliferation': An Anatomy of the Debate', in Cesare Romano *et al* (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2015), 136.

8 George Abi-Saab, 'La Métamorphose de la Fonction Juridictionnelle Internationale', in Denis Alland *et al* (eds.) *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff Publishers 2014), 377, 385.

9 Karen Alter has for instance mentioned 29 international courts and tribunals in one of her studies on the subject. *Cf.* Karen Alter, 'The Multiplication of International Courts and Tribunals after the end of the Cold War', in Cesare Romano *et al* (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2015), 63, 66 – 67.

10 Roger P. Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance', (2000) 94 *American Society of International Law Proceedings*, 160, 165.

11 International Law Commission, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (13 April 2006), A/CN.4/L.682, p. 11, para. 8.

12 See, *e.g.*, Theodor Meron, 'Anatomy of an International Criminal Tribunal', (2006) 100 *American Society of International Law Proceedings*, 279.

and these differences make them unique.[13] These distinctive characteristics thus refer to their mandate and function, which includes the nature of their jurisdiction (compulsory or voluntary), the scope of jurisdiction *ratione materiae*, *personae*, *temporis* and *loci* and, relatedly, their permanence or *ad hoc*-ness, as well as to their institutional design (*e.g.*, in terms of the composition of the bench) and the level at which they operate (universal, regional, sub-regional).[14]

In addition and despite these differences, there is one aspect that is common to all (or nearly all) international courts and tribunals, namely, the right for judges to append dissenting opinions. Save for the Court of Justice of the European Union[15] and the Andean Tribunal of Justice,[16] international judges and arbitrators have incontrovertibly been permitted to append dissenting opinions.[17] Hence, the proliferation of international courts and tribunals has also resulted in an exponential growth of the possibility for judges to append dissenting opinions. This phenomenon on the proliferation of dissenting opinions has expanded in such a way, that it has even transcended to the practice of the so-called quasi-judicial bodies. The Inter-American Commission on Human Rights, the Human Rights Committee and the Committee against Torture, among others, allow its members to

13 As Philippe Couvreur, former Registrar of the International Court has pointed out in an academic article, if one pretends to determine the role of international courts and tribunals it is "dependent upon the society in which it is required to operate". *Cf.* Philippe Couvreur, 'The Effectiveness of the International Court of Justice in the Peaceful Settlement of International Disputes', in A. Sam Muller *et al* (eds.) *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff Publishers 1997), 83, 86; Benedict Kingsbury, 'International Court: Uneven Judicialization in Global Order', in James Crawford and Martti Koskenniemi (eds.) *The Cambridge Companion to International Law* (Cambridge University Press 2012), 203, 215 – 222; Philippe Sands, 'Reflections on International Judicialization', (2016) 27 *European Journal of International Law*, 885, 887.

14 Some other differences are also relevant. See, *e.g.*, Allain Pellet, 'The Anatomy of Courts and Tribunals', (2008) 7 *The Law and Practice of International Courts and Tribunals*, 275 – 287.

15 In the case of this international court, the reason for not allowing dissenting opinions is to be mainly found in the fact that, its structure is based on the French Council of State (where no dissenting opinions are allowed either) and its position as a supranational body above states, which would make its task difficult if dissents were allowed. *Cf.* Julia Laffranque, 'Dissenting Opinion in the European Court of Justice – Estonia's Possible Contribution to the Democratisation of the European Union Judicial System', (2004) 9 *Juridica International*, 1, 17.

16 When this international tribunal was created, its design was explicitly modelled on the Court of Justice of the European Union. This might explain why dissenting opinions were not envisaged by the drafters of its statute. *Cf.* Lawrence R. Helfer *et al*, 'Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice', (2011) 1 *Oñati Socio-Legal Series*, 1, 3.

17 Even at some international courts and tribunals, whose constitutive instruments do not explicitly consecrate this right, judges have been allowed to append dissenting opinions. *Cf.* Göran Sluiter, 'Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY', in Bert Swart *et al* (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press 2011), 191, 197.

append dissenting opinions to decisions arising from individual communications.

The current place of dissenting opinions in international adjudication can be appraised, bearing in mind the importance of these opinions in the adjudication of cases in multi-member courts. In this regard, judges themselves have placed dissenting opinions as an essential safeguard of their individual responsibility, without which they would not have accepted their election as members of an international court or tribunal.[18] In fact, the former justice of the Supreme Court of the United States, William O. Douglas, has noted that "[t]he right to dissent is the only thing that makes life tolerable for a judge on an appellate court".[19] In addition, and despite the fact that a judge may dissent for a variety of reasons,[20] it has been noted that a dissenting judge "speaks to the future, and his voice is pitched to a key that will carry throughout the years".[21] In other words, his views have the effect of offering protest[22] and opening possibilities for systemic change.[23] In this order of ideas, the dissenting opinion also constitutes an important tool for the development of the law.

By the same token, eminent scholars, important sub-organs of the United Nations such as the International Law Commission and highly reputed institutions as the *Institut de Droit International*, usually consider the views expressed in dissenting opinions when making claims about either the *lex lata* or *lex ferenda*.[24]

Paradoxically, this importance granted to international dissenting opinions does not correspond with the sporadic and unstructured interest that they have attracted. Hemi Mistri has for instance recently noted that

18 Sir Hersch Lauterpacht has referred in this regard to the position expressed by Max Huber in an academic article, some years after leaving the Permanent Court of International Justice. Lauterpacht noted that Huber "would have hardly decided to accept office as judge if the Statute had not taken over the Anglo-Saxon system of dissenting opinions." *Cf.* Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), 69, fn. 16.

19 *Cf.* William O. Douglas, *America Challenged* (Princeton University Press 2010), 4.

20 Gerald L. Neuman, 'Giving Meaning and Effect to Human Rights: The Contributions of Human Rights Committee Members', in Daniel Moeckli & Hellen Keller (eds.) *The Human Rights Covenants at 50: Their Past, Present and Future* (Oxford University Press 2018), 32, 38.

21 Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press 1921), 714 – 715.

22 In the case of investor-State arbitration, under the auspices of the International Centre for Settlement of Investment Disputes, some of the proceedings on the annulment of awards are based on the views expressed by the dissenting arbitrator in his opinion. *Cf. Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*. Decision on Annulment, 18 May 2018, para. 190.

23 J. Louis Campbell III, 'The Spirit of Dissent', (1983) 66 *Judicature*, 305, 306.

24 For instance, in two of the most recent topics included to its programme of work (*i.e.* identification of customary international law and peremptory norms of general international law), the special rapporteurs of the International Law Commission on each of these topics have references to the views expressed by judges in their dissenting opinions.

the right to dissent at international criminal tribunals "constitutes a practice often overlooked as a subject of critique in its own right, despite its prevalence."[25] In this same vein, Andrew Lynch has also noted that,

> "[n]otwithstanding the, almost general acceptance and existence of the practice of appending dissenting opinions, their occurrence is a phenomenon of judicial work that attracts direct consideration only sporadically. Even if they may often receive attention in cases of interest to the public, there has been only a limited effort to reflect upon the role of dissent in legal reasoning generally."[26]

2. Statement of the problem and research aim

This dissertation zeroes in on dissenting opinions in international adjudication. Despite the fact that the right to dissent is virtually common to all of the international courts and tribunals, differences exists in how the exercise of this right is regulated and designed in the statute of international courts and tribunals.

For instance, while in the case of the Dispute Settlement Mechanism of the World Trade Organization, the dissenting opinions to be appended by a member of the panel should be anonymous,[27] the author of any dissenting opinion appended to the judgments of the European Court of Human Rights should be known. Furthermore, in the case of the Inter-American Court of Human Rights ("IACtHR"), its Rules of Court explicitly indicate that any dissenting opinion to be appended to a judgment, should strictly be limited to the issues addressed by the court in its majority judgment. In contrast, the relevant provisions in the context of the Centre for the Settlement of Investment Disputes are silent on this aspect and there is not (in principle) a limit of this kind, for dissenting arbitrators.

The existence of differences in how the exercise of this right to append dissenting opinions is regulated and designed, can also be appreciated from comparing the numbers of dissenting opinions so far appended at various international courts and tribunals. For instance, at the International Court of Justice ("ICJ"), since 1946 when it rendered its first decision on preliminary

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25 Hemi Mistri, 'The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice', (2015) 13 *Journal of International Criminal Justice*, 449, 451.

26 Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of Australia', (2003) 27 *Melbourne University Law Review*, 724. More recently, it has also been noted with regard to dissenting opinion from international criminal tribunals, that this is "a practice often overlooked as a subject of critique in its own right, despite its prevalence." Similarly, back in the 20s this claim had also been made in the United States, where it was noted that as a general rule, dissenting opinions receive slight attention. *Cf*. Alex Simpson, 'Dissenting Opinions', (1923) 71 *University of Pennsylvania Law Review*, 205.

27 *Cf*. James Flett, 'Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence', (2010) 13 *Journal of International Economic Law*, 287, 300.

objections in the *Corfu Channel* case[28] until one of its most recent decisions (*i.e.* the advisory opinion of 25 February 2019 concerning the *Legal Consequences of the Separation of Chagos Archipelago from Mauritius in 1965*)[29] it has rendered 145 judgments. This includes judgments on preliminary objections, merits, compensation, requests for interpretation, and requests for revision,[30] as well as advisory opinions. In only 11 of these judgments[31] no dissenting opinions were appended.[32] A somewhat similar situation occurs in the case of the International Tribunal for the Law of the Sea. Up to date, this international tribunal has rendered 25 decisions; this includes judgments on preliminary objections, merits, prompt release, requests for

28 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Preliminary Objections, Judgment of 25 March 1948, [1948] ICJ Rep. 15.

29 *Legal Consequences of the Separation of Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, [not yet published in the ICJ Reports].

30 Even though the ICJ has rendered some of its decisions on requests for permission to intervene in the form of judgments, they are excluded from this statistic since some of its decisions on this incidental proceeding have been rendered by means of an order (e.g. *Jurisdictional Immunities of the State (Germany v. Italy)*, Application by the Hellenic Republic for Permission to Intervene, Order of 4 July 2011, [2011] ICJ Rep. 494).

31 *Request for Interpretation of the Judgment of November 20th, 1950, in the* Asylum Case (Colombia/Peru), Judgment of 27 November 1950, [1950] ICJ Rep. 395; *Haya de la Torre (Colombia/Peru)*, Judgment of 13 June 1951, [1951] ICJ Rep. 71; *Minquiers and Ecrehos (France/United Kingdom)*, Judgment of 17 November 1953, [1953] ICJ Rep. 47; *Nottebohm (Liechtenstein v. Guatemala)*, Preliminary Objections, Judgment of 18 November 1953, [1953] ICJ Rep. 111; *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion of 7 June 1955, [1955] ICJ Rep. 67; *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, [1961] ICJ Rep. 17; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion of 26 April 1988, [1988] ICJ Rep. 12; *Applicability of Article VI, Section 22, on the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, [1989] ICJ Rep. 177; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 February 2009, [2009] ICJ Rep. 61; *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, [2013] ICJ Rep. 44; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand)*, Judgment of 11 November 2013, [2013] ICJ Rep. 281.

32 It must be pointed out that, the fact that no dissenting opinions have been appended in these judgments does not mean that the said decisions were unanimous. As it will be explained below, the concept of dissenting opinion is not limited to those opinions from judges who vote against the majority decision in the *dispositif*. Thus, some judgments where no dissenting – but declarations or separate – opinions were appended, do not amount to a unanimous decision.

the prescription of provisional measures and advisory opinions. In only 9 of these decisions, no dissenting opinions were appended.[33]

A clear and striking contrast in the number of dissenting opinions is to be found in the regional human rights courts. The Inter-American Court of Human Rights has rendered since its decision on preliminary objections in the case of *Velasquez Rodriguez v. Honduras* in 1987,[34] until one of its most recent decision concerning the interpretation of the judgment on the merits, reparations and costs in the *Case of López Soto et al v. Venezuela*,[35] a total of 403 judgments. In only 71 of these judgments, dissenting opinions were appended. To put it differently, 332 judgments have been unanimously decided. Moreover, the African Court on Human and People's Rights has rendered 51 judgments (including its decisions on jurisdiction and advisory opinions) until its most recent decision in the case of *Kijiji Isaiga v. United Republic of Tanzania*. In only 7 of these judgments, the decision was not unanimous and dissenting opinions were therefore appended. 44 of its judgments have therefore been unanimous. A quite similar trend occurs in the case of the European Court of Human Rights. It has been indicated that[36] in the approximately 2000 judgments that this court rendered between 1959 and April 2001, only 602 of these judgments were non-unanimous.[37]

In addition to these differences as to how the exercise of the right to append dissenting opinions is regulated and designed, there are also differences in the way in which judges and arbitrators make use of their right to append dissents. One may refer in this regard to the dissenting opinion

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33 *Mox Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, p. 95; *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, p. 10; *"Juno Trader" Case (Saint Vincent and the Grenadines v. Guinea-Bissau)*, Prompt Release, Judgment of 18 December 2004, ITLOS Reports 2004, p. 17; *"Hoshinmaru" Case (Japan v. Russian Federation)*, Prompt Release, Judgment of 6 August 2007, ITLOS Reports 2007, p. 18; *"Tomimaru" Case (Japan v. Russian Federation)*, Prompt Release, Judgment of 6 August 2007, ITLOS Reports 2007, p. 74; *"ARA Libertad" Case (Argentina v. Ghana)*, Provisional Measures, Order of 5 December 2012, ITLOS Reports 2012, p. 332; *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Provisional Measures, Order of 25 April 2015, ITLOS Reports 2015, p. 146; *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Merits, Judgment of 23 September 2017, ITLOS Reports 2017, p. 10.

34 *Velásquez Rodríguez v. Honduras*. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1.

35 *Case of López Soto et al v. Venezuela*. Interpretation of the Judgment on Merits, Reparations and Costs. Judgment of May 14, 2019. Series C No. 379.

36 Jeffrey L. Dunoff & Mark A. Pollack, 'The Judicial Trilemma', (2017) 111 *American Journal of International Law*, 225, 250.

37 This tendency seems, however, to have change in more recent years. White and Boussiakou indicated that between 1999 and 2004, 80% of the Chamber and Grand Chamber judgments were non-unanimous. *Cf.* Robin C. A. White & Iris Boussiakou, 'Separate Opinions in the European Court of Human Rights', (2009) 9 *Human Rights Law Review*, 37, 50

appended by judge Lucio Moreno Quintana, to the majority judgment of the International Court of Justice on the merits of the case concerning the *Temple of Preah Vihear*. This judge noted to be,

> "unable to agree with the majority of my colleagues in the decision of this case. It is my firm conviction that sovereignty over the portion of territory of the Temple of Preah Vihear belongs to Thailand. The dissenting opinion which I express hereunder gives the reasons on which it is based. In American international law questions of sovereignty have, for historical reasons, a place of cardinal importance. That is why, I could not, as a representative of a legal system depart from it."[38]

Interestingly, the position of judge Lucio Moreno Quintana is in clear opposition with the views expressed by the former president of the ICJ, Rosalyn Higgins, when reflecting on the role and responsibility of a judge of the International Court of Justice in the contemporary international legal system. For her "while judges are elected in their personal capacities, they must through their work serve the entire international community, and not one particular region or legal system".[39] In fact, in the dissenting opinion that she appended to the advisory opinion concerning *Legality of the Threat or Use of Nuclear Weapons*, she noted to be unable to vote with the majority on certain aspects since "it is not clear to me that [the answer] (…) best serve to protect mankind against that unimaginable suffering that we all fear." Further, these previous views, can moreover be compared with the reason expressed by arbitrator Dobrosav Mitrović, in the dissent he appended to the award on jurisdiction in *Mytilineos Holding SA*, where he noted that the,

> "professional and ethical duty of an arbitrator, in case he disagrees with the arbitral award rendered by the majority of arbitrators, to inform the parties of his legal opinion and the arguments that prevented him from accepting the arbitral award. This the primary purpose of dissenting opinions (…) [and not] to enter into a discussion with the opinions and arguments of other arbitrators as stated in the Arbitral award."[40]

These three references are indicative of the fact that judges do not always append a dissenting opinion for the same reasons. The rationale of judge Lucio Moreno Quintana's dissent thus lies in his perception of being

38 *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, [1962] ICJ Rep. 6, (Dissenting Opinion, Judge Moreno Quintana), p. 67.

39 Rosalyn Higgins, 2 *Themes & Theories: Selected Essays, Speeches, and Writings in International Law* (Oxford University Press 2009), 1124.

40 *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro and Republic of Serbia*. Partial Award on Jurisdiction, 8 September 2006, (Dissenting Opinion, Arbitrator Mitrović), para. 1.

a representative of a specific legal system.[41] For its part, the rationale of former president Rosalyn Higgins lies in her perception of serving the international community when expressing her views. Finally, the rationale of arbitrator Dobrosav Mitrović lies in his perception of a duty *vis-à-vis* the parties to the dispute.

It is against this background that, when taken together, all these aspects mentioned above, constitute a clear indication that the use of dissenting opinions may not be the same in all the existing international courts and tribunals. In this regard, for instance, the considerable difference in the number of dissenting opinions between the human rights courts and the ICJ and the International Tribunal for the Law of the Sea, is perhaps indicative that at least *prima facie* the mandate and jurisdiction *ratione materiae* of an international court or tribunal informs the use of the right to append dissenting opinions.

In fact, this difference in the exercise of the right to dissent is moreover an aspect that has not been the subject of analysis, so far.[42] The existing analyses on the subject of dissenting opinions have been limited to (i) the dissents at a specific regime of international law or a particular international court or tribunal, *e.g.* international criminal law[43] or a regional human rights court such as the European Court of Human Rights;[44] (ii) address the aspect as to whether dissents should be permitted or not;[45] (iii) analyse the substantive merits of dissents that have been appended to a specific award or judgment;[46] or (iv) analyse of the dissents from one particular judge throughout her or his judicial career.[47]

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41 Lyndell V. Prott, *The Latent Power of Culture and the International Judge* (Professional Books 1979), 226.

42 Analysis on other aspects, however, exist. For instance, in a recently published paper in the American Journal of International Law it is analysed how, depending on the core values that states seek to maximize when creating an international court or tribunal, dissenting opinions are allowed or not. *Cf.* Jeffrey L. Dunoff & Mark A. Pollack, *supra* note 36, 225.

43 See, *e.g.*, Hemi Mistri, *supra* note 25, 449.

44 Florence Rivière, *Les Opinions Séparées des Juges à la Cour Européenne des Droits de l´Homme* (Bruylant 2004).

45 See, *e.g.*, Pedro J. Martinez Fraga & Harout J. Samra, 'A Defense of Dissents in Investment Arbitration', (2012) 43 *University of Miami Inter-American Law Review*, 445 – 479.

46 See, *e.g.* Hugh Thirlway, 'The Nuclear Weapons Advisory Opinion: The Declarations and Separate and Dissenting Opinions', in Laurence Boisson de Chazournes & Phillipe Sands (eds.) *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999), 390, 396.

47 See, *e.g.*, Liliana Obregon, 'Noted for Dissent: The International Life of Alejandro Alvarez', (2006) 19 *Leiden Journal of International Law*, 983; Robert P. Barnidge, 'The Contribution of Judge Antonio Augusto Cançado Trindade to the Adjudication of International Human Rights at the International Court of Justice', in James A. Green & Christopher Waters (eds.) *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Martinus Nijhoff Publishers 2015), 34.

It is against this background that this dissertation, sets out to investigate whether there are differences in the exercise of the right to append dissenting opinions that can be traced back to the different institutional settings of the international court or tribunal in which they were rendered. To be more precise, this dissertation aims to enquire whether and to what extent the settings that guide international courts and tribunals, *i.e.* mandate, jurisdictional and institutional design may explain the differences in the exercise of the right to append dissenting opinions. The reason for this enquiry, also finds its basis in the fact that judges and arbitrators are members of a court or tribunal with a specific mandate and tasks. With a view to moreover comply with the said mandate, states give to each international court and tribunal the structure they consider as the most appropriate. It is within the context of the mandate and structure of the international court and tribunal, that each judge or arbitrator is expected to act. Consequently, his dissenting opinion is also expected to be subjected (in principle) to his role and function as a member of the institution that she or he belongs to.

This enquiry is made through a focus on two courts that are notable for their differences in mandate and structure, as well as the difference in the number of dissents. These two courts are the International Court of Justice and the Inter-American Court of Human Rights. While sharing a part of their mandate as regards the application of human rights, these two courts are also vastly different in mandate, jurisdictional and institutional design. The mandate of the ICJ refers to the settlement of disputes between states, whereas the mandate of the IACtHR is to ensure the observance of the rights consecrated by the American Convention of Human Rights ("ACHR" or "the American Convention") by means of complaints filed by an individual against a contracting state.[48] *Ratione materiae*, the jurisdiction of the International Court of Justice comprises all cases that states refer to it concerning any question of international law, while in the case of the Inter-American Court of Human Rights its jurisdiction only comprises cases concerning the interpretation and application of the ACHR. Furthermore, *ratione personae* the International Court is open to states, while the Inter-American Court of Human Rights is also open to individuals. Similarly, the composition of their benches and deliberation process in both courts is different. In the case of the ICJ, in the election of its 15 members the representation of the main forms of civilizations and the principal legal systems of the world should be assured. The deliberation process also takes account of this fact and therefore allows for the active participation of all its members in the drafting of a judgment. On the other hand, the only aspects that should be considered in

48 It is also possible for the Inter-American Court to be seised of communications in which a state alleges the violation of a human right set forth in the American Convention. Nonetheless, this is a situation that has never occurred. *Cf. V.R.P, V.P.C. and others v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 8, 2018. Series C No. 350, para. 33.

the election of the 7 members of the IACtHR is their recognised competence in the field of human rights; all the members should take part in the deliberation but their active participation is not required. In sum, these differences between both international courts make that, although being part of the same domain, kingdom, class and order, they cannot be said to pertain to the same family, in the taxonomy of international courts and tribunals.[49]

It is in view of the many differences between the International Court of Justice and the Inter-American Court of Human Rights that both constitute a perfect object of study, to enquire whether and to what extent some aspects in which international courts and tribunals are dissimilar, may explain the differences in the exercise of the right to append dissenting opinions. The research aim of this dissertation is therefore

> **to analyse whether and to what extent the differences in mandate, jurisdictional and institutional design of the International Court of Justice and the Inter-American Court of Human Rights, may result in differences in the exercise of the right to append dissenting opinions.**

In order to address this research aim, this dissertation will proceed in three steps. First, the topic of dissenting opinions in general will be contextualised by analysing its roots in domestic law. During this analysis, it will be enquired whether and to what extent the discussion on dissenting opinions at the domestic level is relevant at the international level and can therefore inform the research aim. Second, there is a focus on the International Court of Justice and the Inter-American Court of Human Rights, through a comparative analysis of their differences and similarities in mandate, jurisdictional and institutional design. The third step is to analyse whether and to what extent the differences and similarities may result in differences in the exercise of the right to append dissenting opinions.

For the purpose of undertaking this research aim in these three steps, this dissertation will be guided by concrete research questions. These questions are

1. What are the origins of dissenting opinions in domestic law?
2. What were the arguments advanced in favour and against dissenting opinions in domestic law?
3. To what extent do differences between domestic and international law pose a bar to transposing discussions at the domestic level to the international level?
4. What are the origins of dissenting opinions in international law?
5. How have the arguments advanced in favour and against dissenting opinions in international law influenced their institutional and procedural design at specific international courts and tribunals?

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49 *Cf*. Cesare Romano, 'A Taxonomy of International Rule of Law Institutions', (2012) 2 *Journal of International Dispute Settlement*, 241, 264 – 267.

6. What are the differences and similarities in mandate, jurisdictional and institutional design of the International Court of Justice and the Inter-American Court of Human Rights?
7. Which of the differences in mandate, jurisdictional and institutional design from the International Court of Justice and the Inter-American Court of Human Rights, may result in differences in the exercise of the right to append dissenting opinions?

3. Delineation of the concepts of dissenting opinion and judgment

Dissenting opinions constitute the object of the research aim to be followed in this dissertation. They are the result of a disagreement with the majority judgment. In that sense, the judgments from the International Court of Justice and the Inter-American Court of Human Rights, as well as the dissenting opinions appended therein, are the most important primary source to be analysed, as well as the object of the research aim. The delineation of both concepts is therefore necessary. The need for this delineation is also given for three reasons: (i) the fact that in the case of dissenting opinions, there is no unified definition of this concept and the judicial practice seems to complicate efforts towards a clear-cut definition; (ii) the fact that in some incidental proceedings decisions are not always rendered in the form of a judgment; (iii) the fact that without defining these concepts, it is not possible to understand why certain judgments have not been taken into account, as well as why the analysis on dissenting opinions has not been limited to those opinions that judges have given such designation. Each of these reasons will be explained as follows.

It is true that well set criteria exist related to ICJ individual opinion for the determination as to when it should be considered as a separate or dissenting opinion or declaration. In its first yearbooks, the International Court of Justice provided for a definition of dissenting opinions. It, for instance, indicated in its second yearbook that, pursuant to article 74, paragraph 2 (current article 95, paragraph 2) of the Rules of the Court, the opinion of a judge who disagrees with a judgment or advisory opinion should be called a dissent.[50] This is moreover a reference that the International Court of Justice kept in a few subsequent yearbooks.[51] A separate

50 International Court of Justice, *Yearbook 1948 – 1949*, p. 80; See also, Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (Martinus Nijhoff Publishers 1984), 8.

51 *Cf*. International Court of Justice, *Yearbook 1949 – 1950*, p. 101; International Court of Justice, *Yearbook 1950 – 1951*, p. 118.

opinion is for its part defined as the opinion of a judge that supports the decision of the majority,[52] even though it is based on different grounds.[53]

Despite these clear criteria, the judicial practice shows that when a judge disagrees with a judgment or advisory opinion, she or he does not always call the individual opinion a dissenting opinion.

In fact, the operative paragraph of a judgment is sometimes composed of various subparagraphs and leads to situations in which a judge votes in favour of certain subparagraphs, while also voting against some others.[54] It also occurs that sometimes two submissions are addressed in the same subparagraph and a judge only agrees with the majority in one of these submissions. Judge Mohamed Shahabuddeen has in fact referred to the problem posed by these situations in one of his individual opinions. He has indicated that,

> "The Court's voting practice does not always allow for a precise statement of a judge's position on the elements of a *dispositif* to be indicated through his vote; how he votes would depend on his perception of the general direction taken by such an element and of any risk of his basic position being misunderstood." [55]

Consequently, when a judge is confronted with any of the situation as described above, she or he might find it difficult to decide his vote and determine if the opinion that she or he will append should be called separate or dissent. The final decision as to how the opinion should be called rests exclusively with the judge herself or himself, who is moreover free to call it the way that she or he considers more appropriate.[56] Some instances are indicative of this aspect.

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52 International Court of Justice, *Yearbook 1947 – 1948*, p. 68; Victor Rodríguez Rescia, *Las Sentencias de la Corte Interamericana de Derechos Humanos: Guía Modelo para su Lectura y Análisis* (Instituto Interamericano de Derechos Humanos 2009), 29.

53 Rainer Hoffmann & Tilmann Laubner, 'Article 57', in Andreas Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012), 1388. An example of a proper separate opinion, formally speaking, is provided by Judge Basdevant's opinion appended to the advisory opinion concerning the *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*. He notes in "no way intend[s] any criticism of the [Court's opinion] which, I consider, would be out of place in a separate opinion written by a Judge, but I believe that I should indicate briefly the means by which I am enabled to subscribe to the Opinion given by the Court." *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, Advisory Opinion of 7 June 1951, [1951] ICJ Rep. 67, (Separate Opinion, Judge Basdevant), p. 80.

54 Juan J. Quintana, *Litigation at the International Court of Justice* (Martinus Nijhoff Publishers 2015), 559.

55 *Cf. Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, (Dissenting Opinion, Judge Shahabuddeen), p. 377.

56 Mohammed Shahabuddeen, *Precedent at the World Court* (Cambridge University Press 1996), 182.

Judge Hisashi Owada for instance appended a dissenting opinion to the judgment of the ICJ in the case concerning *Territorial and Maritime Dispute*, in order to express his disagreement with only one (out of the six) subparagraphs of the operative paragraph.[57] In clear contrast, judges Dalveer Bhandari and Patrick Robinson voted against several operative clauses of the judgment in *Certain Activities carried out by Nicaragua in the Border Area* and *Construction of a Road in Costa Rica along the San Juan River* joint proceedings, and appended separate opinions.[58] The same situation occurred in the case of judge Hsu Mo, who voted against one of the two subparagraphs constituting the *dispositif* of the judgment in the *Fisheries* case.[59] In addition, judge Vladlen Vereshchetin and former president Peter Tomka voted against certain subparagraphs to the decisions on the merits of the cases concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* and *Maritime Dispute (Peru v. Chile)*, respectively,[60] and appended declarations to these judgments.[61] All these instances demonstrate that when a judge disagrees with a judgment or advisory opinion, she or he not always call the individual opinion a dissenting opinion. The situation at the IACtHR is different. When a member of the Inter-American Court of Human Rights does not vote in favour of certain subparagraphs, she or he can also call the opinion a partial dissenting opinion.[62] In the case of the International Court of Justice no such practice exists.[63]

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57 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment of 19 September 2012, [2012] ICJ Rep. 624, (Dissenting Opinion, Judge Owada), p. 721.

58 *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, [2015] ICJ Rep. 665, p. 741, para. 229 (7).

59 He "agree[d] with the finding of the Court that the method of straight lines used in the Norwegian Royal Decree of July 12th, 1935, for the delimitation of the fisheries zone, is not contrary to international law. But that I am unable to share the view of the Court that all the straight base-lines fixed by that Decree are in conformity with the principles of international law." *Cf. Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116, (Separate Opinion, Judge Hsu Mo), p. 154. See also, *Acevedo Jaramillo et al v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 7, 2006. Series C No. 144 (Separate Opinion, Judge Medina Quiroga).

60 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, [2001] ICJ Rep. 40, p. 117, para. 252(4); *Maritime Dispute (Peru v. Chile)*, Judgment of 27 January 2014, [2014] ICJ Rep. 3, p. 72, para. 198(3).

61 An additional example is provided by former President Guillaume, who has documented that in the merits decision in the case concerning *Right of Passage over Indian Territory*, judges Basdevant and Badawi Pasha appended declarations. *Cf.* Gilbert Guillaume, 'Les Déclarations Jointes aux Décisions de la Cour Internationale de Justice', in Calixto A. Armas Barea *et al* (eds.), *Liber Amicorum 'In Memoriam' of José María Ruda* (Kluwer Law International 2000), 421, 425.

62 See, *e.g.*, *Case of Human Rights Defender et al v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 28, 2014. Series C No. 283, (Joint Partially Dissenting Opinion, Judges Caldas and Ferrer MacGregor).

63 In fact, there is only one instance in which this situation has occurred, namely, the opinion appended by judge *ad hoc* Orrego Vicuña. *Cf.* Juan J. Quintana, *supra* note 54, 599.

A reason that may explain why ICJ judges do not decide to give to their individual opinions the same name in these kinds of situations, may be found in the fact that, in the case of a partial or total disagreement with the majority judgment, a judge may not want to be seen as someone who disagrees globally with the judgment. A dissenting opinion has that effect, and in consequence the judge sometimes prefers to call her or his opinions either as separate opinion or a declaration, instead of a dissenting opinion.

With respect to instances in which two submissions are addressed in one subparagraph, the *Oil Platform* case constitutes a relevant example.[64] In its judgment on the merits of this case, the majority addressed two submissions in the first subparagraph of the *dispositif*. Some judges of the ICJ agreed with the decision of the majority with regard only to one of these submissions. Interestingly, only two of these judges (Awn Al-Khasawneh and Nabil Elaraby) voted against that subparagraph, while the others (Rosalyn Higgins, Gonzalo Parra-Aranguren, Thomas Buergenthal, Hisashi Owada, Bruno Simma and judge *ad hoc* François Rigaux) voted in favour despite their partial disagreement. Judge Awn Al-Khasawneh explained his vote by noting that,

> "[i]t is unusual from the point of view of established drafting technique and unfortunate from that of logical coherence that the *dispositif* of the present Judgment amalgamates in a single paragraph (…) two separate findings that do not depend on each other for their validity and soundness and hence leaves us with no choice but to accept the paragraph as a whole or to reject it. (…) I have no choice but to vote against the paragraph as a whole, for whilst I concur in principle with the first finding."[65]

For its part, one of the partially dissenting judges who voted in favour of the subparagraph, Bruno Simma, explained his vote by noting that,

> "I have vote in favour of the first part of the dispositif of the present Judgment with great hesitation. In fact, I see myself in a position to concur – in principle – with the Court's treatment of only one of the two issues dealt with there (…) the reason why I have [voted in favour of the subparagraph] of the *dispositif*, (…) lies in a consideration of Realpolitik: I welcome that the Court has taken the opportunity, offered by United States reliance on Article XX of the 1955 Treaty, to state

64 An additional instance is to be found in the case concerning the Gabčíkovo-Nagymaros Project. Judge Oda noted in his dissenting opinions that "I have also voted against operative subparagraph 2D (para. 155). I have done so because the request made by myself and other judges to separate this paragraph into two so that it could be voted on as two separate issues was simply reject for a reason which I do not understand. I have therefore had to vote against this paragraph as a whole, although I had wanted to support the first part of it." *Cf. Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Merits, Judgment of 25 September 1997, [1997] ICJ Rep. 7, (Dissenting Opinion, Judge Oda), p. 153, para. 1.

65 *Oil Platforms (Iran v. United States)*, Merits, Judgment of 6 November 2003, [2003] ICJ Rep. 161, (Dissenting Opinion, Judge Al-Khasawneh), p. 266, para. 2.

> its view on the legal limits on the use of force at a moment when these limits find themselves under the greater stress."[66]

While the two judges that voted against the subparagraph (Awn Al-Khasawneh and Nabil Elaraby) appended dissenting opinions, the judges who voted in favour despite their partial disagreement appended separate opinions. This is an important aspect since the opinions from this last group or judges explain the reasons of their dissent with part of the subparagraph. Nonetheless, if the vote from each of these judges and their decision to call their opinions as separate were taken into account, these opinions could not be part of the analysis of this dissertation when they in fact address a disagreement with the majority decision.

In consequence of all the above, the criteria for the determination of the name of the opinion are not in keeping with practice and cannot therefore be considered as the concept that encapsulates the essence of what constitutes a dissenting opinion.

Hence, this dissertation will follow a material (*i.e.* based on its content) rather than a formal or nominal approach, with regard to the concept of dissenting opinion. Neither the manner a judge calls his opinion nor the fact that he has voted (in whole or in part) against the operative part of the judgment, are decisive factors. This is why, for the purposes of this dissertation, the criterion for the determination of the individual opinions amounting to a dissent will not be based on the fact that a judge has voted (in whole or in part) against the operative part of the judgment.

The ICJ and the IACtHR have both noted, in the context of requests for the interpretation of judgments, that the reasons leading to the *dispositif* are inseparable to it.[67] Consequently it is suggested that a judge who, although supporting the majority's view in its operative part, bases her or his decision on different grounds and, moreover, disproves the majority reasons on which the decision is based, is actually appending a dissenting opinion.[68] Notably, this concept of dissent has been used in other studies

66 Ibid, (Separate Opinion, Judge Simma), pp. 324 – 325.

67 *Cf. Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the* Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand)*, *supra* note 31, p. 296, para. 34; *Espinoza Gonzáles v. Peru*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2015. Series C No. 295, para. 11.

68 An example of this instance can be found in the dissenting opinions appended to the decision on the merits in the *Fisheries Jurisdiction* case. *Cf*. Mita Manouvel, *Les Opinions Séparées à la Cour Internationale: Un Instrument de Contrôle du droit international prétorien par les États* (L'Harmattan 2005), 110.

on the subject,[69] and it is considered as the correct one for the purposes of this dissertation since, broadly speaking, it encapsulates the *raison d'être* of a dissenting opinion, namely, a disagreement with the majority judgment.

In addition, it should be noted that the analysis to be made in this dissertation will comprise all dissenting opinions appended to both judgments as well as advisory opinions.[70] The reason for conducting an analysis on the dissents with regard to the contentious as well as advisory jurisdictions of these international courts is based on the fact that, it is argued that no substantial difference exists between what international courts and tribunals vested with these both types of jurisdiction are allowed to do when settling a dispute or giving an advisory opinion.[71] Even when, from a formal perspective important differences exist between these two types of jurisdiction,[72] the function of these international courts is to make findings on law with regard to a dispute or legal question that has been submitted

69 Alan Paterson has indicated that a dissenting opinion is "a reasoned judgment which disagrees with the outcome to an appeal which is supported by the majority of the judges hearing the case. However, although the overwhelming majority of dissents fall into this category, in this work will include also judgments which agree on the outcome favoured by the majority but whose reasoning is radically different from that of the majority." *Cf*. Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013), 12. Similarly, for the justice of the Supreme Court of the United States Antonin Scalia a dissenting opinion is any opinion that disagrees with the reasoning of the court; they can therefore sometimes reach the same disposition as the majority. *Cf*. Antonin Scalia, 'The Dissenting Opinion', (1994) 29 *Journal of the Supreme Court History*, 33.

70 One must not lose sight, however, of the fact that even if the presence of dissenting opinions is essential in ascertaining their role and function, their absence and what they do not say is also important in that regard. *Cf*. Bernard H. Oxman, 'Separate and Dissenting Opinions and Their Absence: A Window on Decision-Making in the Tribunal', in Harry N. Scheiber *et al* (eds.) *Regions, Institutions and the Law of the Sea: Studies in Ocean Governance* (Martinus Nijhoff Publishers 2013), 47, 51.

71 For instance, some scholars have indicated that the International Court's advisory jurisdiction is important in the settlement of disputes, as an instrument of preventive diplomacy. *Cf*. Marti Koskenniemi, 'Advisory Opinions of the International Court of Justice as an instrument of Preventive Diplomacy', in Najeeb Al-Nauimi *et al* (eds.) *International Legal Issues Arising under the United Nations Decade of International Law* (Martinus Nijhoff Publishers 1995), 599 – 619.

72 Sir Christopher Greenwood, current judge at the International Court, has indicated that the differences between these two types of jurisdiction comprise the fact that (i) contentious cases take place between the states parties to a dispute, whereas the advisory jurisdiction can only be invoked the Security Council, General Assembly and other UN organs or specialised agencies and there are no parties in the sense in which the term is used in contentious proceedings; and (ii) that while the judgments of the International Court are binding, no provision of the its Statute imposes an obligation of compliance with an advisory opinion. *Cf*. Peter Tomka, 'The Rule of Law and the Role of the International Court of Justice in World Affairs', *Inaugural Hilding Eek Memorial Lecture at the Stockholm Centre for International Law and Justice*. Downloaded at < http://www.icj-cij.org/presscom/files/9/17849.pdf>; Christopher Greenwood, 'Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice', in Giorgio Gaja *et al* (eds.) *Enhancing the Rule of Law through the International Court of Justice* (Martinus Nijhoff Publishers 2014), 63.

to them. Consequently, it is submitted that no real differences exist between these two types of jurisdiction.[73] Based on this claim, this dissertation will analyse the decisions rendered in both types of jurisdiction, also with a view of analysing whether differences exists between them in the context of the exercise of the right to append dissenting opinions.

Likewise (and with regard to the International Court of Justice), it should also be indicated that not all of the judgments that it has rendered (and where dissenting opinions have been appended) will be analysed for the purposes of the present dissertation. The ICJ has for instance rendered some of its decisions on requests for permission to intervene (under article 62 of its Statute) in the form of an order[74] and others in the form of a judgment.[75] No known reason exists as to why the International Court of Justice has preferred an order over a judgment (and vice versa) in certain cases. It has therefore been decided not to include any of the judgments on requests for permission to intervene. Moreover, their inclusion would also inescapably lead to justify why orders in a specific incidental proceeding are included in this dissertation, while orders in other incidental proceedings (provisional measures and counter-measures) are excluded. In consequence, and bearing in mind the research aim of the dissertation, in the case of the International Court of Justice only those dissents appended to judgments on preliminary objections and merits, as well as those on derivative proceedings (interpretation and revision of judgments) will be taken into account for the analysis.

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73 In this regard, as noted by Edvard Hambro, "since the cases before the Court in advisory proceedings should be treated with the same judicial guarantees as contentious cases… the result of this – as far as the jurisprudence of the Court is concerned – is that the legal reasons behind the Opinions carry the same weight and are invested with the same high authority as in the case of judgments." *Cf.* Edvard Hambro, 'The Authority of the Advisory Opinions of the International Court of Justice', (1954) 3 *International and Comparative Law Quarterly*, 5.

74 *Nuclear Tests Case (Australia v. France)*, Application by Fiji for Permission to Intervene, Order of 22 July 1973, [1973] ICJ Rep. 320; *Nuclear Tests Case (New Zealand v. France)*, Application by Fiji for Permission to Intervene, Order of 12 July 1973, [1973] ICJ Rep. 324; *Nuclear Tests Case (Australia v. France)*, Application by Fiji for Permission to Intervene, Order of 20 December 1974, [1974] ICJ Rep. 530; *Nuclear Tests Case (New Zealand v. France)*, Application by Fiji for Permission to Intervene, Order of 20 December 1974, [1974] ICJ Rep. 534; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Application by Equatorial Guinea for Permission to Intervene, Order of 21 October 1999, [1999] ICJ Rep. 1029; *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 30.

75 *Continental Shelf (Tunisia/Lybian Arab Jamahiriya)*, Application by Malta for Permission to Intervene, Judgment of 14 April 1981, [1981] ICJ Rep. 3; *Continental Shelf (Lybian Arab Jamahiriya/Malta)*, Application by Italy for Permission to Intervene, Judgment of 21 March 1984, [1984] ICJ Rep. 3; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment of 13 September 1990, [1990] ICJ Rep. 92; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Costa Rica for Permission to Intervene, Judgment of 4 May 2011, [2011] ICJ Rep. 348; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, Judgment of 4 May 2011, [2011] ICJ Rep. 420.

4. Research methodology

For the purpose of conducting the research aim and answering the concrete research questions guiding it, the dissertation will mainly use different primary and secondary text-based sources. With respect to the origins of dissenting opinions in domestic law, secondary sources are the most important. Scholarly works mainly from the common law system are relevant with regard to the origins of dissenting opinions. In the case of the arguments advanced in favour and against dissenting opinions, the scholarly works from academics belonging to the continental system are also relevant, more specifically from countries such as France and Italy where dissenting opinions are not allowed. As for the analysis on the possible transposition of discussions to the international level, the scholarly literature in international law is relevant for the determination of the extent to which the discussions in domestic law are relevant for international law. This scholarly literature (that also includes the views from some judges in individual opinions) refers to that addressing the differences between domestic and international law, as well as the aspects that should be considered for such a transposition.

The part of the dissertation that analyses the differences and similarities in the mandate, jurisdictional and institutional design of the ICJ and the IACtHR, requires a close look at constitutive instruments and rules of procedure from both courts, as well as to their case law for examining the content and scope of their mandate, jurisdictional and institutional design. The information contained in these sources is complemented with secondary sources, mainly scholarly works. They are relevant because they either critically discuss or complement some of the views expressed by both courts in their case law. In addition, they are also relevant to fully understand some parts from aspects such as the deliberation and drafting of judgments, where the views and recollections from 'inside the court' clarify aspects that primary sources briefly mention. Based on all these sources, the analysis on the differences and similarities in the mandate, jurisdictional and institutional design will result in some questions that will be useful for the analysis regarding whether they may result in differences in the exercise of the right to append dissenting opinions.

Finally, and with a view to answering to the questions that will be used to inform the exercise of the right to dissent at both courts, all the dissenting opinions appended to their judgments were read and analysed. Some of these dissenting opinions were selected with a view to presenting them as concrete examples that clearly illustrate how judges exercise their right to dissent. Secondary sources have also informed this selection. More specifically, scholarly works that analyse a specific judgment are important, since they critically analyse the judgment in a broad picture and therefore help to understand why judges may have dissented.

5. Structure of the dissertation

The analysis to be conducted in this dissertation, as this was explained in the previous section on the statement of the problem and research aim, will be divided in two main parts.

Part I seeks to provide the general framework of dissenting opinions in international adjudication. For this purpose, Part I will be divided into two chapters. A discussion concerning dissenting opinions in domestic jurisdictions, will be provided in Chapter 1. The chapter addresses three questions. First, what are the origins of dissenting opinions in domestic jurisdictions? Second, what were the arguments advanced in favour and against dissenting opinions in domestic jurisdictions? Third, whether and to what extent do the reasons for the existence of dissenting opinions in domestic law have merit for analysing dissenting opinions in international adjudication? Further, Chapter 2 analyses the exercise of the right to append dissenting opinions in international adjudication. The chapter addresses two questions. First, what are the origins of dissenting opinions in international adjudication? Second, how have the arguments advanced in favour and against dissenting opinions in international adjudication, influenced their institutional and procedural design in international courts and tribunals?

Part II of the dissertation focuses on the differences and similarities in mandate, jurisdictional and institutional design of the International Court of Justice and the Inter-American Court of Human Rights and the possibility of the said differences and similarities resulting in differences in the exercise of the right to append dissenting opinions. For this purpose, Part II will also be divided in two chapters. Chapter 3 focuses on the differences and similarities in mandate, jurisdictional and institutional design of the ICJ and the IACtHR. Subsequently, Chapter 4 analyses how the said differences and similarities may result in differences and similarities in the exercise of the right to append dissenting opinions.

Finally, the conclusions will offer some final considerations with regard to the differences in the exercise of the right to append dissenting opinions at the International Court of Justice and the Inter-American Court of Human Rights. Based on these considerations, it will also discuss whether any more generic findings may be extrapolated from this study regarding the exercise of the right to dissent and how this is informed by different institutional settings. In other words, it will be discussed whether and to what extent it is possible to speak about a connection between the exercise of the right to append dissenting opinions and the institutional settings, at international court and tribunals in general.

Part I:

Framework on the Exercise of the Right to Append Dissenting Opinions

Introduction

This part aims to offer a contextual framework on the exercise of the right to append dissenting opinions. It contains two chapters. Chapter 1 sets the stage by going back to debates on dissenting opinions at the domestic level. It addresses the origins of dissenting opinions at this level, analyses the arguments advanced in favour and against dissenting opinions and it also interrogates which of these 'domestic arguments' have merit for analysing dissenting opinions at the international level. In this sense, it specifically examines structural differences between domestic and international law that might prevent transposition of discussions at the domestic level to the international level. For its part, Chapter 2 zeroes in on the introduction of dissenting opinions in international adjudication. It addresses the origins of dissenting opinions at this level, it analyses (building on the analysis of Chapter1) the arguments advanced in favour and against dissenting opinions, and it examines how these arguments have influenced the institutional and procedural design of the exercise of the right to append dissenting opinions at international courts and tribunals.

The reason for looking at domestic law lies in the fact that, during the discussions that took place at the Committee of Jurists ("the Advisory Committee"), entrusted in 1920 with the task of drafting the statute of the Permanent Court of International Justice ("the Permanent Court" or "the PCIJ"), the issue regarding the appropriateness of dissenting opinions centred on the views expressed in both the common law and civil law systems in this regard. In a few words, the discussion on the permissibility *vel non* of the exercise of the right to append dissenting opinions took account of the views expressed at the domestic level. Consequently, the origins of dissenting opinions in international adjudication seem to find its roots in municipal law; they are not therefore a creation of international law.

In this context, the possibility for judges to append dissenting opinions is a right that one can say has emerged in domestic jurisdictions. It has subsequently been transplanted to the international plane. In consequence, the contextual framework on the exercise of the right to append dissenting opinions, inescapably leads to the need to consider the views advanced at the domestic level, as a starting point.

Whereas the common law system allows for dissenting (as well as concurring) judges to append their individual opinions, civil law is classically associated with the position that the formalization of dissenting views into dissenting opinions is not permitted under any circumstance whatsoever. In the latter, courts should speak with one voice, deliberations within the courtroom must remain secret and the authority of the *res judicata* of decisions should be preserved.[1] In view of these differences between both

1 Yannick Lécuyer, "Le Secret Du Délibéré les Opinions Séparées et la Transparence", (2004) 57 *Revue Trimestrielle des Droits de l'Homme*, 197, 200.

legal systems, with respect to the exercise of the right to append dissenting opinions, it is argued that judicial dissent and public disagreement in last resort multi-member courts and tribunals is a regular feature in common law.[2]

In this order of ideas, from the final decision taken in the adoption of the Statute of the Permanent Court, one can say that the said divergence between both systems was decided in favour of the common law;[3] the inclusion of dissenting opinions in international adjudication therefore appears as a triumph of the common law over the civil law system. In this context, an analysis on the role and function of dissenting opinions in the common law system, as well as of the arguments in favour and against them, seem to be required for the purpose of determining a framework of dissenting opinions in international adjudication.[4] This does not mean, however, that the civil law system is irrelevant in this regard. The international adjudicatory system (and in international law in general) has a mixed heritage.[5] The international adjudicatory system is based, in some of its aspects, on the civil law system (*e.g.* the secrecy of deliberations). It is in fact by means of these aspects that it is possible to explain why in the civil law system dissenting opinions are not permitted. These reasons cannot therefore be disregarded. In consequence both the views and practice of the common law and civil systems are therefore relevant when setting the exercise of the right to append dissenting opinions in international adjudication.

It is against this background, that this Part will address in its Chapter 1 the relevance (for international law) of the arguments against and in favour (*i.e.* the permissibility) of dissenting opinions that have been advanced in municipal law. The research question that this chapter attempts to answer refers as to,

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2 Samuel A. Peterson, 'Dissent in American Courts', (1981) 43 *The Journal of Politics*, 412, 413; François Rigaux, "Opinions Dissidentes, Opinions Séparées et Opinions Convergentes: l'Unanimité dans l'Exercice de la Fonction Judiciaire", in Gilbert Closset Marchal *et al* (eds.) *Mélanges Jacques van Compernolle* (Bruylant 2004), 575; Michael D. Kirby, "Judicial Dissent – Common Law and Civil Law Traditions", (2007) 123 *Law Quarterly Review*, 329.

3 It must be noted, however, that an important number of countries belonging to the civil law system, notably France and Italy being the exception, allow nowadays for the publication of dissenting opinions in courts of last resort. *Cf.* Juha Raitio, *The Principle of Legal Certainty in EC Law* (Springer 2003), 315. Consequently, this conclusion as to the triumph of the common law over the civil law system, should therefore be put in context, *i.e.* that it refers to the moment when the Committee of Jurists decided to allow judges to record the fact of their dissent, as by that time most of the countries of the civil law system did not allow for dissenting opinions.

4 *Cf.* Angelo Piero Sereni, 'Les Opinions Individuelles et Dissidentes des Juges des Tribunaux Internationaux', (1964) 68 *Revue Générale de Droit International Public*, 819, 824.

5 *Cf.* Colin B. Picker, "International Law's Mixed Common Heritage: A Common/Civil Law Jurisdiction", (2008) 41 *Vanderbilt Journal of Transnational Law*, 1083.

What dissenting opinions at the domestic level can teach us about dissenting opinions at the international level, and whether and to what extent the differences between domestic and international law, pose a bar to transposing discussions at the domestic level on dissenting opinions, to the international level.

Besides, it must also be noted that notwithstanding the reference to domestic jurisdictions and their use of dissenting opinions, attention should also be paid to international law itself, and its particularities. In this regard, the reasons that the drafters (as well as the bodies that subsequently discussed and modified) the Statute of the Permanent Court had in mind when accepting the exercise of this right for judges, as well the drafters of the statutes of other international courts and tribunals, are relevant for the determination of the contextual framework of the exercise of the right to append dissenting opinions. It is in fact in the light of the origins of dissenting opinions in international law, that the arguments in favour and against them can be unravelled. Further, it is by analysing these arguments that it is possible also possible to analyse how they have influenced the institutional and procedural design of the exercise of the right to append dissenting opinions in international courts and tribunals. In consequence, Chapter 2 of this Part will address the research question concerning,

how the arguments advanced in favour and against dissenting opinions at the international level have influenced the institutional and procedural design of the exercise of the right to append dissenting opinions in international courts and tribunals.

Finally, in the light of the research questions guiding the two chapters and the aim of this Part (*i.e.* to offer a contextual framework of dissenting opinions), it will be concluded with the presentation of a brief conclusion in which some aspects on the exercise of the right to dissent at the domestic and international level, will be highlighted.

1 The exercise of the right to dissent in domestic jurisdictions

1.1. The sin of analogy from municipal law

As noted in the introduction to this Part, dissenting opinions are not an institution created by international law. Reference to the main systems of law that exist at the domestic level may thus be useful as a first stepping stone for analysis of dissenting opinions in international law.

A reference to domestic law must, however, take account of statements such as from Joseph Weiler, who has noted that "[a]nalogies to domestic law are impermissible, though most of us are habitual sinners in this respect",[1] or from Mary Ellen O'Connell, who has indicated that an analogy to domestic law is false.[2] These observations regarding the impermissibility and falseness of the plain use of analogies are based on the fact that, important differences exist between both legal orders and they must, at the very least, be taken into account when elements or discussions from one legal order are to be used to build upon in the other.[3] For instance, in relation to the concept of *the rule of law*, Robert McCorquodale observed that two are the most fundamental aspects to be taken into account, when pretending to apply the concept of the rule of law from national systems to international law. On the one hand, there is not just one definition of the concept. The common law tradition indicates that three are the main aspects of the concept, namely, the absolute supremacy of the law over government power, equality before the law and enforcement before the courts. The civil law tradition focuses less on the judicial process and more on the nature of the state in the form of the law-based state. On the other hand, the basis for the concept cannot be found in domestic law since international law lacks a binding court, an executive

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1 Joseph H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 547, 550.

2 Mary E. O'Connell, 'Enforcement and the Success of International Environmental Law', (1995) 5 *Indian Journal of Global Legal Studies*, 47, 50.

3 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Lawbook Exchange1927), 84 – 85; Mohamed Shahabuddeen, 'Municipal Law Reasoning in International Law', in in Vaughan Lowe *et al* (eds.) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Martinus Nijhoff Publishers 1996), 90, 91; Marti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', (2005) 16 *European Journal of International Law*, 113, 122; Thomas Poole, 'Sovereign Indignities: International Law as Public Law', (2011) 22 *European Journal of International Law*, 351; Ciarán Burke, 'Moving while Standing Still: Law, Politics and Hard Cases', in Nikolas M. Rajkovic *et al* (eds.) *The Power of Legality: Practices of International Law and Politics* (Cambridge University Press 2016), 125, 146.

and legislative branch do not exist, there is no separation of powers and that there is the sovereignty of states with which to contend.[4]

Specifically in relation to adjudication and the role of courts Mohamed Shahabuddeen has also elaborated upon differences in the structure of international law and municipal law, in an academic writing while he was a member of the International Court of Justice. He has observed that not every relation between states has its counterpart in municipal law. In this regard, he has also highlighted that the absence of a universally compulsory judicial tribunal to determine what the law is and the existence of a central authority to enforce it.[5] As he put it,

> "to overestimate the relevance of private law analogies is to overlook significance differences between the legal framework of national societies and that of the international community, as well as differences between the jurisdictional basis and powers of the Court and those of national courts".[6]

The consideration of municipal law as a relevant source, from where to borrow reasons and insights, has traditionally been considered with suspicion.[7] Consequently, this may also have consequences for the use of the discussions on dissenting opinions in municipal law, for the purpose of analysing dissenting opinions in international adjudication.

Nonetheless, the existing differences between international law and municipal law, does not turn (as suggested by Joseph Weiler) every use of the latter into a sin. Only when an analogy is made between municipal and international law, without taking into account their differences, is it possible to assert the commission of a sin. One can therefore say that, it is only when "importing [municipal] law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules"[8] as such, that one has committed a sin. Conversely, when acting with great caution and bearing in mind the existing differences, reference to municipal systems may certainly be useful.

In that order of ideas, the genesis, *raison d'être*, structure and use of dissenting opinions in municipal law is relevant for analysing dissenting opinions in international law, as "features or terminology which are reminiscent of the rules and institutions of [municipal] law as an indication

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4 *Cf.* Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?", (2016) 65 *International and Comparative Law Quarterly*, 277, 279 – 289. See also, *Certain Phosphates Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 240, (Dissenting Opinion, Judge Schwebel), 330.

5 Mohamed Shahabuddeen, *'Municipal Law Reasoning in International Law'*, in in Vaughan Lowe et al (eds.) Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings (Martinus Nijhoff Publishers 1996), p. 92.

6 *Certain Phosphates Lands in Nauru (Nauru v. Australia)*, *supra* note 4, (Separate Opinion, Judge Shahabuddeen), p. 289.

7 André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011), 274.

8 *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, [1950] ICJ Rep 128, (Separate Opinion, Judge McNair), p. 148.

of policy and principles rather than as directly importing these rules and institutions."[9]

Some judges of the International Court of Justice have made use of municipal law, in their individual opinions, for the analysis of the case submitted to it.[10] They have moreover made use of it, taking account of the approach mentioned in the paragraph above. Two recent examples are worth mentioning in this regard. In the first place, the analysis of judge Bruno Simma on whether the *exceptio non adimpleti contractus* forms part of international law. He noted in the separate opinion that he appended to the judgment in the case concerning *Application of the Interim Accord of 13 September 1995* that,

> "[t]he problem that we face [on the transferability of such a concept developed *foro domestico* to international plane] is that in fully developed national legal systems the functional synallagma will operate under the control of the courts, that it, at least, such control will always be available (…) What we encounter at the level of international law, however, will all too often be instances of non-performance of treaty obligations accompanied by invocation of our principle, but without availability of recourse to impartial adjudication of the legality of the measures."[11]

A more recent example regarding an approach of this kind, can be found in the separate opinion appended by the former judge and president of the ICJ, Hisashi Owada, to one of most recent orders on the indication of provisional measures. When referring to the standard adopted by the ICJ in requests for the indication of provisional measures, concerning the need that the rights sought to be protected must be at least plausible, he noted that,

> "[w]hile a facile analogy of this legal institution with similar institutions in private law should naturally be carefully avoided, given that the specific purposes for which a legal institution similar in name could be considerably different, it is important to recognize that the *rationale* for this institution introduced in the Statute of the Court finds resonance in similar institutions stipulated in a number of domestic legal systems."[12]

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9 Id.

10 Judge Hersch Lauterpacht has for instance taken account of municipal law for analysing whether guardianship is an institution from private law. He noted that "[a]n examination of the main systems of municipal law in the matter of guardianship does not corroborate the view that is a merely family institution of a private law nature." Cf. *Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, [1958] ICJ Rep. 55, (Separate Opinion, Judge Lauterpacht), p. 84.

11 *Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Macedonia v. Greece)*, Merits, Judgment of 5 December 2011, [2011] ICJ Rep. 644, (Separate Opinion, Judge Simma), p. 700, para. 13.

12 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination (Ukraine v. Russian Federation)*, Request for the Indication of Provisional Measures, Order of 19 April 2017, [2017] ICJ Rep. 104, (Separate Opinion, Judge Owada), p. 1, para. 4.

It precisely in this sense, and based on the idea of resonance, that municipal law is relevant for the purposes of this dissertation, *i.e.* since it amounts to an important indication of policy and principles to be taken into account, as far it does not contradict the structure of international law. Consequently and for the purposes of this dissertation, the discussions on dissenting opinions in municipal law will be used as a source of inspiration that takes account of the structural differences between the municipal and international order, thus in full awareness that these differences might on occasion prevent the transposition of certain arguments to the international level.[13]

In fact, the most relevant differences between domestic and international law are (i) the non-compulsory nature and possibility for states to opt out from the jurisdiction of an international court or tribunal; (ii) the mandatory use of precedents in some domestic jurisdictions; (iii) the fact that some international courts and tribunals exercise subsidiary jurisdiction; (iv) different rules and dynamics regarding compliance and enforcement of decisions; (v) the composition of the bench that in some international courts and tribunals includes a national element but is otherwise not part of an overarching structured system.

1.2. The relevance of the approaches of civil or continental law systems on dissenting opinions

Further, in this attempt for looking at municipal law, an additional question arises concerning the relevance of the views from the civil or continental law system and not only from the common law system. This is so, since this legal system has classically been known for rejecting (or limiting to the fullest extent possible) the use of any kind of individual opinions. To put it differently, dissenting opinions have been considered as a regular feature in the common law systems.[14] Consequently, it is important to question if only the views from the common law system are relevant for the purposes of the present Chapter.

In this regard, it should be noted, as indicated elsewhere, that the "differences between Anglo-Saxon and continental attitudes should [not] simply be ignored… [these] differences in perspective… continue to engender

13 For instance, the role and function of dissents in the common law system might be broader in scope. In fact, in a recent study eight hypotheses have been presented as to why judges participate more often in opinion writing than others. Most of these hypotheses are not relevant for determining the role and function of dissenting opinions in international adjudication, as the said hypotheses are presented in the context of the United States legal system. *Cf.* Saul Brenner & Eric S. Heberlig, '"In My Opinion…": Justices Opinion Writing in the U.S. Supreme Court, 1946 – 1997', (2002) 83 *Social Science Quarterly*, 762, 763 – 765.

14 Rainer Hoffmann & Tilmann Laubner, 'Article 57', in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary (2nd edn, Oxford University Press 2012), 1384.

lively and interesting discussions and international law is richer because of it".[15] Moreover, the international adjudicatory system is a mix of both, the common and civil law systems.[16] Consequently, it is also necessary to take into account the views on the matter asserted in the latter, since it might be in the light of the views asserted in the civil law system, that it is possible to explain why an aspect from dissents in the common law system, has not been transplanted to the international plane.

By the same token, an additional and more foundational argument exists as to the need for considering the views from both municipal systems of law and this is that dissenting opinions in general (*i.e.* in both municipal and international law) are inextricably linked (from a positivistic perspective) to the very concept and nature of law in general and the role of the judge.

Both the civil law and common law systems have different approaches (from a positivistic perspective) with regard to how law is defined and what is the role of the judiciary when a dispute is submitted to it.[17] On the one hand, the civil law system is considered as a code-based system, where instead of listing special rules for particular situations a body of general principles is systematized to regulate all situations in the society.[18] The role of the judge is to act as the mouthpiece of the law (*bouche de la loi*).[19] In other words, he is a passive representative of the law-maker who mechanically applies the law[20] and therefore performs uncreative functions.[21] Nevertheless, when applying the law the judge sometimes needs to interpret it and throughout this process he might extend its scope and fill gaps on points where the written law is silent.[22] The law lays down principles and does not get into the details that may arise in each circumstance; those details must be addressed and filled by the judge.[23] She or he must, however, use only

15 James Crawford and Allain Pellet, 'Anglo Saxon and Continental Approaches to Pleading before the ICJ', in Ian Buffard *et al* (eds.) *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008), 931, 967.

16 International law has for instance adopted the approach of the civil law system, with regard to the burden of persuasion. *Cf.* Eduardo Valencia-Ospina, 'Evidence before the International Court of Justice', (1999) 1 *International Law Forum du Droit International*, 202, 203 – 204.

17 See, Francis A. Mann, 'Fusion of the Legal Profession?', (1977) 93 *The Law Quarterly Review*, 367.

18 Joseph Dainow, 'The Civil Law and the Common Law: Some Points of Comparison', (1967) 15 *American Journal of Comparative Law*, 419, 424.

19 Charles de S., Baron de Montesquieu, *The Spirit of the Laws* (2001), 180.

20 Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Martinus Nijhoff Publishers 2014), 197.

21 John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2nd edn, Stanford University Press 2007), 84.

22 Joseph Dainow, *supra* note 18, 426.

23 Bernard Rudden, 'Courts and Codes in England, France and Soviet Russia', (1973) 48 *Tulane Law Review*, 1010, 1011.

specific techniques when filling gaps.[24] On the other hand, the common law system finds its basis in judicial decisions and the role of the judge is to formulate the principles under which the case at hand should be decided. He has a creative function whenever a rule has not already been formulated in a previous decision.[25] Consequently, he is a more influential figure in the social and political life of the country and has even been labelled as 'cultural hero'.[26] In common law written law has different standing. Even in the presence of a legislative text, the judge seeks to restrict its scope of applicability.[27]

All in all, the difference between both systems can be summarised in the following terms,

> "[a] civil law system differs from a common law system much as rationalism differs from empiricism or deduction from induction. The civilian naturally reasons from principles to instances, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, "What should we do this time?" and the second asking aloud in the same situation, "What did que do last time?" The civilian thinks in terms of rights and duties, the common lawyer in terms of remedies. The civilian is chiefly concerned with the policy and rationale of a rule of law, the common lawyer with its pedigree. The instinct of the civilian is to systematize. The working rule of the common lawyer is *solvitur ambulando*."[28]

Notwithstanding the differences noted above, both systems of law share an aspect that lays at the heart of the very nature of the law, namely, its vagueness and incompleteness. This is moreover an aspect that is also present in international law, to a much greater extent than domestic law. Law is not able to regulate every single aspect in the public and private domain. Hence, in both systems (as was mentioned in the paragraph above) the law (either by means of a written law or a judicial decision) needs to be clarified or stated due to the existence of grey areas. In multi-member courts, and due to the fact that everybody thinks differently, it is sometimes impossible to obtain a unanimous decision when law itself is vague an open to various interpretations. In consequence, the fact that a judge may dissent from a

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24 Roberto G. MacLean, 'Judicial Discretion in the Civil Law', (1982) 43 *Louisiana Law Review* 45, 52 – 53.

25 Jean Georges Sauveplanne, *Codified and Judge Made Law: The Role of Courts and Legislators in Civil and Common Law Systems* (North-Holland Publishing 1982), 102.

26 Seon Bong Yu, 'The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries', (1999) 2 *International Area Studies Review*, 35, 37.

27 Joseph Dainow, 'The Constitutional and Judicial Organization of France and Germany and Some Comparisons of the Civil Law and Common Law Systems', (1961) 37 *Indiana Law Journal*, 1, 45.

28 Thomas Mackay Cooper, 'The Common and the Civil Law – A Scot's View", (1950) 63 *Harvard Law Review*, 468, 470 – 471.

judgment (and is sometimes entitled to express his disagreement, either by means of recording the fact of his dissent or expressing his views) is but a natural consequence of the concept of law itself and the role that the judge plays in this regard.

Since the aspects mentioned in the paragraph above, are not exclusive to one system of municipal law (*i.e.* either common or civil law), as they are related to systemic and foundational aspects of law in general, they are therefore aspects that are present in all systems of law. Hence, disagreement between judges is a common feature in both municipal and international law. This therefore also explains why it is not only the arguments in favour of dissenting opinions (*i.e.* the views asserted in the common law system) that are relevant for the research aim of this dissertation. The arguments from the continental system seeking to limit to the fullest extent possible the exercise of the right to dissent, also constitute an important indication of policy and principles for the conceptual framework on dissenting opinions that this Part will offer.

In sum, it is against this background and having in mind the differences between municipal and international law mentioned above (section 1.1), that the views on dissenting opinions asserted in municipal law, are relevant to the international adjudicatory system.

1.3 Origins of dissenting opinions in municipal law

The practice from judges to append individual opinions in general, is a right that has existed (in the case of the countries belonging to the common law system) since the establishment of multi-member judicial institutions.[29] Judges have always therefore been allowed to express their views, notwithstanding the decision adopted by the majority.

In the specific case of the right to append dissenting opinions, it should be pointed out that, the way in which this kind of opinions is nowadays known (*i.e.* as the opinion appended by a judge who has voted against the decision of the majority), is the result of the several variations that the right to append individual opinions has suffered, throughout the history in the common law system (mainly). Consequently, it is not possible to understand the structure and role and function of dissenting opinions, without an understanding as to how decisions were taken (*i.e.* how judges deliberate and the majority decision was drafted), before dissenting opinions as they are known today came to existence in the common law system.

The origins of dissenting opinions in this system of law can be traced back to two different times in history, both of them related to the implementation of a majority judgment, during the tenures of Lord Mansfield

29 Frederic Reynold, *Disagreement and Dissent in Judicial Decision-making* (Wildy, Simmonds & Hill Publishing 2013), xiv.

and Chief Justice Marshall in England and the United States, respectively in 1756 and 1801.

Before the tenures of Lord Mansfield and Chief Justice Marshall, the English and American multi-member courts delivered their decisions *seriatim*, *i.e.* by each judge expressing his individual views on the matter by means of an individual opinion irrespective of the fact that he was with the majority or not.[30] In this construction, there were no deliberations within the court. Each judge was entrusted to write his personal opinion as to how the case should be decided. In order to determine in favour of whom the court had decided, it was necessary to count the number of judges voting in favour of the applicant's or the respondent's case. The reasons from each of the judges were therefore irrelevant for taking the decision. No deliberations at all took place and therefore no collegial responsibility existed for the judges with regard to the decision of the case at hand.

While the roots of this practice remain unclear,[31] claims have been made as regards its function, namely,

> "[the] delivery [of opinions] by each individual judge may be a more accountable method of deciding cases than decisions made in seclusion, because judgments made in the open and without explicit caucus among judges may be less likely to be (or appear to be) infected by corruption or collusion or [in the case of England] the influence of the monarch."[32]

Thus, it was from the outset a consecrated right for judges in the common law system to express their views in an individual opinion to the public.[33] Some authors have even noted that, in the first case decided by the Supreme Court of the United States, namely, *State of Georgia v. Brailsfrod*, the opinion

30 Rory K. Little, 'Reading Justice Brennan: Is There a "Right" to Dissent?', (1999) 50 *Hastings Law Journal*, 683, 688.

31 Andrew Lynch, 'What Makes a Dissent 'Great'?', in Andrew Lynch (ed.) *Great Australian Dissents* (Cambridge University Press 2016), 1, 2. Nonetheless, it has been suggested that the practice of delivering opinions *seriatim* is similar to the law of citations in Roman law. Consequently, it can be said that the former derives from the latter, as well as it has been pointed out that the possibility for a judge to express her or his views has been advanced as the possible basis of this practice of delivering opinions *seriatim*. *Cf.* Joshua M. Austin, 'The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?', (2010) 31 *Northern Illinois University Law Review*, 19, 35 – 36.

32 M. Tood Henderson, 'From Seriatim to Consensus and Back Again: A Theory of Dissent', (2007) *Supreme Court Review*, 283, 290. Additionally, it must be noted that "a difference existed, however, in the practice of seriatim between English and American courts. While in the former it was followed in all but self-evident cases, in the latter all cases were decided following the said practice." *Cf.* Michael Mello, 'Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment', (1995) 22 *Florida State University Law Review*, 591, 609.

33 Bernard Schwartz, *A History of the Supreme Court* (Oxford University Press 1993), 20.

of the first of the justices was a dissent.[34] Nevertheless, by reason of the manner in which decisions were taken, it is not accurate to speak of the existence of a right for judges to append dissenting opinions (as they are known today). This is so, since the determining factor for establishing the decision of the court was the count of heads in favour of the position of the parties. This might lead to the situation in which the reasons of a judge for voting in favour of one of the parties, could be completely different (and even contradictory) from those of his colleagues also voting in favour of the position of the same party. One could not therefore speak of a decision of a majority, if all of the judges have taken different positions. Without a decision in which the majority speaks in one voice, it is not possible to properly speak of a dissenting opinion. Judges were used to write their opinions without paying due regard to the views expressed by the rest of their colleagues. In consequence, they only got to know that their position (and not their reasons) was not part of the "majority" during the reading of the opinions in open court, and even when the rest of their colleagues were not in disagreement with the reasons therein.

This long tradition for courts to deliver their decisions *seriatim* was, however, broken in England and the United States in 1756 and 1801, respectively. In these years Lord Mansfield and Justice Marshall were appointed, in the King's Bench in England and as Chief Justice of the Supreme Court of the United States, respectively. They decided to implement caucus opinions and to prevent those judges not within the "majority" (*i.e.* plain dissenters as well as those that, although agreeing with the majority, did so for different reasons) from appending their reasons for not supporting the court's opinion.[35] In other words, both Lord Mansfield and Justice Marshall decided to stop with the *seriatim* practice and implement a single judgment that must be accepted (without exception) by all members of the court.[36] An important reason existed in both countries for these two judges to introduce deliberations within the courtroom and promote a single judgment that prevented judges from writing separately.

With regard to the change introduced by Lord Mansfield in England, it is believed that the reason behind his decision lies in the exponential growing that trade and commerce were experimenting throughout Europe by that time. It was envisaged that this phenomenon would inescapably lead to disputes between traders and other commercial men. As a

34 *State of Georgia v. Brailsford*, 2 Dall. 402 (1792). *Cf.* Karl M. ZoBell, 'L'Espressione di Giudizi Separati nella Suprema Corte: Storia della Scissione della Decisione Giudiziaria', in Costantino Mortati (ed.) *Le Opinioni Dissenzienti del Giudici Costituzionali ed Internazionali* (Giuffrè 1964), 61, 71.

35 G. Edward White, *The Marshall Court and Cultural Change: 1815 – 1835* (Oxford University Press 1991), 187.

36 Jed Handelsman Shugerman, 'A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court', (2003) 37 *Georgia Law Review*, 893, 911 – 912.

consequence, it was expected that resort to courts would become more frequent to settle all disputes arising from transactions regarding trade and commerce. Nonetheless, in the case of England, a fear existed as to the lack of benefits that this phenomenon would bring to its courts and the subsequent expansionist plans of the English Empire, by virtue of the practice from English courts to deliver their decisions *seriatim*. In fact, some years before being appointed in the King's Bench, Lord Mansfield noted in the *Vallejo v. Wheeler* case that,

> "in all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon. But it is not easy to collect with certainty from a general verdict, or from notes taken at *nisi prius*, what was the true ground of decision; therefore in this, as in all doubtful cases, I wished a case to be made for the opinion of the Court."[37]

Hence, the fact that every judge was entitled to express his opinion entailed a problem. The existence of diverse and sometimes diverse contradictory reasons adduced by each of the judges would render it difficult to build a specific rule or principle for similar cases. The lack of certainty and clarity, as to how certain types of cases would be decided, would therefore make English courts less attractive and less likely to be chosen by businessmen to settle their disputes. In consequence, Lord Mansfield made English courts shift from *seriatim* opinions to the delivery of a single opinion, with a view of providing the certainty and stability needed for commercial transactions.[38]

As for John Marshall, the practice of the Supreme Court of the United States was, before his appointment as Chief Justice, to also deliver its decisions *seriatim*. As it was the case in England, this practice created substantial uncertainty and instability in the law,[39] and it had the concomitant effect of weakening the Supreme Court's authority.[40] In fact, at the time the judiciary was considered as the weakest of the three branches of government.[41] Marshall therefore considered it necessary to turn the judicial branch into a much more powerful institution. The prevailing interpretation of

37 *Cf.* Francis Hildyard, *A Treatise on the Principles of the Law of Marine Insurance* (William Benning 1845), 323 – 324.

38 James Oldham, 'Review: From Blackstone to Bentham: Common Law versus Legislation in Eighteenth-Century Britain', (1991) *Michigan Law Review*, 1637, 1645.

39 David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789 – 1888* (University of Chicago Press 1985), 14.

40 Ibid, 55; Alexander Hamilton *et al*, *The Federalist* (Liberty Fund 1961), 491.

41 Thomas G. Walker, 'Seriatim Opinions', in Kermit L. Hall *et al* (eds.) *The Oxford Companion to the Supreme Court of the United States* (2nd edn, Oxford University Press 2005), 911.

the United States constitution centralized the majority of the power in the federal government. Marshall was against this interpretation and he consequently sought to change it during his tenure.[42] This led Marshall to attempt to follow Lord Mansfield's proposal of having a court unified in its decisions, with a view of increasing the authority of the Supreme Court.[43] For Marshall, this change would increase its authority, since the practice of deciding *seriatim* discouraged confidence and trust in the judiciary.[44]

Nevertheless, the attempts from Lord Mansfield and Justice Marshall of making courts speak in one voice, did not last long. In England, right after Lord Mansfield retired in 1788, Lord Kenyon returned to the practice of deciding cases *seriatim*. This practice still exists nowadays (though law lords' opinions show a gradual shift towards a greater use of the equivalent of an opinion of the court).[45] Lord Kenyon preferred to decide cases on an *ad hoc* basis, rather than, as Lord Mansfield sought, to announce broad legal rules.[46] He believed that each case presented its own particularities and it was therefore difficult to set a general rule for cases of the same nature.

Likewise, the attempt from the Chief Justice Marshall of making the Supreme Court speak with one voice (amply criticised by President Thomas Jefferson)[47] lasted only six years.[48] Justice Johnson broke unanimity by appending a dissenting opinion in *Ex Parte Bollman and Ex Parte Swartwout*.[49]

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42 Russell Smyth & Paresh Kumar Narayan, 'Multiple Regime Shifts in Concurring and Dissenting Opinions on the U.S. Supreme Court', (2006) 3 *Journal of Empirical Legal Studies*, 79, 92.

43 Compared to Lord Mansfield attempt, Marshall's decision to make the court speak with one voice was not strictly followed during his tenure as Chief Justice. Some of the decisions were taken seriatim, though they were an exception that moreover took place when Marshall was either absent or had recused himself of certain cases. *Cf.* John P. Kelsh, 'The Opinion Delivery Practices of the United States Supreme Court1970 – 1945', (1999) 77 *Washington University Law Quarterly*, 137, 144.

44 Note, 'From Consensus to Collegiality: The Origins of the 'Respectful' Dissent', (2011) 124 *Harvard Law Review* 1308 – 1310.

45 William D. Popkin, *Evolution of the Judicial Opinion: Institutional and Individual Styles* (New York University Press 2007), 31.

46 M. Tood Henderson, *supra* note 32, 303.

47 See, Andrew J. Levin, 'Mr. Justice William Johnson, Creative Dissenter', (1944) 43 *Michigan Law Review*, 497, 513 – 519. Jefferson expected to prevent the court from gaining the strength that the abolition of *seriatim* opinions would entail. *Cf.* Gary D. Rowe, 'The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes', (1992) 101 *Yale Law Journal*, 919, 929.

48 Actually, Marshall's attempt could have lasted less time. As a state judge, Justice Johnson was accustomed to the practice of *seriatim* opinions. His colleagues in the Supreme Court, however, dissuaded him not to append dissents, since it might be seen as indecent cutting at other justices. Cf. Charles F. Hobson, 'Defining the Office: John Marshall as Chief Justice', (2006) 154 *University of Pennsylvania Law Review*, 1421, 1444.

49 *Ex Parte Bollman and Ex Parte Swartwout*, 4 Cranch 75 (1807).

From that moment on,[50] Johnson and his colleagues decided to regularly append separate and dissenting opinions.[51] A return, however, to the *seriatim* practice as it was known before John Marshall did not occur. The Supreme Court kept rendering its decisions by a single decision made by the majority of its members. This moment was thus constitutive for the concept of dissenting opinions.

The practice of appending dissents has significantly increased since then, to the extent that it is nowadays a commonplace.[52] The proliferation of dissents has even led some scholars to believe that the said increase in the number of separate and dissenting opinions amounts to a return to the *seriatim* practice,[53] even though some others argue that it only amounts to a quasi-*seriatim* approach, since there is an opinion from the majority.[54]

All in all, it can be said that the roots of the practice (as it is known today) of allowing dissenting judges, to express the reasons for their disagreement from decision taken by majority, lies in the United States practice created by justice Johnson's break away from unanimity in 1807. Nonetheless, the said practice could not have existed if it were not for the previous practice of having decisions *seriatim*. Hence, the practice of appending individual opinions to a majority decision represents but a natural consequence of the *seriatim* practice employed in the common law system since the early ages.[55] It has moreover (when compared to the instances where courts were forced to speak in one voice) reflected a shift in the courts' understanding of the nature of law, namely, from a grid of

50 It must also be noted, that another attempt to eradicate dissenting opinions was made some years after Marshall's retirement. Chief Justice Taft made that attempt, as for him "in many cases where I differ from the majority it is more important to stand by the Court and give its judgment weight than merely to record my individual dissent where it is better to have the law certain than to have it settled either way… most dissents elaborated, are a form of egoism. They don't do any good and only weaken the prestige of the Court. It is much more important what the Court thinks than what anyone thinks." *Cf*. Robert Post, 'The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decision-making in the Taft Court', (2001) 85 *Minnesota Law Review*, 1267, 1311.

51 Donald G. Morgan, 'The Origin of Supreme Court Dissent', (1953) 10 *William and Mary Quarterly*, 353, 367.

52 Only one additional instance, on the prohibition of dissenting opinions, has been reported in the history of the Supreme Court of the United States. Chief Justice Taft (1921 – 1930), did not approve dissents in the believe that, it is more important to stand by the court, avoiding to weaken its prestige and have the law certain. *Cf*. Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (Random House 2003), 116.

53 M. Tood Henderson, *supra* note 32.

54 Peter Bozzo, Shimmy Edwards and April A. Christine, 'Many Voices, One Court: The Origins and the Role of Dissents in the Supreme Court', (2011) 36 *Journal of Supreme Court History* 193, 210.

55 Andrew Lynch, 'Is Judicial Dissent Constitutionally Protected?', (2004) 4 *Macquarie Law Journal*, 81, 84.

fixed and certain principles design for the settlement of disputes, to the site of ongoing processes of adjustment and statesmanship designed to achieve social purposes.[56]

Remarkably, it should also be noted that the attempt from Lord Mansfield and Chief Justice Marshall of making common law courts deliver a single opinion, is based on the manner that civil law courts make their decisions, *i.e.* through a single majority opinion. In this sense, the practice of dissenting opinions as it is known today is a curious fulcrum between civil and old-English practice.[57] One can therefore argue that (although indirectly and perhaps to a limited extent) the origins of dissenting opinions can also be found in the civil law system. In that sense, they can be seen as a middle ground between both systems of law.[58]

1.4 Arguments in favour and against dissenting opinions in municipal law

As the origins of dissenting opinions have shown, two opposite (and markedly different) positions have taken place in the common law system with regard to the possibility of allowing *vel non* dissenting opinions. A somewhat similar situation has also occurred in the civil or continental law system. This is despite the fact that the latter has historically been known for opposing to dissenting opinions. In fact, in the past decades a shift has taken place in this regard. An important number of states belonging to this system of law have opted for allowing judges to append dissenting opinions,[59] considering that the arguments advanced against dissenting opinions are unconvincing.[60] Karl Kelemen has for instance noted that in Europe, some of the countries where the publication of individual opinions

56 Robert Post, *supra* note 50, 1274.

57 Arthur J. Jacobson, 'Publishing Dissent', 62 *Washington and Lee Law Review*, 1607.

58 Elisabeth Zoller, 'La Practique de l'opinion dissidente aux Etats-Unis', in Michel Ameller *et al* (eds.) *La République : Mélanges en l'honneur de Pierre Avril* (L.G.D.F. 2001), 609, 610.

59 Juha Raitio, *The Principle of Legal Certainty in EC Law* (Springer 2003); Christian Walter, 'La Practique des opinions dissidentes en Allemagne', (2000) 8 *Les Cahiers du Conseil Constitutionnel*, 1; Teresa Freixes, 'La Practique des opinions dissidentes en Espagne', (2000), 8 *Les Cahiers du Conseil Constitutionnel*, 50; Edward J. Cohn, 'Dissenting Opinions in German Law', (1957) 6 *International and Comparative Law Quarterly*, 540; Philip H. Amram, 'The Dissenting Opinion come to the German Courts', (1957) 6 *American Journal of Comparative Law*, 108; Due to this fact, the majority of states that, though following a civil law approach allow for dissenting opinions, can be considered as mixed jurisdictions, i.e. legal systems where the Romano-Germanic tradition has been suffused by the common law tradition. *Cf.* Frederick Parker Walton, *The Scope and Interpretation of the Civil Code of Lower Canada* (Butterworths 1980), 1.

60 Rousseau, Dominique, 'La Transposition des opinions dissidentes en France est-elle souhaitable? "Pour": Une opinion dissidente en faveur des opinions dissidentes', (2000) 8 *Les Cahiers du Conseil Constitutionnel*, 1

is not allowed are Austria, Belgium, France, Italy and Luxemburg.[61] In view of this situation, arguments in favour of dissenting opinions also exist in the civil or continental law system. A reference therefore to the arguments in favour of dissenting opinions is not circumscribed to the common law system, just as a reference to the arguments against them is not limited to the continental or civil law system. In turn, the arguments in favour and against dissenting opinions in both systems of law will be identified and explained, in order to subsequently analyse whether they are relevant for international law.

At the outset and before addressing the arguments in municipal law, two issues must be highlighted. On the one hand, as indicated by Paul Martens, that the arguments invoked by either those in favour or against dissenting opinions are the same. The difference lies in the fact that opposite effects are given to each of the principles or aspects that constitute the basis of the arguments.[62] In other words, whereas those in favour argue that the said principles or aspects are not at stake, for those against dissenting opinions they are contrary to the said principles. The arguments in favour and against dissenting opinions therefore constitute the two sides of the same coin.

On the other hand, and in connection with the issue mentioned above, the discussion and arguments advanced in favour and against dissenting opinions do not centre on the question whether a right exists for judges to express their disagreement with a majority judgment. It is claimed that the existence of such a right is out of question since it forms an integral part of the judicial process[63]. In that sense, the said discussion mainly centres on the question whether reasons exist that allow for the limitation of the right to dissent, with a view of protecting the principles that enshrine the exercise of the judicial function. The reference to the concept of "arguments against" therefore relates to the arguments that seek to limit the exercise of the right to dissent. Similarly, the reference to the concept "arguments in favour" refers to the arguments supporting an unrestrictive exercise of the right to dissent.

The first of the principles referred by those advocating in favour and against dissenting opinions, is the secrecy of deliberations. This is considered as one of the most important principles enshrining the exercise of the

61 Karl Kelemen, 'Dissenting Opinions in Constitutional Courts', (2013) 14 *German Law Journal*, 1345. Reference is also made of other countries in Europe such as Malta and The Netherlands. *Cf.* Marieta Safta, 'The Role of Dissenting and Concurring Opinions in the Constitutional Jurisdiction', (2016) 5 *Society of Juridical and Administrative Sciences*, 207, 208.

62 Paul Martens, 'La Pratique du Délibéré Collégial' in Jacques Englebert (ed.) *Questions de Droit Judiciaire Inspirées de L'affaire Fortis* (Larcier 2011), 9, 17.

63 Rory K. Little, *supra* note 30, 691; Michael A. Musmanno, 'Dissenting Opinions', (1956) 60 *Dickinson Law Review*, 139 ; Hunter Smith, 'Personal and Official Authority: Turn-of-the-Century Lawyers and the Dissenting Opinion', (2012) 24 *Yale Journal of Law & the Humanities*, 507.

judicial function[64] that moreover constitutes the basis (and cause) of the recourse to this means for the settlement of disputes.[65] Hence, it is considered indispensable for the effective functioning of a court of law,[66] as an absolute necessity for insulating the judiciary is required for the preservation and strength of the court as an institution.[67] In a few words, by virtue of this principle the independence and impartiality of the judges is to be preserved. This is why the application of this principle requires judges to deliberate outside the presence of the public, and it also prohibits the disclosure of any information whatsoever as to how the judges have voted.[68] In consequence, it is believed that, due to its great importance, allowing for dissenting opinions would seriously undermine the principle regarding secrecy of deliberations.[69] Should the judge be allowed to append a dissent, she or he would likely be subjected to pressures from outside the court. Similarly, depending on the content of her or his opinion, the judge (or her or his colleagues') independence and impartiality might be at stake,[70] since reference to the manner in which deliberations were held can (either directly or indirectly) be found therein. With a view of preserving this principle the content and scope of dissenting opinions should be therefore limited.

For its part, those who have considered that dissenting opinions should be allowed argue that the principle on the secrecy of deliberations should not be subjected to such a stringent interpretation;[71] they thus call for a more liberal interpretation.[72] In this regard, it has been argued that the principle only imposes the duty not to reveal the position adopted by the rest of her or his colleagues, whose views will remain secret.[73] In fact, Philip Amram has noted that, following a more liberal interpretation of the principle, the Supreme Court of Bremen, Germany, considered that the right to append dissenting opinions does not violate the principle on the secrecy of deliberations.[74] In its analysis on the provision that indicates that in advi-

64 Conseil d'Etat, *Sieurs Legillon*. 17 November 1922, *Rec.*, p. 849.

65 Jean-Paul Béraudo, 'La Confidentalité et le Délibéré', in José Rosell (co-ord.) *Les Arbitres Internationaux: Colloque du 4 février* (Société de Législation Comparée 2005), 101.

66 Felix Frankfurter, 'Mr. Justice Robert', (1955) 104 *University of Pennsylvania Law Review*, 311, 313.

67 Peter G. Fish, 'Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics', (1967) 8 *William and Mary Law Review*, 225.

68 René Chapus, *Droit du Contentieux Administratif* (Montchrestien-Lextenso 2001), 932.

69 Patrick. Daillier & Alain Pellet, *Droit International Public* (9th edn, L.G.D.J. 2001), 883.

70 Edward J. Cohn, *supra* note 59, 540.

71 Bart Nelissen has noted that some countries belonging to the civil law system, have religiously applied the principle of the secrecy of deliberations, to the extent that they consider an indication in a judgment as to how the decision was taken, either unanimously or by majority, a violation of the principle. *Cf.* Bart Nelissen, 'Judicial Loyalty Through Dissent or Why the Timing is Perfect for Belgium to Embrace Separate Opinions', (2011) 15 *Electronic Journal of Comparative Law*, 1, 4.

72 Paul Martens, 'Sur les Louyatés Démocratiques du Juge', in Jean Verhoeven (ed.), *La Louyaté: Mélanges offerts à Étienne Cerexhe* (Larcier 1997), 249, 268.

73 Yannick Lécuyer, *supra* note 1, 215.

74 Philip H. Amram, *supra* note 59, 110.

sory opinions any judge may request that his dissenting opinion be filed, the court concluded that this provision does not contradict the obligation for judges to maintain secrecy over their deliberations and their voting.[75]

The second principle addressed in the discussions on dissenting opinions is the collegiality of decisions. The origins of this principle can be traced back to the continental or civil law system and has subsequently entered into the common law system.[76] Its basis is to be found in the fact that judges should "have a common interest, as members of the judiciary, in getting the law right."[77] Hence, through a single judgment the court can issue an authoritative statement as to how a rule should be applied[78] and therefore provide legal certainty with respect to some of the aspects addressed in the judgment.[79] Moreover, a judgment that results from a compromise among judges protects them from outside pressures and allows them to express their views freely within the courtroom.[80] Consequently, through this principle their independence and impartiality is also secured, since it would be the institution as a whole (instead of one of its members) that would be questioned for the views expressed in the judgment.

Dissenting opinions are considered contrary to this principle, as they will excuse some members of the court from the collegial responsibility in the making of the judgment.[81] Dissenters will therefore focus on providing their reasons and personal views in the matter, acting more in their personal capacity than in the name of the institution that they represent. Having dissents would also discourage collegiality in the sense that it amounts to having several courts of one judge each.[82] This would moreover create confusion as to what the law is,[83] which is in total contradiction with the goal that collegiality pursues. On the other hand, those advocating in favour of dissenting opinions have argued that the principle on the collegiality of decisions is not at stake. In a collegial environment divergent views are discussed during the deliberative process and contribute to the mutual aim

75 Id.

76 Roderick Munday, 'Judicial Configurations: Permutations of the Court and Properties of Judgment', (2002) 61 *Cambridge Law Journal*, 612.

77 Harry T. Edwards, 'The Effects of Collegiality on Judicial Decision Making', (2003) 151 *University of Pennsylvania Law Review*, 1639, 1645.

78 Roderick Munday, '"All for One and One for All" The Rise to Prominence of Composite Judgment within the Civil Division of the Court of Appeal', (2002) 61 *Cambridge Law Journal*, 321, 331.

79 Ibid, 348.

80 Vittoria Barsotti *et al*, *Italian Constitutional Justice in Global Context* (Oxford University Press 2015), 134.

81 *Cf.* David Edward, 'How the Court of Justice Works', (1995) 20 *European Law Review*, 539, 556.

82 Editor, 'Courts and Decisions', (1870) 1 *Albany Law Journal*, 405; Charles A. Hereschoff Barlett, 'Dissenting Opinions', (1906) 32 *Law Magazine & Review: A Quarterly Review of Jurisprudence*, 46, 55.

83 Ruth Bader Ginsburg, 'Remarks on Writing Separately', (1990) 65 *Washington Law Review*, 133, 148.

of the judges of applying the law and finding the right answer.[84] Collegiality therefore allows judges to disagree freely and use that disagreement to improve and refine the majority judgment.[85] In addition, even if a judge makes know the reasons of her or his dissent whenever is necessary,[86] this does not mean that she or he should express them in every decision that she or he disagrees with the majority.[87]

A third principle also mentioned in the discussion is the *res judicata* authority (and as a consequence of it the credibility and effectiveness) of the decisions from courts.[88] It is believed that the binding force of a judgment that derives from the *res judicata* principle and the consequences that it entails, are at stake by the publication of dissenting opinions.[89] The interested parties in the judgment (as well as any other person) may pay due regard to the particular views of a judge in the case at hand, especially if she or he has dissented. It may therefore occur that the losing party (and the public in general) is sympathetic to the reasons stated in the dissenting opinion, as they may consider that it contains a stronger legal argument. Dissenting opinions can as a consequence create uncertainty and may also undermine the authority of the decision in question.[90] The principle of *res judicata* and subsequent obligations for the parties (especially the losing party) to comply with the judgment of the court will therefore be at stake. Any of the parties might decide not to comply with it, since the reasons provided by the majority therein, might appear unconvincing. In addition, the credibility of the judges might be at stake in the believe

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84 Harry T. Edwards, *supra* note 77, 1646

85 Id.

86 Alpheus Thomas Mason, *William Howard Taft: Chief Justice* (Simon & Schuster 1965), 201.

87 *Cf*. Roscoe Pound, 'Cacoethes Dissentiendi: The Heated Judicial Dissent', (1953) 39 *American Bar Association Journal*, 794, 795; Matthew P. Bergman, 'Dissent in the Judicial Process: Discord in Service of Harmony', (1991) 68 *Denver University Law Review*, 79; Ruth Bader Ginsburg, 'The Role of Dissenting Opinions', (2010) 95 *Minnesota Law Review*, 1, 7.

88 François Luchaire, 'La Transposition des opinions dissidentes en France est-elle souhaitable? "Contre": Le point de veux de deux anciens membres du Conseil constitutionnel', (2000) 8 *Les Cahiers du Conseil Constitutionnel*, 1.

89 This is in fact the reason that explains why two current exceptions exist in the common law system with regard to the right for judges to append dissenting opinions: the Privy Council of the United Kingdom and decisions in criminal cases. Concerning the Privy Council, its function is to give advice to the Crown and serve as court of last resort, in situations regarding the United Kingdom overseas territories and countries of the Common wealth. The existence of dissenting opinions would go against the need to preserve intact the power of the United Kingdom over its colonies and dominions. A single pronouncement is therefore more advisable. *Cf*. Alex Simpson, *supra* note 26, 207; Louis Blom-Cooper & G. Drewry, *Final Appeal: A Story of the House of Lords in its Judicial Capacity* (Oxford University Press 1972), 82. As for criminal cases, the discomfiture of an unsuccessful appellant should not be aggravated by an over division among judges, especially when the disagreement is related to aspects concerning the assessment of facts or evidence. *Cf*. Ruth Bader Ginsburg, *supra* note 87, 135.

90 Rupert Cross, 'The Ratio Decidendi and a Plurality of Speeches in the House of Lords', (1977) 93 *Law Quarterly Review*, 378; Omar Chessa, *I Giudici del Diritto: Problemi Teorici della Giustizia Constituzionale* (FrancoAngeli 2014), 372.

that other reasons were taken into account when taking the decision;[91] this could therefore result in a lack of effectiveness with regard to the function entrusted to a court on the settlement of the disputes submitted to it.

Those who defend the use of dissenting opinions consider that they do not compromise (in any form whatsoever) the decision taken by the majority of the members of a court.[92] Whereas from the viewpoint of the authority of a decision, unanimity is always to be preferred; it should not, however, be obtained at any cost. Accordingly, only when unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But when it is merely formal (*i.e.* recorded as such in the judgment despite conflicting views among judges), it is not desirable; whatever may be the effect upon public opinion.[93] Hence, the legitimacy of the judicial process and the authority of courts' decisions should not rest upon illusions.[94] In fact, it is only by means of a dissenting opinion that the legitimacy of the judicial process and the authority of a majority decision can be assessed. Consequently, when a rule of law stated by a majority can withstand the criticism of a dissent, the legitimacy and authority can be measured.[95] It thus argued that the elimination of dissenting opinions would not necessarily move courts to the direction of a better state of discourse.[96]

Further, an additional principle to which a great number of scholars tend to refer is the independence and impartiality of the judiciary.[97] The majority of scholars believes that dissenting opinions contribute to rather than diminish the realization of this principle. It is therefore in this context that dissents have been defined, as "one of the great and cherished freedoms that we enjoy."[98] Consequently, independence and impartiality can only be secured if each judge expresses his view as to how a case should be

91 François Luchaire, *supra* note 88.

92 See, *e.g.*, Vittorio Denti, 'Per Il Ritorno al Voto di Scissura nelle Decisioni Giudiziarie', in Costantino Mortati (ed.) *Le Opinioni Dissenzienti del Giudici Costituzionali ed Internazionali* (Dott. A. Giuffré 1964), 1, 12.

93 Kurt H. Nadelmann, 'The Judicial Dissent: Publication v. Secrecy', (1959) 8 *American Journal of Comparative Law*, 415, 431.

94 Stanly H. Fuld, 'The Voices of Dissent', (1962) 62 *Columbia Law Review*, 923, 928; Robert H. Jackson, 'Advocacy before the Supreme Court: Suggestions for Effective Case Presentation', (1951) 37 *American Bar Association Journal*, 861, 863; See also, Karl M. ZoBell, 'Division of Opinion in the Supreme Court: A History of Judicial Desintegration', (1959) 44 *Cornell Law Quarterly*, 186, 213.

95 Robert G. Simmons, 'The Use and Abuse of Dissenting Opinions', (1956) 16 *Louisiana Law Review*, 497, 498; Lee Epstein, William M. Landes and Richard A. Posner, 'Why (and When) Judges Dissent: A Theoretical and Empirical Analysis', (2011) 3 *Journal of Legal Analysis*, 101, 104.

96 M. Tood Henderson, *supra* note 32, 293.

97 See, *e.g.*, Michael D. Kirby, *supra* note 2, 40; William. D. Popkin, 'A Common Lawyer on the Supreme Court: The Opinions of Justice Stevens', (1989) *Duke Law Journal*, 1087, 1090;

98 William J. Brennan, 'In Defense of Dissents', (1986) 37 *The Hastings Law Journal*, 427, 438.

decided.[99] Thus, it constitutes the only manner in which they can demonstrate to have acted in a fair and conscientious manner.[100] It is therefore incompatible with the individual independence and impartiality of the judges (expressed through their individual opinions),[101] when they are restrained from expressing their personal views, bearing in mind that law is not an exact science,[102] nor is it immutable,[103] and that different views might therefore exist when assessing a legal matter in multi-member courts, especially when the said matter refers to incommensurable values.[104] Judges' opinions therefore contribute to the marketplace of competing ideas.[105] For its part, others consider that a dissenting opinion puts the independence and impartiality of a judge at risk. If she or he freely expresses her or his views on the matter, they are put to public scrutiny and may affect her or his judicial career.[106] In order to prevent that a judge is questioned for her or his views, dissents should not be made public.

Besides these principles that are invoked by both, those in favour or against dissenting opinions, there are additional aspects that have been mentioned and that have moreover been amply dedicated to an analysis as to whether dissenting opinions serve a real purpose and perform a worthwhile function.[107]

This question as to the usefulness of dissenting opinions has been principally assessed from the standpoint of how dissenting opinions contribute to the development of the law.[108] In consequence, the main reason behind accepting this institution is its contribution in this regard. One of the most

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99 William O. Douglas, 'The Dissent: A Safeguard of Democracy', (1948) 32 *Journal of the American Judicature Society*, 104, 106.

100 Matthew P. Bergman, *supra* note 87. In fact, it is suggested that "an independent judge is more likely to write separate opinions, rather than simply join colleagues without expressing a distinct point of view." *Cf.* William. D. Popkin, *supra* note 97.

101 Claire L'Heureux-Dube, 'The Dissenting Opinion: Voice of the Future?', (2000) 38 *Osgoode Hall Law Journal*, 495, 503.

102 Evan A. Evans, 'The Dissenting Opinion – Its Use and Abuse', (1938) 3 *Modern Law Review*, 120, 128; Robert G. Simmons, *supra* note 95; Joe W. Sanders, 'The Role of Dissenting Opinions in Louisiana', (1963) 23 *Louisiana Law Review* 673.

103 Israel Bloch, 'The Value of Dissent', (1930) 3 *Law Society Journal*, 7, 8.

104 John. Alder, 'Dissents in Courts of Last Resort: Tragic Choice?', (2000) 20 *Oxford Journal of Legal Studies*, 221, 227 – 233.

105 William. J. Brennan, 'In Defense of Dissents', (1986) 37 *Hastings Law Journal*, 427, 435.

106 Julia Laffranque, 'Dissenting Opinion and Judicial Independence', (2003) 8 *Juridica International*, 162, 168.

107 Stanly H. Fuld, *supra* note 94, 926.

108 See, *e.g.*, Alan Barth, *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court* (Knopf 1975); J. Louis Campbell III, *supra* note 23, 312; Robert G. Flanders Jr., 'The Utility of Separate Judicial Opinions in Appellate Courts of Last Resort: Why Dissents are Valuable', (1999) 4 *Roger Williams University Law Review*, 401, 410 – 411; Randal T. Shepard, 'What Can Dissents Teach Us?', (2005) 68 *Albany Law Review*, 337, 342 – 344; Alex Kozinski & James Burnham, 'I Say Dissental, You Say Concurral', (2012) 121 *Yale Law Journal Online* 601; Melvin L. Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* (Pantheon Books 2015), 7.

famous and often quoted words (even from international judges when appending their dissents),[109] as to the contribution of dissenting opinions to the development of the law can be found in one of the works of the former Chief Justice of the Supreme Court of the United States (and also a judge of the Permanent Court), Charles Evan Hughes. He noted that,

> "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting justice believes the court have been betrayed"[110]

In this sense, through her or his dissenting opinion the judge may therefore be laying the logical groundwork for future cases[111] and giving room to new developments in subsequent cases.[112] Some examples have been provided in the academic literature, in support of this proposition. One of the most cited and illustrative examples is the dissenting opinion appended by justice John Marshall Harlan, to the Supreme Court's decision in *Plessy v. Ferguson*. Having voted against the majority decision, justice Harlan indicated in his dissent that the United States Constitution is color-blind and therefore neither knows nor tolerates classes among citizens. It is noted that his dissenting in this case constitutes the basis of the Supreme Court's subsequent decision in *Brown v. Board of Education* and *Romer v. Evans*.[113] Nonetheless, it has also been suggested that the contribution to the development of the law, is not a function of dissenting opinions themselves. If a dissenting opinion becomes later the decision of a court, it is but a

109 *Cf. South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, (Dissenting Opinion, Judge Jessup), p. 325; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, (Dissenting Opinion, Judge Schwebel), p. 26, para 4.

110 Charles Evans Hughes, *The Supreme Court of the United States: Its Foundation, Method and Achievements* (Columbia University Press 1928), 68. In the context of English law, the most famous and often cited words in this regard, are the views of the retired Lord Nicholls of Birkenhead, who noted that "[d]issenting judgments do more than attract passing interest. They are an important aspect of judicial freedom. They have no legal effect on cases in which they are given, but they can have a practical effect. At best a dissenting opinion judgment may be so obviously right that the courts or Parliament soon steer the law along a better path." *Cf.* Neal Geach & Christopher Monagham (eds.), *Dissenting Judgments in the Law* (Wildy, Simmons and Hill Publishing 2012), 4.

111 Vanessa Baird & Tonja Jacobi, 'How the Dissent becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court', (2009) 59 *Duke Law* Journal, 183, 186.

112 See, *e.g.*, Jeffrey A. Segal & Harold J. Spaeth, 'The Influence of *Stare Decisis* on the votes of United States Supreme Court Justices', (1996) 40 *American Journal of Political Science*, 971, 977.

113 Daniel Mangis, 'Dissent as Prophecy: Justice John Marshall Harlan's Dissent in *Plessy v. Ferguson* as the Religious Rethoric of Law', in Clarke Rountree (ed.) *Brown v. Board of Education at Fifty: A Rhetorical Perspective* (Lexington Books 2005), 23, 41.

product of the court's normative approval.[114] Moreover, the redemption of dissenting opinions occurs far less often, than it is believed.[115] Be that as it may, the contribution of dissenting opinions to the development of the law is out of question, as one of the arguments in favour of their permissibility.

Lastly, a dissenting opinion is important since it serves a warning role, *i.e.* it must be considered as a sign that a legal doctrine must not be pressed too far.[116] This role and function for a dissenting opinion can only be understood, in light of the *stare decisis* doctrine that permeates the common law system.[117] In this vein, a dissenting opinion may be a helpful tool for the determination of the rule set forth by the majority in its decision and (more important) if it can be considered as a strong precedent.[118] In other words, it might be seen as a sign that indicates which are the limits of a decision, either in terms of its *ratio decidendi* or the factual circumstances to which it applies.[119] A dissenting opinion thus narrows the scope of the decision and may therefore lead to consider a decision as a statement showing evidence of an underlying principle that is open to constant re-examination.[120]

Finally, a more systemic argument related to the nature of law itself, as well as to the nature of the common law system, has been advanced in defence of dissenting opinions. It has been noted that both, depublication and unpublication[121] of dissents is a threat to the integrity of common law.[122] This is so, since

> "common law judges take moral and political responsibility for the positions they shoulder in the conflict of visions, just as the parties whose disputes they resolve assume responsibility for their positions. Rather than oracles of the law bearing legal truth to a feckless mass, common law judges are participants with citizens in an ongoing struggle over plural visions of justice."[123]

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114 *Cf.* Richard A. Primus, 'Canon, Anti-canon, and Judicial Dissent', (1998) 48 *Duke Law Journal*, 243, 247 – 248.

115 Andrew Lynch, 'The Intelligence of a Future Day: The Vindication of Constitutional Dissent in the High Court Australia – 1981-2003', (2007) 29 *Sydney Law Review*, 195, 228.

116 Joe. W. Sanders, 'The Role of Dissenting Opinions in Louisiana', (1963) 23 *Louisiana Law Review*, 673, 675.

117 Rupert Cross, *Precedent in English Law* (Clarendon Press 1977), 17.

118 M. Tood Henderson, *supra* note 32, 341. See, also, Roscoe Pound, *supra* note 87, 795.

119 Maurice Kelman, 'The Forked Path of Dissent', (1985) *Supreme Court Review*, 227, 242 – 257; Diane P. Wood, 'When to Hold, When to Fold, and When to Reshuffle: The Art of Decision making on a Multi-Member Court', (2012) 100 *California Law Review* 1445.

120 John Alder, 'Dissenting Opinions in Courts of Last Resort: Tragic Choices?', (2000) 20 *Oxford Journal of Legal Studies*, 186, 234.

121 Depublish (verb) is defined as "remove from an official record." Unpublish (verb) is defined as "make (content that has previously been published online) unavailable to the public." Cf. Oxford English Dictionary, 'Unpublish' and 'Depublish', available at http://en.oxforddictionaries.com/definition/unpublish and http://en.oxforddictionaries.com/definition/depublish (accessed 16 January 2019).

122 Arthur J. Jacobson, *supra* note 57, 1607.

123 Ibid, 1632.

In that sense, a dissenting opinion is but a reflection of the competing understanding of views that exist in society. It therefore fosters the democratic nature of the entire legal process.[124]

1.5 The relevance of the municipal law debate on dissenting opinions for international law

The subsection above has presented the arguments in favour and against dissenting opinions, in municipal law. From the said discussion, three main arguments can be identified as the main against dissents, namely, (i) that they are contrary to the secrecy of deliberations and undermine the need to preserve the independence and impartiality of judges; (ii) that they break the collegiality principle; and, (iii) that they undermine the authority of the majority decision as such. For its part, the two main arguments in favour of dissenting opinions are (i) that they constitute a sign that warns which are the limits of a majority decision; and, (ii) that they contribute to the development of the law.

By the same token, the presentation of these arguments confirms the view that judges are entitled to express their disagreement in multi-member courts. In this sense, it is recognized that dissenting opinions play an important role in the adjudication process in general. This also includes the civil law system, notwithstanding its opposition to the permissibility for judges to append dissenting opinions. In fact, the reason for the said opposition is based on the conviction, that it is necessary to give more weight to the need to preserve some of the principles that enshrine the exercise of the judicial function.

Against this background and taking into account the research question that this chapter attempts to answer, it is necessary to address what elements from the discussion at the domestic level are relevant for the framework on dissenting opinions at the international level. These elements that will be considered are the arguments in favour and against dissenting opinions, as well as their roles and functions. To put it another way, and in line with the research question of this chapter, it will be addressed how and to what extent the arguments on the secrecy of deliberations, collegiality in the decision-making, authority of decisions, independence and impartiality of the judiciary and the development of the law that have been advanced at the domestic level, can be transposed to the international level.

At first sight, it would be possible to argue that, because of the different structure between domestic and international law, the arguments against and in favour of dissenting opinions at the former may play out slightly differently. Nonetheless, following Campbell McLachlan, the boundary

124 Lucia Corso, 'Dissenting Opinion, Judicial Review and Democracy', (2010) 14 *Mediterranean Journal of Human Rights*, 159, 183.

between domestic and international law is porous in nature;[125] some aspects from one level might therefore be transposed to the other. In addition, it should also be taken into account that the arguments (with the exception of the development of the law) whose extent of transposition is analysed, are part of the essence of any judicial institution.[126]

Yet, the differences between domestic and international law are numerous. As regard the arguments concerning the collegiality in the decision-making, the diversity in the composition of some international courts and tribunals is an important factor to be noted. In international courts judges come from various legal systems and traditions of the world and this certainly constitutes an important aspect that differentiates adjudication at the domestic and international level.[127] In the case of the independence and impartiality of the judiciary, an important difference is the presence of a national element within some international courts and tribunals. Further, also important is the lack of a centralised structure that results in a disintegrated judicial system.[128] In that sense, the relation among international courts and tribunals is horizontal and not vertical[129] and each international court operates in a relative vacuum. Similarly, also important is the fact that the doctrine of *stare decisis* has not been adopted by most international courts and tribunals is noteworthy.[130] Both differences are important with respect to the arguments regarding the authority of decisions and development of the law.

Having highlighted these differences in the abstract, the following sections will further contextualise how the debates on dissenting opinions at the domestic level had been transposed to the international level.

125 Campbell McLachlan, *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers 2009), 299.

126 Chester Brown has for instance noted that this is in fact an important aspect in order to explain the emerging common law of international adjudication, despite differences among international courts and tribunals. *Cf*. Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007), 230.

127 *Cf*. Silvia Fernández de Gurmendi, 'Judges: Selection, Competence, Collegiality', (2018) 112 *American Journal of International Law Unbound*, 163, 166.

128 *Prosecutor v. Dusko Tadic*. Decision on the defence motion for Interlocutory Appeal on Jurisdiction. Decision of 2 October 1995, para. 11.

129 Campbell Mclachlan, *supra* note 125, 305.

130 Michael P. van Alstine, 'Stare Decisis and Foreign Affairs', (2012) 61 *Duke Law Journal*, 941.

2 The exercise of the right to dissent at international courts and tribunals

When the PCIJ was established, article 57 of its Statute vested the judges who dissented from the majority judgment, with the right to make the reasons of their dissent known, in a separate opinion to be appended to the majority judgment, should they want to do so.[1] This provision sowed the seeds for a broader practice of appending dissenting opinions, which has subsequently been included in the Statutes of a variety of international courts and tribunals.[2] Hence, from 1920 onwards, the possibility of appending dissenting opinions has existed at the international scene. In addition, the proliferation of international courts and tribunals was marked by a great copy-pasting of the constitutive instruments of existing international courts (mainly the International Court of Justice) to new international courts and tribunals[3] This proliferation included the possibility to dissent, save for some notable exceptions. In a few words, dissenting opinions appeared at the international scene, with the firm intention of being here to stay.[4] Consequently, it is possible to assert that the consecration of the right, for judges of the first international court, to append dissenting opinions, laid the foundations for its subsequent consecration in more recent international courts and tribunals.

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1 Statute for the Permanent Court of International Justice (adopted 16 December 1920) 6 L.N.T.S 379.

2 The treaties and other international instruments setting up the various international courts and tribunals therefore allow judges to deliver dissenting opinions. See, Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 U.N.T.S 222, art. 45; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 U.N.T.S. 123, art. 66; United Nations Convention on the Law of the Sea, Annex VI (adopted 10 December 1982, entered into force 28 July 1994) 1833 U.N.T.S 3, art. 30(3); Statute of the International Tribunal for Rwanda, UNSC Res 955 (8 November 1994) UN Doc S/RES/955, art. 22(2); Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted June 10 1998, entered into force 25 January 2004), art. 28(7); Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), 2187 U.N.T.S 90, art. 83(4).

3 See, Karen Alter, *A Common Law of International Adjudication* (Oxford University Press 2007), 68; Chester Brown, *'The Multiplication of International Courts and Tribunals after the end of the Cold War'*, in Cesare Romano et al (eds.) The Oxford Handbook of International Adjudication (Oxford University Press 2015), 63, 226.

4 Richard M. Mosk & Tom Ginsburg, 'Dissenting Opinions in International Arbitration', in Matti Tupamäki (ed.) *Liber Amicorum Bengt Broms: Celebrating his 70th Birthday, 16 October 1999* (Finnish Branch of the International Law Association 1999), 159, 284.

Given this exemplary role of article 57 of the PCIJ Statute, it is noteworthy to observe that the insertion of this right to dissent has been the result of a long controversy. In fact, article 57 is the result of a long process marked by contestation. Two instances stand out in this regard. First, the 1907 Hague Convention for the Pacific Settlement of International Disputes, which suppressed the possibility for arbitrators to record the fact of their dissent.[5] Second, the decision from the Advisory Committee in its draft statute of the Permanent Court (presented to the Council of the League of Nations), which sought to limit the exercise of this right, by means of only allowing dissenting judges to append a declaration, in which they were able to merely make known the fact of their dissent. An interesting aspect regarding these two instances is the arguments advanced in support of the limitations on the right to append dissenting opinions, as well as the arguments advanced fully in favour of dissenting.

It is against this background that this chapter will address the origins of dissenting opinions in international adjudication, by emphasising in the arguments advanced in the discussions related to the introduction of dissenting opinions in the first permanent adjudicative body, namely, the Permanent Court of International Justice. In addition, this chapter will also address, in view of existing differences in formal settings that guide international courts and tribunals, *i.e.* mandate, jurisdictional and institutional design: whether and to what extent these arguments have broader relevance in the discussions on dissenting opinions at other international courts. The analysis thus takes account of aspects such as the place (and authority) that an international court or tribunal (and its decisions) has in international adjudication. Arguments concerning authority may for instance be assessed differently in the case of the International Court of Justice, which is the principal judicial organ of the United Nations, when compared with an *ad hoc* arbitral tribunal or a regional and specialised international court or tribunal.

2.1 The origins of dissenting opinions at international courts and tribunals

2.1.1 Dissenting opinions before the institution of the first permanent international adjudicative body

The right to append dissenting opinions is as old as the origins of the adjudication of international disputes. The right for judges to append dissenting opinions did not appear in international law, for the first time, with the creation of the first permanent international adjudicative body. It already

5 1097 The Hague Convention for the Pacific Settlement of International Disputes, Oct. 18, 1907, (1908) 2 *American Journal of International Law*, Supp. 43.

existed during the golden age of arbitration.[6] In this regard, three references are particularly relevant, namely, (i) the practice from arbitral tribunals in the awards rendered before 1899; (ii) the 1899 Hague Convention for the Pacific Settlement of International Disputes; and, (iii) the 1907 Hague Conventions for the Pacific Settlement of International Disputes.

Before 1899, arbitral awards were to be decided by majority, even in cases where the *compromis* was silent on how the decision should be taken by the tribunal,[7] and unless it stipulated otherwise. The treaties signed at the time governing arbitration did not include provisions permitting arbitrators to express the reasons of their dissent, in case they were not joining the majority in its decision.[8] No possibility seemed therefore to exist for the inclusion of dissenting opinions. Yet, the practice of international tribunals at the time, as well as a resolution issued by the *Institut de Droit International*, demonstrates that dissents were in fact accepted in these early stages of international adjudication.[9]

Following these practices, members were permitted to give the reasons of their dissent even when the *compromis* did not contain an express provision in this regard.[10] For instance, four out of the five members that composed the arbitral tribunal In the *Alabama Claims of the United States of America against Great Britain*,[11] signed the award. Sir Alexander Cockburn (arbitrator named by Her Britannic Majesty) did not agree with the decision of the tribunal. He therefore presented a statement of his reasons during the announcement of the decision to the parties.[12] This amounts to an oral dissent. Similarly, in the decisions in the cases of *Charles M. Smith* and *Agnes Pollock* against the United States,[13] and of *Grace Brothers & Co. v. Chile*,[14] commissioners Frazer[15] and Goode[16] appended dissenting opinion to the decisions of the commissions, respectively. A somewhat similar practice was expressly permitted by virtue of article 7 of the Jay Treaty.[17] The commis-

6 *Cf.* Mary Ellen O'Connell & Lenore VanderZee, 'The History of International Adjudication', in Cesare Romano *et al* (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2015), 42, 44.

7 Manley Hudson, *International Tribunals: Past and Future* (Carnegie Endowment for International Peace & Brookings Institution 1944), 114.

8 See, *e.g.*, Treaty of Washington (adopted 8 May 1871, entered into force 17 June 1871).

9 Institut de Droit International, 'Projet de règlement pour la procédure arbitrale internationale', 1 *Annuaire de l'Institut de Droit International* (1877), 132

10 Ram Prakash Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication', (1965) 14 *International and Comparative Law Quarterly*, 788, 795.

11 *Alabama Claims of the United States of America against Great Britain* (1872) 29 RIAA 125 – 134.

12 Caleb Cushing, *The Treaty of Washington: Its Negotiation, Execution and the Discussions Relating Thereto* (Harper & Brothers Publishers 1873), 126 – 127.

13 *Cases of Charles M. Smith, later John C. Ferris, administrator v. USA; and Agnes Pollock, later J.B. Haller, administratix v. USA* (1973) 29 RIAA 138 – 142.

14 *Cases of Grace Brothers & Co. v. Chile, Nos. 16, 19, 20, 21, 22 and 29* (1894) 29 RIAA 305 – 319.

15 *Cases of Charles M. Smith*, *supra* note 13, 142.

16 *Cases of Grace Brothers & Co.*, *supra* note 14, 314 – 319.

17 Treaty of Amity, Commerce and Navigation, United States of America – Great Britain (adopted 19 November 1974, entered into force 29 February 1796), art. 7.

sion to be established pursuant to the said provision was expected to receive complaints from American citizens, regarding losses and damage, by reason of illegal or irregular captures of American vessels or other property. The decision (which should be taken by majority) consisted of the exhibition of separate opinions by all of its members,[18] *i.e.* following the *seriatim* practice of the courts in the common law system. In the event that one or more of the commissioners were part of the minority, the reasons as to their disagreement were contained in their individual opinions, which (by virtue of constituting part of the minority) can be said to amount to a dissenting opinion.

As for the resolution adopting Draft Rules for International Arbitration Procedure, issued by the *Institut de Droit International* at its session in The Hague in 1875, article 23 of these Draft Rules indicated that the award rendered by the tribunal should be signed by all its members; if a minority, however, refused to do so, a declaration could be included establishing a minority in fact refused to sign the award.[19] Compared to the practice of arbitral tribunals, the Draft Rules of the *Institut de Droit International* limited dissenting opinions to a mere record of the fact of the dissent, thus closing any possibility to the indication of the reasons thereof.

Taking into account this background, the 1899 Hague Convention for the Pacific Settlement of International Disputes, expressly included in its article 52 the possibility for arbitrators not voting with the majority to record their dissent, but without the possibility of including the reasons therein.[20] Accordingly, the possibility of allowing dissenting arbitrators to append their reasons for dissent, as was sought by the Russian proposal[21] and the delegate of Siam,[22] was dismissed. States considered it dangerous to go beyond what was finally agreed in the Convention, *i.e.* a record of the fact of dissent without the possibility of including the reasons. Allowing for a dissenting opinion would moreover lead to the perception of the existence of two awards if these opinions were to be made public.[23]

In contrast, during the second Hague Peace Conference, leading to the adoption of the 1907 Hague Convention for the Pacific Settlement of International Disputes, a proposal was tabled by the Dutch delegate in order to suppress the possibility to record the fact of dissent, as set forth in article

18 Jean-Louis, Toffin, *La Dissidence à la Cour Permanente de Justice Internationale* (Imprimerie d'Art F.-R 1937), 19.

19 Institut de Droit International, *supra* note 9.

20 Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (Martinus Nijhoff Publishers 1984), 13.

21 'Fifth Meeting July 17, 1899', words of Mr. Martens, Russian member of the Third Commission, in James Brown Scott (director) *Proceedings of the Hague Peace Conference: The Conference of 1899* (Oxford University Press 1920), 615.

22 Ibid, words of Mr. Rolin, Siam member of the Third Commission, 616 – 617.

23 Ibid, words of Chevalier Descamps, Belgian member and rapporteur of the Third Commission, 616; Frederick William Holls, *The Peace Conference at the Hague and its Bearings on International Law and Policy* (The MacMillan Company 1900), 285 – 286; Shabtai Rosenne, *The Hague Peace Conferences of 1899 and 1907and International Arbitration: Reports and Documents* (Martinus Nijhoff Publishers 2001), 72.

52 of the 1899 Hague Convention. It was argued that the proposed provision was contrary to fundamental principle governing arbitral proceedings, namely, that the arbitral award must actually amount to a final decision in all its aspects. Subsequently, to allow dissenting judges to append the reasons for dissent would be tantamount to reopening the case outside the courtroom, and the confidence in the tribunal's decision could be undermined.[24] As a result, the 1907 Convention omitted any reference whatsoever to dissenting opinions. In that sense, it was decided to stipulate in article 79 that the award should be signed by the president and the registrar of the tribunal. The decision adopted, was the result of the standpoint according to which, it was foreseeable that judges who were not in agreement with the whole reasoning of the award would not sign it.[25] By not allowing therefore any kind of pronouncement whatsoever from dissenting judges, the authority of the tribunal's decision would be preserved.

2.1.2 Dissenting opinions in the creation of the first permanent adjudicative body: the Permanent Court of International Justice

Previous proposals for the establishment of a permanent international court[26] did not materialise, until the creation of the League of Nations. Article 14 of the Covenant of the League of Nations, indicated that one of the tasks of the Council was the formulation and submission to the members of the League of Nations, of adoption plans for the establishment of a Permanent Court of International Justice. Consequently, the Council organised a commission of ten prominent jurists for the drafting of the statute of the new court.[27] This commission named as the Advisory Committee, based its work on the schemes presented by several states, the documents governing the functioning of previously established international courts and tribunals,[28] as well as in some other (classified as "non-official") documents, submitted for the purpose of the constitution of a permanent court. Some of these documents contained references to the issue of dissenting opinions.[29]

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24 *2 Proceedings of the Hague Peace Conferences, Conference of 1907* (1921), 363 – 364. The Dutch delegate at the conference, M. Loeff, synthesised his government's position referring to the latin phrase "*Roma locuta est, causa finite est*" (Roma has spoken, the case is closed) but in terms adaptable to the discussion: "*Tribunal locuta est, res finite est*" (the Tribunal has decided, the matter is closed). *Cf.* p. 363.

25 Ibid, report of Baron Guillaume, 437.

26 Ram Prakash Anand, *Studies in International Adjudication* (Oceana Publications 1969), 2.

27 Mary Ellen O'Connell & Lenore VanderZee, *'The History of International Adjudication'*, in Cesare Romano et al (eds.) The Oxford Handbook of International Adjudication (Oxford University Press 2015), 52.

28 See, *e.g.* the Convention for the Establishment of a Central American Court of Justice, Dec. 20, 1907, (1908) 2 *American Journal of International Law*, 239.

29 Some other schemes presented, such as the Dutch, Swiss and La Fontaine proposal on behalf of the Special Commission of the Interparlamentary Union, did not contain any single reference on the matter. In that sense, they followed the approach of the 1907 Hague Convention for the Pacific Settlement of International Disputes.

Accordingly, two of the three drafts[30] elaborated by the Scandinavian countries (Denmark, Norway and Sweden), allowed for the publication of dissenting opinions, namely, the Norwegian and Swedish drafts. In the case of the Danish draft, it gives the impression of permitting the judge to make known the fact of his dissent, although not allowing for the publication of his opinion, in view of the wording of its draft article 18.[31] In the statement of considerations enclosed to the said draft, it is noted that the reason for not allowing the publication of dissenting opinions is based on the fact that, judgments should be final and without appeal.[32] On the other hand, although the Norwegian and Swedish drafts allowed for the publication of dissenting opinions, no reasons were given as to why the said publication should be permitted. Interestingly, it is to be noted that a reason for such a position can be found in the fact that, even though these countries (Finland and Iceland included) form an individual legal family, they display elements from both the civil and common law systems.[33] In fact and with regard to dissenting opinions they follow the approach from the common law system.[34]

Likewise, article 46 of the draft presented by the so-called five neutral powers (Denmark, Norway, the Netherlands, Sweden and Switzerland), permitted the inclusion of dissenting opinions. It is interesting to note that the proposal included in this draft, was not unanimous; it was taken by the majority of these five neutral powers. Whereas Denmark, Norway and

30 The original idea of the Scandinavian countries was to submit a joint draft elaborated in three commissions – one for each country –. This in fact occurred when in early 1919, the three countries issued an "Avant-projet de Convention relative à une Organisation Juridique International, élaboré par le trios comités nommés par le gouvernements de la Suède, du Danemark et de la Norvége" Nevertheless, as in June 1919 the Treaty of Versailles was signed, which provided for the establishment and organisation of the League of Nations, the Scandinavian countries decided to meet again in order to revise the draft project originally presented. During the revision process, the three countries were not able to agree on certain issues and, therefore, Norway and Sweden decided to present separate projects. *Cf.* Permanent Court of International Justice: Advisory Committee of Jurists, *Documents presented to the Committee relating to Existing Plans for the Establishment of a Permanent Court of International Justice*, 55. Downloaded at <http://www.icj-cij.org/pcij/serie_D/D_documents_to_comm_existing_plans.pdf>.

31 Article 18 of the Danish Government's committee established "[a] statement must be given for the reasons of all judicial decisions and other findings of the Court. The judgments are to be signed by the President and the Secretary. They are read at a public sitting, the Parties being duly summoned. Dissenting opinions are not published". Ibid, 207.

32 Ibid, at 209.

33 Per Henrik Lindblom, 'The Role of the Supreme Courts in Scandinavia', (2000) 39 *Scandinavian Studies in Law*, 324, 326.

34 Filippo Valguarnera & Alessandro Simoni, *La Tradizione Giuridica dei Paesi Nordici* (G. Giappichelli 2008), 69.

Switzerland were in favour allowing for dissenting opinions, the Netherlands and Sweden were against it.[35]

The members of the Advisory Committee analysed all these drafts and met in The Hague from June 16th to July 24th, 1920, in order to prepare a final scheme to be presented to the Council of the League of Nations. During its meetings, the first instance where the matter of dissenting opinions arose was in the discussion concerning the necessity for states parties to a dispute, to be represented on the Permanent Court by a member of their nationality. In explaining this proposal, Lord Phillimore noted the importance of giving the parties the possibility to appoint a representative, in order to protect their interests and permit the Permanent Court to understand certain questions requiring a highly specialised knowledge and that moreover relate to differences between legal systems.[36]

In this context, Mr. de Lapradelle pointed out that, allowing judges *ad hoc* the possibility of recording their dissent constituted a delicate issue since, in his opinion, a national judge would always want to record the fact of his dissent in a decision unfavourable to his country.[37] As these judges would generally be dissenting from the majority, their votes would have no value and the reasons of their dissent would be but a restatement of the arguments likely to hurt the parties' feelings.[38] The discussion introduced by Mr. de Lapradelle was, however, merely reduced (at this point of the discussion)[39] to his statement and a brief reply from Lord Phillimore. The latter noted that a national judge would not always vote in favour of his country[40] and his appointment is necessary, in order to guarantee the acceptance of the decisions of the Permanent Court.[41]

35 This clarification regarding which states were in favour and against is important, because is in the light of it that one can understand that no contradiction exist between the positions taken by some of these five neutral powers (specifically the Netherlands and Sweden) in their individual drafts, and that presented together with Denmark, Norway and Switzerland

36 Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee June 16th – July 24th, 1920 with annexes* (1920), at 528 – 529. Downloaded at <http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf>.

37 Ibid, 531.

38 Ibid, 535.

39 The members of the Committee were discussing draft article 25, concerning national judges within the Court in order to ensure parties' representation. Consequently, the discussion followed the said course and, the issue of allowing national judges to record their dissent was left to be discussed at the meeting where the question of a statement of reasons in the decision would be considered. *Cf.*, Ibid, 533.

40 Id.

41 Ibid, 536.

When the time came for the Advisory Committee to assess the precise draft provision concerning dissenting opinions,[42] the discussion did not centre on whether or not they should be allowed; it referred as to its scope, *i.e.* whether or not dissenters should merely record the fact of their dissent or should be allowed to append to the majority judgment, an opinion containing the reasons of their dissent. By majority, the members of the Advisory Committee decided that the former was the most appropriate option.[43] Nevertheless, the records are silent on the reasons adduced by the members of the Advisory Committee for preferring this option. Likewise, the issue of *ad hoc* judges and their possibility to (at least) record the fact of their dissent was also discussed. The Advisory Committee as a whole decided, contrary to the intention of the members of the drafting committee, that judges *ad hoc* should have the same right as the rest of the members of the Permanent Court, when not voting with the majority.[44]

As a result of the above, the Advisory Committee included in article 56 of its draft scheme (that would subsequently be submitted to the Council of the League of Nations) a right for judges to dissent in the following terms:

> "If the sentence given does not represent, wholly or in part, the unanimous opinion of the judges, the dissenting judges shall be entitled to claim that their dissent or reservations shall be mentioned. No reasons for the dissent or reservations may be given."[45]

In its comments, contained in the report annexed to its draft scheme, the Advisory Committee noted, along with recalling the reasons that led to the deletion of dissenting opinions from the 1907 Hague Convention, that one of the main reasons, for not allowing judges not voting with the majority to give the reasons of their dissent, was the equality that should exist between the judges that are nationals of one the parties to the dispute and the rest of the members of bench. In other words, the Advisory Committee acknowledged that the practice in international adjudication of that time, allowed judges and arbitrators to give the reasons for their dissent. However, to give this possibility to national judges would lead to long dissenting opinions in favour of her or his state, in the event that it had lost the case. Consequently, as national judges were not to be given the possibility of making public the reasons for dissent, it would not be desirable for other judges to do so.[46] All

42 Draft article 19, chapter 3, of the text prepared by the drafting committee set forth that "[i]f the judgment given does not represent, wholly or in part, the unanimous opinion of the judges, the dissenting judges shall be entitled to have their opinions and the reasons on which they are based inserted after the statement of reasons which precede the decision of the majority. Judges of the nationality of the parties in dispute shall not have this right." Ibid, 570.

43 Ibid, 591.

44 Ibid, 592.

45 Ibid, 669.

46 Ibid, 742 – 743.

the members from the PCIJ are equal, notwithstanding other aspects (such as the link to one of the parties or their appointment just for one case) that may make them different.

The draft scheme prepared by the Advisory Committee was first discussed within the Council of the League of Nations. Some of its members, as well as other League members, proposed amendments to the said draft, *inter alia*, with regard to the possibility for dissenting judges to append the reasons of their disagreement with the majority judgment. Whereas the Italian Government made a call in its proposal, for the suppression of draft article 56 (contending that the publication of the dissenting opinions or any other kind of reservations of the judges with the majority judgment, might lessen respect for the judgment of the Permanent Court),[47] the Swedish Government's amendments were directed in the opposite direction. It went beyond supporting the right for judges to record the fact of their dissent. In that sense, it sought to broaden the scope of this right by allowing judges not voting with the majority to append the reasons of their dissent, considering the importance that these reasons of dissenting judges may have from international law's point of view.[48] As a result, the Council of the League of Nations decided to include, in its draft to be submitted to the Assembly of the League of Nations, the possibility for dissenting judges to state the reasons of their dissent.[49]

The motivation behind such an enlargement on the scope rested upon the development of international law.[50] As noted by the Council itself in its report (when commenting on the principle of *res judicata*),

> "[with regard to] the question of giving to the various legal systems represented by the various States the possibility of collaborating with the Court in the development of international law. It must first of all be noted that the Court will contain representatives of the different judicial systems into which the world is divided and that the judgments of the Court will therefore be the result of the co-operation of entirely different thoughts… If these judges were permitted to state their opinions together with their reasons, the play of the different judicial lines of thought would appear clearly."[51]

This draft scheme, as amended by the Council was submitted to the Assembly of the League of Nations. With regard to dissenting opinions, the discussion on draft article 56 took place based on Italy's proposal (already mentioned

47 Permanent Court of International Justice: Advisory Committee of Jurists, *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (1921), at 30. Downloaded at <http://www.icj-cij.org/pcij/serie_D/D_documents_conseil_de_la_societe_des_nations.pdf>.

48 Ibid, 37.

49 Ibid, 44.

50 Ijaz Hussain, *supra* note 20, 21.

51 *Documents concerning the action taken by the Council*, *supra* note 47, 50.

above) for the suppression of the said provision and the subsequent response from Sweden to the proposal. The discussion centred, however, on the matter of the publicity *vel non* of dissenting opinions and the embarrassment for national judges if their opinions were to be made public. It did not therefore address the question as to what should be the extent to which the right for dissenting judges should be exercised, *i.e.* if they should merely make known the fact of their dissent or they can also make the reasons for dissent known.[52]

Nevertheless, during this discussion some members of the subcommittee referred to an issue relevant for the determination of the role and function of dissenting. Sir Cecil Hurst noted for instance that two different approaches exist in this regard, namely, the continental and Anglo-Saxon approaches. As a decision of the Permanent Court might establish rules of law incompatible to the principles and rules of either of these two systems, the publication of dissenting opinions might contribute in avoiding such a danger.[53]

In the end, it was decided by the subcommittee to maintain the Council's draft, for two reasons. First of all, considering the experience that the Anglo-Saxon system had shown, the publication of dissenting opinions would augment rather than diminish the authority of the decision from the Permanent Court. Secondly, there were important arbitral decisions in which national judges had expressed dissenting opinions.[54]

The Assembly of the League of Nations, by a resolution dated 13th December 1920, declared that it had unanimously adopted the draft presented by the Council.[55] In consequence, the right for judges (not within the majority) to state the reasons of their dissent was included in article 57 of the Statute of the Permanent Court, in the following terms,

> "[i]f the Judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion."[56]

When a new Committee of Jurists revised the Statute of the Permanent Court in 1929, one of the aspects that was discussed refer to the convenience of dissenting opinions. As in previous instances (i.e. at the 1920 Committee of Jurists and the subsequent discussions in the subcommittee set up by the Assembly of the League of Nations), the debate focused on national judges. In fact, the Committee of Jurists was discussing article 31 (on the right for judges of the nationality of the contesting parties to retain their sit and for the parties to include a judge of their nationality if there is not one upon the bench), when the discussion on dissents arose. Fromageot, French

52 Ibid, 138.
53 Id.
54 Id.
55 Ibid, 257.
56 Ibid, 266.

delegate at the Committee, observed that dissenting opinions were placing national judges in a difficult position *vis-à-vis* their governments. Having in mind that their opinions would be published, they were being led to defend their governments and not to judge it. Consequently, their independence would be at stake.[57] He therefore proposed a change in the publicity of the Permanent Court's decisions in two aspects. On the one hand, a deletion of the part of the judgment that mentions how the decision was reached, i.e. unanimously or by majority (which included the number of judges in favour and against). On the other hand, a suppression of dissenting opinions from all judges considering that, they had not enhanced the authority of the Permanent Court.

There were two reasons leading the Committee not to propose any amendment whatsoever to article 57 of the Statute (thus rejecting Fromageot's proposal). First of all, and as a policy reason, it was noted by some of the members of the Committee that such a proposal would have the effect of leading countries from the Anglo-Saxon system to withdraw from the Permanent Court and would moreover render United States accession more difficult.[58] Secondly, from previous experience in international arbitration, dissenting opinions had proven to be important. It was also observed that the views of the minority are as important as those of the majority in the building-up of an international jurisprudence.[59] Lastly, it was noted that the dissenting opinion is an essential condition for the full exercise of the liberty of conscience and impartiality.[60]

The drafting of the Rules of the Permanent Court also presented interesting discussions on the implementation of certain aspects concerning dissenting opinions. Hence, in the drafting of the 1922 Rules of the Court, a proposal was made by Judge Beichmann to permit dissenting judges to append dissenting opinions to advisory opinions of the Permanent Court,[61] taking into account that the Statute of the Permanent Court was silent in that regard. Without discussing this proposal, the rest of his colleagues accepted it.

Subsequently, in the general revision of the Rules of the PCIJ that took place in 1926 during the Permanent Court's ordinary sessions, the Registrar presented a draft containing (what can be considered as) a slight modification of the provision (article 62) that regulated dissenting opinions. The modification referred to the possibility for dissenting judges to either attach the reasons or merely indicate the fact of their dissent, to the judgment of the Permanent Court.[62] The Registrar considered this modification as neces-

57 League of Nations: Committee of Jurists on the Statute of the Permanent Court of International Justice, *Minutes of the Session held at Geneva, March 11th – 19th, 1929* (1929), 50.
58 Ibid, 51 – 52.
59 Id.
60 Id.
61 Ibid, 219.
62 *Revision of the Rules of Court*, Draft Amendments by the Registrar, PCIJ Rep. Series D Addendum to No. 2, 313.

sary, in view of the fact that, in one of its decisions, the PCIJ had allowed three judges to record the fact of their dissent, without appending their reasons.[63] The amendment was thus necessary to put the Rules in line with the practice of the Permanent Court. Likewise, judges Moore, Finlay and Anzilotti presented an additional amendment to article 62 of the Rules of the Court. According to the amendment they proposed, the names of the dissenting judges and their opinions shall be appended to the judgment.[64]

Both amendments were discussed in the context of the Permanent Court's advisory jurisdiction, considering that judges Moore, Finlay and Anzilotti also sought article 71 of the Rules of the Court to include the name of dissenting judges and their opinions attached to the opinion of the Permanent Court, too.[65] From the records of the meetings, it can be established that this has been the only instance in which dissenting opinions had been amply discussed, during international adjudication's history.

The reason for the amendment from these three judges was based on the Permanent Court's practice. By virtue of that practice,

> "an opinion which allowed it to be supposed that judges were unanimous, whilst dissenting opinions had been expressed in private but not conveyed to the public, was, [in their view] absolutely in conflict with Article 57... Since that article provided a method for the expression of dissenting opinions, such opinions could not be expressed in any other way; in particular, they could not be appended to minutes of the Court's sittings without being also appended to the judgment."[66]

63 *Revision of the Rules of* Court, Detailed Minutes of Sittings devoted by the Court to the Revision of the Rules – Twenty-sixth Meeting, PCIJ Rep. Series D Addendum to No. 2, 172. Even though the Registrar of the Permanent Court, Mr. Hammarskjöld, did not mention the specific decision to which he was referring, one can infer the reference was made to two of the advisory opinions rendered by the Permanent Court. The first one concerned the competence of the International Labour Organization to regulate the conditions of persons employed in agriculture. In its opinion, the Permanent Court indicated that Vice-President Weiss and deputy-judge Negulesco "declare that they [were] unable to concur in the opinion given by the Court." *Cf. Competence of the ILO in regard to International Regulation of conditions of the labour of persons employed in agriculture*, Advisory Opinion of 12 August 1922, PCIJ Rep. Series B No. 2, 43. The second referred to the status of the Treaty of Peace between Finland and Russia, and the annexed Russian declaration regarding the autonomy of Eastern Carelia. In the Permanent Court's decision to the request for an opinion, Vice-President Weiss and Judges Nyholm, Bustamante and Altamira "declare[d] that they [were] unable to share the views of the majority of the Court as to the impossibility an advisory opinion on the Eastern Carelia question." *Cf.*, *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, PCIJ Rep. Series B No. 5, 29.

64 *Revision of the Rules of Court*, Amendments proposed by Lord Finlay, Mr. Moore and M. Anzilotti to articles 62 and 71 of the Rules, PCIJ Rep. Series D Addendum to No. 2, 272.

65 Id.

66 *Revision of the Rules of Court*, Detailed Minutes of Sittings devoted by the Court to the Revision of the Rules – Twenty-eighth Meeting, PCIJ Rep. Series D Addendum to No. 2, 202 – 203.

Interestingly enough, the precise terms of the amendments to articles 62 and 71 of the Rules of the Court, sought by judges Moore, Finlay and Anzilotti, clearly intended to make the publication of dissenting opinions mandatory.[67] Nonetheless, not all of them seemed to have the same idea in mind when proposing the amendment. For instance, for judge Anzilotti the important issue was to make known the result of the vote, while leaving the publication of dissenting opinions to the wishes of dissenters.[68] This was not the same idea that judges Moore and Finlay had in mind.

With regard to making the publication of dissenting opinions mandatory, the rest of the members of the Permanent Court strongly opposed this proposal. The manner in which article 57 of the Statute was couched granted judges but a right, *i.e.* it respects their discretion to make their dissent public but only if they so desire. Thus, to accept such a proposal would be tantamount to going beyond the option given by article 57,[69] transforming what the drafters of the Statute established as a right into an obligation.[70]

Therefore, and in order to reconcile the reasons that judges Moore, Finlay and Anzilotti each had for proposing the amendment with the terms of the Statute, it was decided that once the final vote was taken, a judge desiring to dissent had to do so in accordance with article 57.[71] In addition, this possibility for dissenting judges was not limited to a statement of reasons. The possibility for dissenting judges to simply record the fact of their dissent was also allowed, considering the greater right granted by the Statute might include this lesser right.[72]

Finally, an additional (and more radical) amendment to article 71 of the Rules of the Court was presented. It sought to suppress the possibility for judges to append dissenting opinions in this kind of proceedings,[73] *i.e.* advisory proceedings. It was contended by judges Loder and Weiss that dissenting opinions in advisory proceedings, were contrary to the Statute of

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67 For these judges, "[i]t is proposed to amend Article 62 of the Rules by striking out the last paragraph and adding, after the present enumeration of what the judgment shall contain, the following: *10. The names of dissenting judges. Any reasoned dissenting opinions shall be attached to the judgment*... [as for] Article 71... it is proposed to amend this article by substituting the second paragraph for the following: *The names of dissenting judges shall, together with any reasoned opinions, be attached to the opinion of the Court*." *Cf.*, *Revision of the Rules of Court*, *supra* note 64.

68 *Revision of the Rules of Court*, *supra* note 66.

69 Ibid, 207.

70 Ibid, 210.

71 Ibid, 222.

72 Ibid, 215.

73 *Revision of the Rules of* Court, Projet de Revision du Règlement de la Cour présenté par M. le Président Loder en collaboration avec M. le Vice-Président Wiess, avec commentaries (1923 – 1924), PCIJ Rep. Series D Addendum to No. 2, 284.

the Permanent Court, which only provided for the possibility to dissent in contentious cases.[74] They noted that,

> "in contentious procedure, judges should feel a need, in order to free themselves from responsibility, to state the reasons for their opinion... [while] in an advisory opinion, the situation was not the same: the Council or the Assembly wished for advice. It asked for an opinion, a single conclusion which it might not act upon."[75]

A stronger opposition to dissenting opinions came from judge Oda, for whom

> "it [was] regrettable that the Statute had adopted the system of publishing dissenting opinions; such a system was not only in contradiction with Article 54 of the Statute, but was further capable, in certain cases, of placing judges in a position of dependence in cases where the interests of their governments were at stake."[76]

Some arguments were given in reply to those against dissenting opinions in advisory proceedings,[77] even though the majority of the members of the Permanent Court agreed that dissenting opinions should not be permitted in advisory proceedings. In spite of the said opposition from the majority of judges, it was decided by 8 votes in favour, against 3, to maintain the possibility for dissenting judges to append the reasons of their dissent, within the Rules of the Court.[78] The reason for such a decision was based on the fact that, it would not be advisable to eliminate a possibility opened for judges for some years. A decision of this kind would have the effect of creating a bad impression of the Permanent Court throughout the world by taking a different attitude.

Lastly, a brief reference is also necessary with regard to the subsequent modification of the Rules of the Court in 1931, and the later adoption of a new set of rules in 1936. None of these amendments was, however, new. The Permanent Court had already discussed them. They were therefore only new attempts to reopen a discussion on aspects already discussed by the Permanent Court in the past.

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74 *Revision of the Rules of* Court, Detailed Minutes of Sittings devoted by the Court to the Revision of the Rules – Twenty-seventh Meeting, PCIJ Rep. Series D Addendum to No. 2, 195.

75 Ibid, 196.

76 Ibid, 197.

77 Judge Anzilotti, for instance, noted that "the principle of dissenting opinions was a fundamental principle of the Statute." Likewise, for judge Finlay "to allow Judges to express their personal views in regard to advisory opinions tended, moreover, to create confidence in the Court, and that confidence must not be dissipated." *Cf.*, Ibid, 196 – 197.

78 Ibid, 198.

Regarding the amendment presented in 1931, Sir Cecil Hurst proposed to make mandatory the publication of the opinions from dissenting judges.[79] In his view, the last paragraph of article 62 of the Rules of the Court appears to be contrary to article 57 of the Statute. Besides, it is difficult to reconcile it with the personal and individual responsibility that each judge bears. Accordingly, if a judge does not share the majority's view, he should express such dissent in a reasoned piece and not to remain in anonymity.[80] However, the Permanent Court took no decision whatsoever concerning this proposal. Its members decided to limit the modification of the Rules so far as necessary to give effect to the resolution passed by the Assembly of the League of Nations in 1930.[81] Therefore, proposals such as the one made by Sir Cecil Hurst could be left for discussion at later occasion.[82]

As for the amendment proposed by judge Anzilotti during the modification of the Rules held in 1936, it referred to the incompatibility with article 57 of the Statute of the possibility for judges to record the fact of their dissent, without giving the reasons.[83] No discussion took place regarding this proposal. The Registrar limited himself to recall the reasons leading the Permanent Court to allow this practice, namely,

> "if dissenting opinions were not appended to a judgment, it might be supposed that the judgment had been unanimous, whereas in reality it might have been adopted by a very narrow minority. Unless the number of judges voting for and against was published, the optional publication of dissenting opinions might, therefore, result in an erroneous impression... That was why it had been seen fit to encourage such judges to indicate how they had voted. As (...) the Court could not compel a judge to publish a dissenting opinion, all that could be done was to give judges the option of simply stating the fact that they dissented."[84]

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79 *Modification of the Rules*, Proposition de Sir Cecil Hurst, PCIJ Rep. Series D Second Addendum to No. 2, 294.

80 Id. Judge Sir Cecil Hurst referred, by way of example, to the *Free City of Danzig and ILO* advisory opinion, where the decision was taken by 7 votes to 4. Only two judges (Anzilotti and Huber) appended dissenting opinions, while the two dissenting judges remain (until present) anonymous. *Cf.*, *Free City of Danzig and ILO*, Advisory Opinion of 26 August 1930, PCIJ Rep. Series B No. 18, 17.

81 *Modification of the Rules*, Twentieth Ordinary Session – Ninth Meeting, PCIJ Rep. Series D Second Addendum to No. 2, at 9. The resolution of the Assembly augmented the number of judges to 15 and the Statute of the Permanent Court was modified in certain aspects.

82 *Modification of the Rules*, Twentieth Ordinary Session – Thirty Fourth Meeting, PCIJ Rep. Series D Second Addendum to No. 2, 178.

83 *Modification of the Rules*, Twentieth Ordinary Session – Twenty Fourth Meeting, PCIJ Rep. Series D Second Addendum to No. 2, 325.

84 Ibid, 327.

2.1.3 Dissenting opinions in the creation of the International Court of Justice

Several meetings took place prior to the San Francisco Conference. It was agreed in all of them, that the Statute of the Permanent Court should constitute the point of departure for the new court.[85] Accordingly, any changes to be made would be feasible as far as they were needed and based on the Permanent Court's experience. In fact, the right for dissenting judges to append their opinions to a judgment or advisory opinion was one of those aspects, in which no changes were considered as necessary; it was kept for the new court in the same terms as it was contained in the Statute of its predecessor.

That was, for instance, the conclusion to which the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice arrived.[86] When discussing the need for more than a bare majority to be required in the judgments of the new court, the Inter-Allied Committee analysed the issue of dissenting opinions. Some of its members held they should be abolished, since the main object of proceedings is to secure a decision that should moreover include the reasons in support of the decision. Hence, along with being irrelevant for the said main purpose of (both contentious and advisory) proceedings, dissenting opinions would weaken the authority of the decision.[87] Nonetheless, and despite this opposition on the permissibility of dissenting opinions, the Inter-Allied Committee concluded that they should be kept since,

> "(a) In any matter sufficiently difficult and controversial to come before the Court at all, it is inherently improbable that all the members of a Court of 9 or 11 Judges will be unanimous in their view. The appearance of unanimity produced by the absence of dissenting judgments would therefore to some extent be false and misleading.
> (b) If the Court was not in fact unanimous, this is almost certain to become known, together with the names of those Judges who did not concur in the majority view. In these circumstances, we think it far better that those who dissent should say so in open court and give their reasons.
> (c) We think that dissenting judgments have a very considerable political and psychological value. It is a much more satisfactory state of affairs from the point of view of the losing party if the arguments in support of its case are set out in a reasoned judgment, so that it is plain that they have been given full weight.
> (d) From the point of view of the development of international law, dissenting judgments are also of value. They act as a useful commentary on the decision of

85 See, Shabtai Rosenne, *1 The Law and Practice of the International Court: 1920 – 2005* (Martinus Nijhoff Publishers 2006), 46 – 60.

86 United Nations: Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, (1945) 39 *American Journal of International Law*, Supp. 1 – 56.

87 Ibid, 25.

> the Court itself, the precise point and bearing of which is often brought out more strongly in the light of the dissenting judgments. In addition, the latter often clarify subsidiary points of interest and importance which were not dealt within the judgment of the Court because not directly necessary for the purpose of its findings."[88]

Interestingly, bearing these reasons in mind some of the members of the Inter-Allied Committee moreover considered that it would be suitable to transform the right to dissent, into an obligation.[89] This proposal, however, did not concretize. There is no reference to this proposal in the records of the meetings of the Inter-Allied Committee. It is not therefore possible to know why it was not accepted.

It is against this background that it was decided at the San Francisco Conference to retain almost the same wording of article 57 of the Permanent Court's Statute. Only one modification was made to this provision. It sought to permit reasoned opinions from judges that, although voting with the majority, took their decision on different grounds, *i.e.* separate opinions.[90] This modification constitutes but a reaffirmation of the practice of the Permanent Court.[91]

Concerning the Rules of the Court, at its first meeting, held on April 3rd 1946, the newly established International Court of Justice proceeded to adopt its Rules of the Court, based on the latest version adopted by its predecessor, *i.e.* the 11th March 1936 Rules of the Court.[92] No substantial changes were made to the provision allowing for dissenting opinions. The only changed that was performed, sought to harmonise the provision contained in the Rules of the Court, with the slight change made to the Statute and which allowed judges to also append separate opinions. Similarly, the same can be said with regard to the modification of the Rules of the Court that took place in 1978. The practice from judges to append declarations was "officially" acknowledged and permitted by article 95 of the revised Rules of the Court.[93]

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88 Ibid, 25 – 26.

89 Ibid, 26.

90 Consequently, article 57 of the 1945 Statute of the International Court of Justice provided that "[i]f the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." *Cf.*, Statute of the International Court of Justice, (adopted 26 June 1945, entered into force 24 October 1945) 1 U.N.T.S. 993.

91 Rainer Hoffmann & Tilmann Laubner, 'Article 57', in Andreas Zimmermann et al (eds.), The Statute of the International Court of Justice: A Commentary (2nd edn, Oxford University Press 2012), 1386.

92 International Court of Justice, Yearbook 1947 – 1948, 102

93 On the amendment allowing for declarations see, Farrokh Jhabvala, 'Declarations by Judges of the International Court of Justice', (1978) 72 *American Journal of International Law*, 830; Shabtai Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice* (Martinus Nijhoff Publishers 1983), 196 – 199; Gilbert Guillaume, '*Les Déclarations Jointes aux Décisions de la Cour Internationale de Justice*', in Calixto A. Armas Barea et al (eds.), Liber Amicorum 'In Memoriam' of José María Ruda (Kluwer Law International 2000), 421 – 434.

2.1.4 Dissenting opinions in the subsequent creation of international courts and tribunals

The phenomenon on the proliferation of international courts and tribunals, has also witnessed (save for some exceptions already noted above) the proliferation of the right for judges to append dissenting opinions. When comparing the introduction of this right in the (so-called) modern international courts and tribunals,[94] with its introduction in the early stages of international adjudication, an important difference exists, namely, the absence of lengthy discussions concerning dissenting opinions.[95]

In the case of the European Court of Human Rights, whose constitutive instrument (the European Convention on Human Rights) was drafted and approved in a relatively short period of time,[96] the right for judges to append dissenting opinions was barely discussed. Article 51 of the draft for an European Convention of Human Rights (which also included a draft of the Statute of the European Court of Human Rights), prepared by the International Juridical Section of Movement and submitted to the Committee of Ministers of the Council of Europe,[97] consecrated the right for judges to append separate opinions, when they do not share in whole or in part the opinion of the majority[98] Likewise, the experts appointed for the drafting of a convention by its potential members, included in its article 37 the right for judges to append an opinion if they disagree in whole or in part with the judgment. Interestingly, this group of experts considered that no explanation on this provision was required.[99]

In just one instance the admissibility of dissents was discussed. It took place within the conference of senior officials held at Strasbourg from 8 to 17 June 1950, on the discussion of article 22 of the draft that referred to the extinguished European Commission of Human Rights. The second paragraph of this draft provision intended to consecrate that the opinions of all members of the commission should be stated in its final report. The Italian official noted that the report of the commission would carry a greater

94 Ruth Mackenzie & Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge', (2003) 44 *Harvard International Law Journal*, 271.

95 See. *e.g.*, Göran Sluiter, *'Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY'*, in Bert Swart et al (eds.) The Legacy of the International Criminal Tribunal for the Former Yugoslavia (Oxford University Press 2011), 191, 199.

96 Pieter van Dijk *et al* (eds.), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersetia 2006), 3 – 4.

97 William A. Schabas, 'Adoption of the Convention', in William A. Schabas (ed.) *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015), 3, 4.

98 Arthur Henry Robertson, 1 *Collected Edition of the 'Travaux Preparatoires' of the European Convention of Human Rights: Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly (11 May – 13 July 1949)* (Martinus Nijhoff Publishers 1975), 316.

99 Arthur Henry Robertson, 3 *Collected Edition of the 'Travaux Preparatoires' of the European Convention of Human Rights: Committee of Experts (2 February – 10 March 1950)* (Martinus Nijhoff Publishers 1976), 276.

weight if it did not contain dissenting opinions.[100] On the other hand, the officials from the Netherlands and France expressed a different view. For the Netherlands, the protection of human rights demanded the inclusion of dissents by reason of its genesis.[101] For its part, France indicated that the opinions of the minority should be made known since a public organisation is involved, as well as the system of dissenting opinions has proven to give good results in the International Court of Justice.[102] In sum, current article 45 and former article 31 (related to the report that the extinguished European Commission of Human Rights shall adopt) of the European Convention on Human Rights, were clearly modelled on article 57 of the Statute of the International Court.[103]

A somewhat similar situation also occurred upon the creation of the Inter-American Court. Dissenting opinions were not discussed during the drafting of the American Convention. In 1968, the Council of the Organization of American States transmitted to all member States the draft for an American Convention prepared by the Inter-American Commission of Human Rights. Article 54 of the said draft, included, along with the need for the judgment of the Inter-American Court to be motivated, that when the said judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissent or separate opinion attached to the judgment.[104] Neither in the written observations and comments nor in the debates held by the states members of the Organization of American States, a single comment can be found either in favour or against this draft provision. An amendment was, however, proposed to this provision. From its content it is possible to infer an indirect support for dissenting opinions. The said amendment was presented by the Dominican Republic and sought to include an explicit recognition of the right to append separate and dissenting opinions in advisory proceedings,[105] since the draft was silent in this regard. Nonetheless, the proposal was not addressed (and therefore not accepted) at the conference were the drafting of the American Convention was discussed. The provision (current article 66) allowing for dissenting opinions, as presented by the Inter-American Commission of Human Rights was unanimously approved. Even though it explicitly refers judgments, the practice of the IACtHR suggests that the right to append dissenting opinions also includes advisory opinions.

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100 Arthur Henry Robertson, 3 *Collected Edition of the 'Travaux Preparatoires' of the European Convention of Human Rights: Third and Fourth Sessions of the Committee of Ministers, Conference of Senior Officials (30 March – 17 June 1950)* (Martinus Nijhoff Publishers 1978), 154.

101 Id.

102 Id.

103 William A. Schabas, 'Article 45. Reasons for judgments and decisions', in William A. Schabas (ed.) *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015), 857.

104 *Conferencia Especializada Interamericana sobre Derechos Humanos*, Actas y Documentos, OEA/Ser.K/XVI/1.2 (7 – 22 de noviembre 1969), 31.

105 Ibid, 85.

By the same token, during the drafting of both, the Statute and Rules of the Inter-American Court, no discussion took place within the IACtHR or at the General Assembly of the Organization of American States (on the approval of the Statute of the IACtHR) concerning this right. These instruments were limited to replicating the right vested on judges to append their opinions, as set forth in the American Convention. The only instance and indication as to why dissenting opinions should be accepted, as well as what was considered their role and function, is to be found at the moment when the idea for the drafting of an American Convention on Human Rights began to take place. It is noted that, at the early stages of this idea, it was considered that the draft for an American Convention on Human Rights should be inspired in the European Convention on Human Rights (along with its first six protocols adopted before 1969).[106] Similarly, upon the drafting of the Statute of the Inter-American Court, it was noted that it should be based on the Statute of the International Court of Justice. [107] In view of these two aspects, the inclusion of dissenting opinions in the Inter-American Convention finds its reasons in the discussions and experience of both, the European Court of Human Rights and the International Court of Justice. This explains why the consecration of the right for judges to append dissenting opinions was virtually uncontested.[108]

A perhaps interesting and exceptional instance is to be found in the International Centre for the Settlement of Investment Disputes Convention. In clear contrast to what occurred in the context of the creation of two previously mentioned human rights courts, the first preliminary draft prepared by the staff of the World Bank did not contain any reference whatsoever to dissenting opinions. Its insertion took place during the regional consultative meetings of legal experts convened between December 1964 and May 1965. It was during the consultative meeting held in Santiago de Chile that, on the discussion of article IV which concerned the powers and functions of the tribunal, it was suggested that the said provisions should specify that all decision must be decided by absolute majority. It was also suggested that any dissenting member of the tribunal might put the reasons for his dissent in writing.[109] Hence, it was proposed that the provision should be redrafted

106 Héctor Gros Espiell, *La Convención Americana y Convención Europea de Derechos Humanos: Análisis Comparativo* (Editorial Jurídica de Chile 1991), 57.

107 Héctor Gros Espiell, 'Opiniones Disidentes y Separadas en la Corte Interamericana de Derechos Humanos', (1987 – 1989) 3 *Anuario Argentino de Derecho Internacional*, 23, 30.

108 This same situation can be said to occur, in the case of the International Tribunal for the Law of the Sea. As noted somewhere else, "while drafting the Statute of the Tribunals, the founders of the [United Nations Convention on the Law of the Sea] looked at the ICJ's structure and procedure for inspiration. The Tribunals also modelled its Rules on the ICJ Rules, while departing from the latter, where appropriate, keeping in view the differences between its Statute and that of the ICJ in respect of their competences." *Cf.* Patibandla Chandrasekhara Rao, 'ITLOS: The First Six Year', (2002) 6 *Max Planck Yearbook of United Nations Law*, 183, 216.

109 International Centre for the Settlement of Investment Disputes, *History of the ICSID* Convention, vol II – 1 (ICSID 1968) 331.

in order to include *inter alia* the possibility for dissenting arbitrators to attach their opinion.[110] In view of this proposal, the chairman of the meeting pointed out that, there is not a universally accepted practice either requiring or permitting dissenting opinions;[111] he therefore asked the delegates to express their views on this matter.

Interestingly, the views asserted by other members of the committee, were limited to endorsing the proposal. Furthermore, there is no instance in the records in which a member had expressed any objection whatsoever to allowing arbitrators to append dissenting opinions. The executive directors formulated a draft convention that included in its article 51 the possibility for any arbitrator dissenting from the majority, unless the parties agree otherwise, to append an opinion or make known the fact of his dissent.[112] Part of this draft provisions was, however, modified by the subsequent legal committee of experts representing member states of the World Bank. This committee decided to remove a part of this draft provision that would forbid, should the parties agree, the dissenting arbitrator from either appending his opinion or make known the fact of her or his dissent.[113] The idea behind this decision was to leave to the dissenting arbitrator alone, the decision to append a dissenting opinion or make known the fact of her or his dissent.

Lastly, it is important to note that this decision of introducing the right for judges to append dissenting opinions in the subsequent international courts and tribunals (in the light of the decision taken upon the creation of the ICJ and its experience in that regard) finds one of its first disruptions with the creation of the World Trade Organization. It was expected that the Dispute Settlement Body should coalesce around common and articulated views.[114] In spite of this expectation, articles 14(3) (concerning panels) and 17(11) (concerning the appellate body) of the Dispute Settlement Understanding indicated that any individual opinion shall be anonymous. This idea of ensuring that the names of the dissenting panellists should not be published was included, taking into account that in the light of the principle of confidentiality, both the deliberations and contributions by the members of the panel to any decision should be kept confidential.[115] This will moreover prevent panellists from writing in order to promote themselves.[116]

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110 Id.

111 Ibid, 512.

112 Ibid, 633.

113 International Centre for the Settlement of Investment Disputes, *supra* note 109, vol II – 2, 864.

114 Donald M. McRae, 'The WTO in International Law: Tradition Continued or New Frontier?' (2000) 3 *Journal of International Economic Law*, 27, 39.

115 Katrin Arend, 'Article 14 DSU', in Rüdiger Wolfrum *et al* (eds.) *WTO – Institutions and Dispute Settlement* (Martinus Nijhoff Publishers 2006), 430, 433.

116 Alberto Alvarez-Jimenez, 'The WTO-Appellate Body's Decision-making Process: A Perfect Model for International Adjudication?', (2009) 12 *Journal of International Economic Law*, 289, 322.

More challenging in this regard was the position adopted upon the creation of the Court of Justice of the European Union. As already noted, this constitutes one of the few (current) international courts and tribunals were individual opinions are not allowed. Despite the lack of official sources or access to historical archives,[117] it is known that the court "was neither intended nor equipped to act as anything but a traditional Continental European type of administrative court."[118] The Court of Justice of the European Union therefore clearly borrows from the continental law system.[119] Consequently, emphasis in the judicial process was given to the principles of collegiality[120] and secrecy of deliberations.[121] In that order of ideas, whatever internal divergence there might be, none of it transpires in the judgment.[122] The transparency in the judicial process (by means of the annexation of individual opinions) is not part of the duty to provide the reasons of the decision.[123] In addition, in view of the position of the Court of Justice of the European Union as a supranational body[124] and its function of contributing to the creation of a robust European identity,[125] dissenting opinions would not be advisable.[126]

2.2 Arguments in favour and against dissenting opinions and their effect in the design of dissenting opinions at international courts and tribunals

As noted in the previous section, dissenting opinions at all international courts and tribunals can be said to have common roots in the discussions on article 57 of the Statute of the Permanent Court of International Justice. The

117 Ditlev Tamm, 'The History of the Court of Justice of the European Union Since its Origin', in Allan Rosas *et al* (eds.) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (Springer 2013), 9, 15.

118 Hjalte Rasmussen, *On the Law and Policy in the European Court of Justice* (Springer 1986), 220.

119 Sophie Turenne, 'Advocate General's Opinions or Separate Opinions? Judicial Engagement in the CJEU', (2011) 14 *Cambridge Yearbook of European Legal Studies*, 723, 727.

120 *Cf.* Josef Azizi, 'Unveiling the EU Courts' Internal Decision-Making Process: A Case for Dissenting Opinions?', (2011) 12 *ERA Forum*, 49, 63.

121 *Cf.* Fernanda G. Nicola, 'National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union (2016) 64 *The American Journal of Comparative Law*, 865, 871.

122 Arthur Dyerve, 'The French Constitutional Council', in András Jakab *et al* (eds.) *Comparative Constitutional Reasoning* (Cambridge University Press 2017), 323, 349.

123 Vlad Perju, 'Reason and Authority in the European Court of Justice', (2009) 49 *Virginia Journal of International Law*, 307, 341.

124 Julia Laffranque, '*Dissenting Opinion in the European Court of Justice – Estonia's Possible Contribution to the Democratisation of the European Union Judicial System*', (2004) 9 Juridica International, 15, 17.

125 Vlad Perju, *supra* note 123, 308.

126 *Cf.* Directorate-General for Internal Policies, 'Dissenting Opinions in the Supreme Courts of the Member States (study)', November 2012. available at http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf (accessed 21 January 2019)

arguments advanced in favour and against dissenting opinions during the discussions in that context, have been important for the determination of allowing dissenting opinions at the international courts and tribunals that have been subsequently created. In other words, it is in light of these arguments that states have decided whether or not to allow dissenting opinions in international courts and tribunals.

On the other hand, these arguments have not only been important for the decision to allow *vel non* dissenting opinions. They have also been important for the determination as to how judges can exercise their right to append dissenting opinions. In this regard, it is interesting to note that judges are not allowed to exercise the right to append dissenting opinions in the same manner, across all international courts and tribunals. The reason for explaining why differences exist in the exercise of this right can also be found, in the arguments in favour and against dissenting opinions and how they have been specifically addressed in each international court or tribunal. This is so, since even though the arguments in favour and against dissenting opinions discussed at the existing international courts and tribunals are the same, the conclusions on each of them are not. As Dunoff and Pollack have explained, when states create an international court or tribunal, they do so having in mind some core values that they want to maximise in each judicial institution (*i.e.* judicial independence, judicial accountability, judicial transparency[127] and judicial authority)[128]. Depending on the said core value more importance might be given to a specific argument in favour or against dissenting opinions, at a specific judicial institution, compared to another judicial institution. Consequently, the exercise of the right to append a dissenting opinion is dependent on the core values that the judicial institution seeks to maximise. This subsection will in turn refer to the arguments against dissenting opinions, how they have been addressed and how they have influenced (i.e. imposed limits) to the exercise of the right to append dissenting opinions.

2.2.1 Anonymity in the authorship of dissents

Judicial independence and impartiality is considered as perhaps the most significant factor, for maintaining the credibility and legitimacy of international courts and tribunals.[129] It is by means of the judicial independence and impartiality that judges are allowed to decide autonomously from the preferences of political actors, when delivering their legal opinions.[130] Any

127 Jeffrey L. Dunoff & Mark A. Pollack, *'The Judicial Trilemma'*, (2017) 111 American Journal of International Law, 225, 250.

128 *Cf.* Gleider Hernández, 'Systemic Judicial Authority: The "Fourth Corner" of "the Judicial Trilemma"?, (2017) 111 *American Journal of International Law Unbound*, 349.

129 Ruth Mackenzie & Philippe Sands, *supra* note 94.

130 Erik Voeten, 'International Judicial Independence', in Jeffrey L. Dunoff & Mark A. Pollack (eds.) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012), 421, 422.

interference or influence from the outside should therefore be avoided.[131] In consequence, it is argued (just as in municipal law), that by appending a dissenting (or any other kind of individual) opinion, a judge may be at significant risk of being labelled for the views that he expresses therein.[132]

Based on these arguments, two designs for dissenting opinions have been adopted, in order to address the concerns with regard to independence and impartiality of the judges. The first of the designs indicates that dissenting opinions should be anonymous, as it is the case of the Dispute Settlement Body of the World Trade Organization. This design ensures the name of the dissenting judge will remain unknown. He can therefore freely make known the reasons of his dissent, without being subjected to any outside pressure for the views expressed therein.[133] Any subsequent discussion regarding the views contained in the dissenting opinion will therefore centre on its merits rather than its author.[134]

The second design allows for the identification of the author of the dissenting opinions. This design is based on the argument that it is by means of appending a dissenting opinion, that a judge is able to show how impartial and independent he has acted in the analysis of the case.[135] As noted by Hersch Lauterpacht,

> "[the international judge], by reason of the circumstances encompassing its activity, is exposed to imputations of influence of extraneous considerations, a system such as that actually adopted in the in the matter of Dissenting Opinions and fully operative in the practice of [various international courts and tribunals], constitutes a powerful safeguard. It precludes any charge of reliance on mere alignment of voting and lifts the pronouncements of [international courts and tribunals] to the level of the inherent power of legal reason and reasoning."[136]

In a few words, a judges' position is best protected by overtness.[137] The dissenting opinion from a judge is thus a mutual expression of his independence, *i.e.* a judge's independence from the rest of his colleagues.[138] In

131 Paul Mahoney, 'The International Judiciary – Independence and Accountability', (2008) 7 *The Law & Practice of International Courts and Tribunals*, 313, 321.

132 Jirí Malenovský, 'Les Opinions Séparées et leurs Répercussions sur l'Indépendance du juge International', (2010) 3 *Colombian Yearbook of International Law*, 27, 62.

133 Meredith K. Lewis, 'The Lack of Dissent in WTO Dispute Settlement', (2006) 9 *Journal of International Economic Law*, 895, 908.

134 Jennifer Hillman, 'Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?', (2017) 111 *American Journal of International Law Unbound*, 364, 365.

135 Kenneth J. Keith, 'The International Court of Justice: *Primus inter* pares?', (2008) 5 *International Organizations Law Review*, 7, 17.

136 Hersch Lauterpacht, The Development of International Law by the International Court (1958), 69.

137 Rosalyn Higgins, 'Non-identification of the majority and minority in the practice of the International Court of Justice', in Gabriel M. Wilner (ed.) *Jus et Societas: Essays in Tribute Wolfgang Friedmann* (Martinus Nijhoff 1979), 134, 148.

138 Julia Laffranque, '*Dissenting Opinion and Judicial Independence*', (2003) 8 Juridica International, 162, 169.

that order of ideas, the dissenting opinion reinforces the independence and impartiality of judges.[139]

2.2.2 Encouragement of unanimous decisions

When a dissenting opinion is appended to a judgment, it reveals an internal disagreement among members of the court. The credibility of the said decision from the majority might therefore be undermined.[140] Examples have been provided in support of this claim. In the context of the International Centre for the Settlement of Investment Disputes, Albert Jan van den Berg has for instance noted that in the case of *Klöckner v. Cameroon*, the annulment of the award sought by the claimant, was based on the reasons set forth in the opinion appended by the dissenting arbitrator; as a matter of fact, the annulment committee annulled the award relying in large part on the dissenting opinion.[141] Similarly, the application filed by Guinea-Bissau against Senegal before the International Court, sought the annulment of an arbitral award, based on the fact that one of the two arbitrators constituting the majority expressed a somewhat contradictory view, in relation to the vote that he adopted in the *dispositif*.[142] Lastly, an additional example is also found in the recent judgment on preliminary objections rendered by the International Court of Justice, in the case concerning *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*.[143] The majority of the ICJ, by the casting vote of its president, rejected all of Colombia's objections to its jurisdiction. Moreover, seven (of the eight) dissenting judges appended a joint dissenting opinion. Some hours after the ICJ concluded the reading of its judgment, the President of Colombia stated that,

> "for the International Court of Justice to still be regarded as the principal judicial organ of the United Nations, it cannot afford to be seen as a court where one can bring before it the same dispute over and over again. Such a scenario would undercut the certainty, stability and finality that judgments from this court should provide. Allowing this proceedings from Nicaragua could be something injurious for the respondent State, as well as for the efficient operation of

139 James Flett, '*Collective Intelligence and the Possibility of Dissent: Anonymous Individual Opinions in WTO Jurisprudence*', (2010) 13 Journal of International Economic Law, 287, 308.

140 Meredith K. Lewis, *supra* note 133, 905.

141 Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', in M. H. Arsanjani *et al* (eds.), *Looking to the Future: Essays on International Law in Honour of W. Michael Riesman* (Martinus Nijhoff Publishers, 2010), 821, 828.

142 *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep 53, pp. 64 – 65, para. 33.

143 *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, [2016] ICJ Rep. 100.

> the judicial system for the settlement of international disputes'. These words are not mine, they are of the judges constituting part of half of the members of the International Court of Justice who agree with the arguments of Colombia, and that objected that the said court allowed Nicaragua to come back for a second time, to ask for what it was rejected in 2012 (…) In deciding that it has jurisdiction to entertain the application in its merits, it incurred in three main errors (…) It is also relevant to quote others words from the judges that are part of that half of the court that voted in favour of Colombia's arguments. 'The incoherence of the majority's position is thus plain for all to see'. I quote other words, 'one cannot knock at the Court's door for a second time with regard to a claim already examined by the Court on its merits'. Against these blatant contradictions that the judge's themselves point out, I have decided that Colombia will not keep appearing before the International Court of Justice in this matter"[144]

Colombia's has questioned the authority of the decision, based on the joint dissenting opinion. It therefore constitutes an important instance on how a dissenting opinion lessens the authority of a decision.

By the same token, the credibility of a decision has also been questioned with respect to its precedential value. Even though formally speaking decisions from international courts and tribunals are only binding for the parties to a dispute, they cannot in practice be considered as a mere subsidiary source of international law.[145] Their decisions are therefore bound to have significant repercussions beyond the strict confines of the question before them;[146] in that sense, the authority of a decision is not therefore confined to the parties to the dispute.[147] By utilizing the aspects of a specific case that have a wider interest or connotation, one can say that judicial decisions make general pronouncements of law and principle.[148]

It is also worth mentioning that, for some scholars, all these concerns related to the authority of a decision are accentuated when several dissenting opinions are appended. In this regard, the former president of the International Court, Mohammed Bedjaoui, has noted that the proliferation of dissenting opinions (*i.e.* the attachment of several dissenting to a

144 For the relevant quotes from the joint dissenting opinion, one can take a look at paragraphs 59, 60 and 67 of the said opinion.

145 Aldo Zammit Borda, 'A Formal Approach to Article 38(1)(d) of the ICJ Statute from the perspective of the International Criminal Courts and Tribunals', (2013) 24 *European Journal of International Disputes*, 649, 650.

146 Christian J. Tams & Antonio Tzanakopoulos, '*Barcelona Traction* at 40: the ICJ as Agent of Legal Development', (2010) 23 *Leiden Journal of International Law*, 781, 783.

147 Allain Pellet, 'Article 38', in Andreas Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012), 731, 854 – 868.

148 Gerald Fitzmaurice, 'Hersch Lauterpacht – The Scholar as a Judge', (1961) 37 *British Yearbook of International Law*, 13, 14 – 15.

judgment) is worse since it prejudices more the integrity of a decision and therefore impairs its meaning and scope.[149] As it has been also noted,

> "it is a different matter when dissenting opinions multiply, contradict each other, attack each other on the grounds of the majority decision itself, and affirm self-contradictory or obviously erroneous theories."[150]

In the light of these concerns regarding the threats to the authority of a decision, three designs have been adopted for dissenting opinions. The first encourages that the decision should be taken unanimously. In this design dissenting opinions are not expressly prohibited, as it is the case in the Dispute Settlement Body of the World Trade Organization. Pursuant to rule 3.2 of the Working Procedure for appellate review, the Appellate Body shall make every effort to take their decisions by consensus. The reason for such a decision was based on the need for the Appellate Body to speak with one voice, in addressing the foundational questions to be posed to this organ.[151] A dissenting opinion might diminish the credibility and reliability of the appellate review process,[152] as well as it poses negative consequences in maintaining the said consensus.[153] Hence, a means to pursue and fulfil the aims of the law of the World Trade Organization is by discouraging dissenting opinions.[154]

The second design considers that appending a dissenting opinion should be a last resort option. In that sense, the decision should adequately refer to the arguments raised by the dissenter, as well as it should mention the reasons from the majority explaining why the position taken by the dissenter was not accepted.[155] As a consequence, there will be no need for the

149 Mohamed Bedjaoui, 'Comments on the Report: The International Court of Justice: Efficiency of Procedure and Working Methods. Report of the Study Group with additional comments', in Derek William Bowett *et al* (eds.) *The International Court of Justice: Process, Practice and Procedure* (British Institute of International and Comparative Law 1997) 87, 88.

150 Nicolas Politis, 'How the World Court has Functioned', (1926) 4 *Foreign Affairs*, 451.

151 Gabrielle Marceau *et al*, 'Introduction and Overview', in Gabrielle Marceau *et al* (eds.) *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015), 3, 48.

152 Arthur V. Ganesan, 'The Appellate Body in its Formative Years: a personal perspective', in Gabrielle Marceau *et al* (eds.) *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in the Multilateral Trading System* (Cambridge University Press 2015), 517, 531.

153 Claus-Dieter Ehlermann, 'Reflections on the Appellate Body of the WTO', (2003) 6 *Journal of International Economic Law*, 695, 696.

154 Ronnie R. F. Yearwood, *The Interaction between World Trade Organisation (WTO) Law and External International Law: the constrained openness of WTO law (a prologue to a theory)* (Routledge 2012), 84.

155 Peter J. Rees & Patrick Rohn, 'Dissenting Opinions: Can They Fulfil a Beneficial Role?', (2009) 25 *Arbitration* International, 329, 341.

dissenting judge to append an opinion.[156] It is reported that, in the context of the International Centre for the Settlement of Investment Disputes, this design has been adopted by some tribunals.[157] In the case of *Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, the president of the tribunal decided the award will contain the majority reasoning, as well as the position adopted by the dissenting arbitrator on certain aspects of the award.[158]

Finally, the third design does not consider that dissenting opinions pose a significant risk for the authority of a decision. In that sense, no limitation exists for appending dissenting opinions. In this design, the possibility for judges to append the opinion is expressly provided in the constitutive instrument of the international court or tribunal. The reason for this design is to be found in the fact that the authority of a decision "is persuasive only. And so [it] must persuade."[159] For a decision to be persuasive (and therefore authoritative), it is important for it to be based on ""rigorous legal analysis and elaborate logical reasoning founded on an informed, well-researched and comprehensive of the international legal issues involved."[160] It is in this regard that the authority of a decision (*i.e.* its level of persuasion) can only be appreciated in the light of view on the contrary, namely, dissenting opinions.[161] Moreover, the inclusion of dissenting opinions (to a specific case) should be regarded as an indication of the complexity of legal questions,[162] that an international court or tribunal has to deal with. Consequently, as noted by Gerald Fitzmaurice,

> "even when a unanimous decision – from the particular point of view of the case at hand – is preferable, the same decision is less interesting for a lawyer than a decision embodying a substantial majority view, accompanied by a few separate or dissenting opinions."[163]

156 Manuel Arroyo, 'Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal', (2008) 26 *Association Suisse de l'Arbitrage*, 432, 460.

157 Patricia Jimenez Kwast, 'Prohibitions on Dissenting Opinions in International Arbitration', in Cedric Ryngaert *et* al (eds.) *What's Wrong with International Law?: Liber Amicorum A.H.A. Soons* (Martinus Nijhoff Publishers 2015), 127, 142.

158 *Vanessa Ventures Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case ARB/03/15, Decision on Jurisdiction, 27 April 2006, at paras. 113 – 114.

159 Christian J. Tams & Antonio Tzanakopoulos, *supra* note 146, 785. *Cf.* Armin von Bogdandy & Marc Jacob, 'The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the *Kosovo* Opinion', in Ulrich Fastenrath *et al* (eds.) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011), 809, 822.

160 Stephan W. Schill, 'Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and its Significance for the Role of the Arbitrator', (2010) 23 *Leiden Journal of International Law*, 401, 424.

161 Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice: General Principles and Substantive Law', (1950) 27 *British Yearbook of International Law* 1, 2.

162 Edward Dumbauld, 'Dissenting Opinions in International Adjudication', (1942) 90 *University of Pennsylvania Law Review*, 929, 940.

163 Gerald Fitzmaurice, *supra* note 148.

Thus, depending on the issues addressed by the dissenting judges, and when compared with the reasons contained in the decision, it is possible to determine how likely the said decision can amount to an important precedent, valid for subsequent disputes on the same matter.[164] In that sense, instead of weakening the authority of the decision, a dissenting opinion either strengthens or at least preserves it.[165] The public order implications of the dispute settlement mechanisms encourages this practice, since the only way of arriving to an accepted solutions is by means of transparently providing the arguments for possible solution, for instance through dissenting opinions.[166] The experience from the Human Rights Committee (where dissenting opinions did not exist during its first years of existence) is a good example in this regard. It has been stated that,

> "the Committee has gradually moved away from the constraints of consensus, which frequently led to Views that only reflected the least common denominator, or Views that lacked proper rationale. Indeed, there were many Views lacking *ratio decidendi*, stating more or less that there had been a violation, because there had been a violation or conversely that there was no violation because there was no violation. Better argued majority opinions are now followed by concurring and/or dissenting individual opinions that further explain or contest the majority's rationale."[167]

2.2.3 Limits to the content of a dissenting opinion

The decision from an international court or tribunal is rendered, in relation to a specific factual context and the claims advanced by the applicant in that regard. Two approaches exist concerning the manner in which international courts and tribunals dealt with the issues raised by the parties. As it has been explained by Sir Gerald Fitzmaurice,

> "there is the approach which conceives it to be the primary, if not the sole duty of a judge to decide the case in hand, with the minimum of verbiage necessary for this purpose, and to confine himself to that. The other approach conceives it to

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164 In this regard, it is indicated that "if a dissenting opinion is not published, this would mean that the dissenting opinion was simple ignored or that a compromise was reached between the majority and the dissenting member. This could make the reasoning of the judgment somewhat unclear and ambiguous. This would lessen its value as a precedent." *Cf*. Mitso Matsushita, 'Some Thoughts on the Appellate Body', in Patrick F. J. Macrory *et al* (eds.) *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005), 1389, 1396.

165 Mita Manouvel, *Les Opinions Séparées à la Cour Internationale: Un Instrument de Contrôle du droit international prétorien par les États* (L'Harmattan 2005), 80 – 81.

166 Stephan W. Schill, *supra* note 160, 428.

167 Alfred de Zayas, 'Individual Opinions in the Practice of the Human Rights Committee under the Optional Protocol to the Covenant on Civil and Political Rights', in Sergio Antonio Fabris (ed.) 3 *Trends in the International Law of Human Rights, Studies in Honour of Professor Antonio Augusto Cançado Trindade* (Nuria Fabris 2005), 537, 547.

> be the proper function of the judge, while duly deciding the case in hand, with the necessary supporting reasoning (…) to utilize those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law."[168]

In international adjudication, courts and tribunals are limited in the scope of their decisions *inter alia* by the terms of the dispute that has been submitted to them. In fact they should never say more than what is strictly necessary to decide the issues before them.[169] International courts and tribunals do not therefore examine all of the issues raised by the parties.[170] They are usually guided by the rule of judicial economy.[171] Some international courts and tribunals, however, are inclined to the judicial activism approach in view of aspects, such as the nature of the proceedings.[172]

Against this background, there is a question regarding the design of dissenting opinions as to whether they should also be guided by the judicial restraint approach. This is an important question, taking into account that it is argued that one of the main reasons for allowing dissenting opinions is to be found, in their contribution to the development of the law.[173] In fact, instances have been mentioned where a dissenting opinion has influenced the development of the law.[174] Using Sir Gerald Fitzmaurice words mentioned above, the development of the law presupposes a judicial activism approach. In that order of ideas, dissenting judges are not usually limited in their opinions to the matters addressed in the majority judgment.[175]

Three different designs have been adopted in this respect for international courts and tribunals. In the first, no explicit limitation exists on the scope of dissents. The constitutive instruments and rules of procedure are limited to indicate that a judge may append a dissenting opinion, when he disagrees in whole or in part with the majority judgment. The scope of the

168 Gerald Fitzmaurice, *supra* note 148.

169 Hugh Thirlway, 'Judicial Activism and the International Court of Justice', in Nisuke Ando *et al* (eds.) 1 *Liber Amicorum Judge Shigeru Oda* (Martinus Nijhoff Publishers 2002), 75, 78.

170 Alberto Alvarez-Jimenez, 'The WTO Appellate Body's Exercise of Judicial Economy', (2009) 12 *Journal of International Economic Law*, 393.

171 Fulvio Maria Palombino, 'Judicial Economy and Limitation of the Scope of the Decision in International Adjudication', (2010) 23 *Leiden Journal of International Law*, 909, 926

172 Fuad A. Zarbiyev, 'Judicial Activism in International Law – A Conceptual Framework of Analysis', (2012) 3 *Journal of International Dispute Settlement*, 247, 271 – 277.

173 See, *e.g.*, Ram Prakash Anand, *supra* note 26, 795; Edward Dumbauld, '*Dissenting Opinions in International Adjudication*', (1942) 90 University of Pennsylvania Law Review, 929, 935; Shiv R. S. Bedi, *The Development of Human Rights Law by the judges of the International Court of Justice* (Hart Publishing 2007), 102.

174 Rainer Hoffmann & Tilmann Laubner, *supra* note 53, 1398 – 1399; Charles N. Brower & Charles B. Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson – Van den Berg presumption that Part-Appointed Arbitrators are Untrustworthy is Wrongheaded', (2013) 29 *Arbitration International*, 7, 36.

175 Hugh Thirlway, *supra* note 169, 92 – 94.

opinion in this design is determined by the judge appending the opinion.[176] As instances of this design, reference can be made to the International Court of Justice, the International Tribunal for the Law of the Sea or the European Court of Human Rights. In the case of the second design, the rules of procedure explicitly limit the scope of the dissenting opinion to the aspects addressed in the majority judgment. Consequently, a judicial restraint approach seems to be followed. This design can be said to be based on the fact that, notwithstanding the importance of dissenting opinions for the development of the law, "any development should be integral and incidental to the disposal according to the law of the actual issues before the court."[177] This design is for instance adopted in the Inter-American Court of Human Rights. Article 55 of its Rules of Procedure compels judges to only refer in their opinions to the issues covered in the judgment. As for the third design, the scope of dissenting opinions is limited but only with respect to certain aspects. This is the case of the International Criminal Court. Pursuant to article 83 of its Statute, in the case of proceedings on appeal, any judge dissenting from the majority judgment is entitled to append an opinion only on a question of law.

2.3 Some conclusions on the contextual framework on the exercise of the right to append dissenting opinions

The origins and introduction of dissenting opinions in international courts and tribunals, as presented in the previous subsection, are important for the determination of the framework of dissenting opinions that Part I seeks to present. In fact, from the origins and introduction some conclusions can be extracted. It is necessary to present them, before addressing other aspects of dissenting opinions in international adjudication, since these conclusions will constitute the basis for the aspects that will subsequently be addressed. The conclusions will be presented as follows.

First of all, it is to be noted that the experience in domestic jurisdictions (more specifically from states belonging to the common law system), constitutes one of the reasons for the introduction of dissenting opinions in international adjudication.[178] This was in fact the main reason at the subcommittee set up by the Assembly of the League of Nations, for not proposing any changes to the draft submitted to it and, in consequence,

176 See, *e.g.*, Pieter Kooijmans, 'The ICJ in the 21st Century: Judicial Restraint, Judicial Activism and Proactive Judicial Policy', (2007) 56 *International and Comparative Law Quarterly*, 741, 743.

177 Robert Y. Jennings, 'The Role of the International Court of Justice', (1997) 68 *British Yearbook of International Law*, 41.

178 *Cf.* Catharine Titi, 'Investment Arbitration and the Controverted Right of the Arbitrator to Issue a Separate or Dissenting Opinion', (2018) 17 *The Law and Practice of International Courts and Tribunals*, 197, 198.

allow dissenting judges to append an opinion containing the reasons of their dissent. In that sense, municipal law has proven to be important for dissenting opinions in international adjudication. Nonetheless, it is important to bear in mind the differences between municipal and international law, with a view of not losing sight of the fact that municipal law is important as an indication of policy and principles, of the role and function of dissenting opinions in international law.

Secondly, since the creation of the first permanent international court, the right for judges to append dissenting opinions was, save for the two exceptions already mentioned, not put into question. A close look at the debates during the drafting of the Statute of the Permanent Court, show that in the case of dissenting opinions most of the discussions on their permissibility centred on the convenience of the exercise of this right for judges *ad hoc*. Dissenting opinions from these judges would be devoid of any value, since their inclusion on the bench was permitted, with a view to legitimizing the adjudication process and the acceptance of the judgment by the parties to the dispute. An opinion from a judge *ad hoc* would therefore amount to a restatement of the arguments that the appointing-party has presented throughout the proceedings. In this order of ideas, policy rather than legal reasons, constituted the basis of the decision from the Advisory Committee to limit dissenting opinions, to a mere record of the vote. In other words, it was acknowledged that dissenting opinions do have an important role and function for international adjudication, but it was overshadowed by the discussion on the dissenting opinions from judges *ad hoc*. This situation, however, only occurred during the discussions on the drafting of the Permanent Court of International Justice. It did not take place in other international courts and tribunals in which judges *ad hoc* are also allowed.

Thirdly, the discussion as to the permissibility *vel non* of dissenting opinions referred in general terms, to the tension between judicial authority and judicial independence.[179] In that sense, it was argued that it might be highly probable for dissenting opinions to lessen the authority of the decision rendered by an international court or tribunal, especially when the decision is supposed to be final and binding.[180] On the other hand, dissenting opinions are important in order to preserve the independence

179 See, Antonio Sánchez de Bustamante, *The World Court* (MacMillan 1944), 142.

180 Justice White, from the Supreme Court of the United States, explained in *Pollock v. Farmers Loan and Trust Co.* that the only thing which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort. *Cf.* Paul M. Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (Oxford University Press 2008), 114.

and impartiality of the members of a court.[181] In addition, the contribution of dissenting opinions to the development of the law was also advanced in the discussion, as an important reason for allowing them in international adjudication. In his separate opinion appended to the decision on the case concerning *Appeal relating to the Jurisdiction of the ICAO Council*, judge de Castro has elegantly summarised the arguments of both positions, when noting that,

> "[d]issenting and separate opinions are criticized, (…) because they weaken the authority of judgments: it is not the Court, it is said, but only a tiny majority which takes the decision; furthermore, in separate opinions, some of the arguments on which the judgment rests are called into question by members of the minority. On the other hand, such opinions are evidence of the life and of the evolution of legal doctrine. Some dissenting opinions are the law of the future; others are the expression of the resistance of old ideas."[182]

Fourth and lastly, there is only one instance in the history of international adjudication, in which the admissibility of dissenting opinion was amply discussed, namely, the drafting of the Statute of the Permanent Court of International Justice. As all the references on the subsequent creation of international courts and tribunals show, no discussion at all took place on the matter. The constitutive instruments of all these international courts and tribunals were based on the Statute of the PCIJ. In that sense, dissenting opinions were accepted in international adjudication in general, taking into account the experience of the International Court of Justice, and its predecessor, as well as the fact that none of the arguments against them have prevailed over their benefits.[183] In a few words, dissenting opinions have multiplied in international adjudication through emulation.[184]

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181 In this regard, Hersch Lauterpacht has noted that "[i]n a tribunal which, by reason of the circumstances encompassing its activity, is exposed to imputations of influence of extraneous considerations, a system such as that actually adopted in the [legal instruments that establish the powers and competences of the various international courts and tribunals] in the matter of Dissenting Opinions and fully operative in the practice of [various international courts and tribunals], constitutes a powerful safeguard. It precludes any charge of reliance on mere alignment of voting and lifts the pronouncements of [international courts and tribunals] to the level of the inherent power of legal reason and reasoning." *Cf.* Hersch Lauterpacht, *supra* note 18, 69.

182 *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, [1972] ICJ Rep. 46, (Separate Opinion, Judge de Castro), p. 116.

183 This decision to transplant the dissents model from the International Court to the Inter-American Court can be explained, in the light of the sociological institutionalist hypothesis. Based on this hypothesis it is argued that actors usually fall back on legitimate templates when designing international courts and their rules of procedure. *Cf.* Jeffrey L. Dunoff & Mark A. Pollack, *supra* note 127, 272.

184 Karen Alter, *'The Multiplication of International Courts and Tribunals after the end of the Cold War'*, in Cesare Romano et al (eds.) The Oxford Handbook of International Adjudication (Oxford University Press 2015), 63, 68 – 73.

Part II:

The Influence of the Mandate, Jurisdictional and Institutional Design of the International Court of Justice and Inter-American Court of Human Rights on the Exercise of the Right to Append Dissenting Opinions

Introduction

Part I of this dissertation has set a framework, from a historical and theoretical perspective, for discussing the exercise of dissenting opinions at international courts and tribunals. Part I thus laid down the foundation for the argument that, even if the right to append dissenting opinions at all international courts and tribunals can be traced back to a shared historical and theoretical basis, their design is not the same. In Part I, specifically section 2.3, some factors have been identified to explain such different designs. Building on these findings, Part II will zero in on the different design and exercise of the right to dissent. Taking a comparative approach, the chapters in this part will examine whether and to what extent the differences in mandate, jurisdictional and institutional design inform the exercise of the right to append dissenting opinions. It will focus on two international courts in particular, namely, the International Court of Justice and the Inter-American Court of Human Rights.

Consequently, the research question that will guide this Part reads,

> **to what extent, if at all, do differences in mandate, jurisdictional and institutional design of the International Court of Justice and the Inter-American Court of Human Rights result in differences in the exercise of the right to append dissenting opinions?**

With a view of addressing this research question, this Part will be divided into two chapters. Chapter 3 will refer to the mandate, jurisdictional and institutional design of the International Court of Justice and the Inter-American Court of Human Rights. Special emphasis will be made in each of these aspects to features in which a difference exists between both courts. For its part, Chapter 4 will focus on the practice of both courts on dissenting opinions, with a view to identifying the differences in the exercise of the right to dissent and moreover to analysing whether the said differences are influenced by the differences in mandate, jurisdictional and institutional design of both courts.

3 Mandate, jurisdictional and institutional design of the International Court of Justice and the Inter-American Court of Human Rights

3.1 Mandate of the International Court of Justice and the Inter-American Court of Human Rights

The International Court of Justice and the Inter-American Court of Human Rights were created in different moments in history. The former was created as part of the United Nations system after the end of the Second World War. The latter was created in view of the regional concern for human rights situations in some states[1] and the desirability of a regional instrument drafted in accordance with the specific sensitivities of the region (in the case of the IACtHR), also informed by a lack of willingness from certain states to ratify the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[2] In other words, both courts were created in different contexts and for different purposes.

3.1.1 Mandate of the International Court of Justice

The ICJ was created with the primary aim of peacefully settling disputes. As such, the International Court of Justice embodied the greater idea of judicial adjudication as a dispute settlement mechanism that could amount to being a substitute for war[3] for the solution of international disputes.[4] Consequently, it is the idea of war prevention which is to be considered as the ICJ's archetypical function.[5] Additionally, this function is not limited to

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1 *Cf.* Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Human Rights Protection?', (2010) 9 *Washington University Global Studies Law Review*, 639, 643.

2 *Cf.* Robert K. Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights', (2009) 31 *Human Rights Quarterly*, 856, 862 – 865

3 Yuval Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', (2009) 20 *European Journal of International Law*, 73, 80.

4 Leo Gross, 'The International Court of Justice: Consideration of Requirements for Enhancing its role in the International Legal Order', in Leo Gross (ed.) *1 The Future of the International Court of Justice* (Oceana Publications 1976), 22, 24 – 25.

5 Karen Alter, 'The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review' (2012) *Northwester University School of Law Working Papers*, Working Paper No. 12-002, 1, 9. See also, *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018, [2018] ICJ Rep. 139 (Dissenting Opinion, Judge ad hoc Al-Khasawneh), p. 1.

the dispute brought before it. Its decision on a specific case have allowed for others disputes to be resolved in a similar fashion.[6]

The above does not, however, mean that the role and function of the International Court of Justice is strictly limited to the settlement of disputes.[7] In spite of the fact that some more functions can be attributed to it, they derive from that constituting its *raison d'être*, namely, the settlement of disputes.[8] Consequently, and without having any dispute whatsoever on which to adjudicate, the ICJ cannot exercise any additional function. It has explicitly noted in its judgments in the *Nuclear Tests Cases*, that "as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function."[9] The use of inherent powers is in this sense also subjected to the existence of a dispute.[10]

Nonetheless, over the years the International Court of Justice has started to play a less conspicuous role and function in war prevention and the restoration and maintenance of international peace and security.[11] The nature of the disputes that are submitted to it, along with the scope of its jurisdiction *ratione materiae*,[12] have broadened and transformed the ICJ's role and function, moving away from sole war prevention.[13]

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6 Malcom N. Shaw, 'The International Court of Justice: A Practical Perspective', (1997) 46 *International and Comparative Law Quarterly*, 831, 833.

7 Armin Von Bogdandy and Ingo Venzke, 'On the Function of International Courts: An Appraisal in the Light of their Burgeoning Authority', (2013) 26 *Leiden Journal of International Law*, 49, 49 – 50.

8 See, *e.g.*, Sean D. Murphy, 'International Judicial Bodies for Resolving Disputes between States', in Cesare Romano *et al* (eds.) *The Oxford Handbook on International Adjudication* (Oxford University Press 2015), 181, 196. Richard Bilder indicates, for instance, that a decision not only settles the dispute between the parties, but that may also provide at least some guidance to both the parties and other states as to how they and others should conduct themselves. *Cf.* Richard. I. Bilder, 'International Dispute Settlement and the Role of International Adjudication', in Lori Fisler Damrosch (ed.) *The International Court of Justice at a Crossroads* (Transnational Publishers 1987), 155, 166.

9 *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 253, at pp. 270 – 271, para. 55; *Nuclear Tests Case (New Zealand v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 457, p. 476, para. 58.

10 *Cf.* Chester Brown, 'The Inherent Powers of International Courts and Tribunals', (2006) 76 *British Yearbook of International Law*, 195, 208 – 211.

11 Yuval Shany, *Assessing the Effectiveness of International Courts and Tribunals* (Cambridge University Press 2014), 166.

12 James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Cambridge University Press 2012), 718.

13 In this regard, it has been for instance noted that recourse through judicial means would hardly be effective. The dispute is usually settled on paper, since its practical settlement requires further action that is dependent on the parties will. Cf. Barth L. Smit Duijzentkunst & Sophia L. R. Dawnkins, 'Arbitrary Peace? Consent Management in International Arbitration', (2015) 26 *European Journal of International Law*, 139.

In view of the above, it is argued that a reference to the International Court of Justice as a mere adjudicatory institution, presents an incomplete picture of its judicial function.[14] It has other inherent functions that derive from its nature as a court of law.[15] In consequence, an additional function has started to attract more attention, namely, the development of international law.[16] In fact, some authors claim that this is to be considered as the main role and function of the International Court of Justice, considering its failure to effectively settle disputes.[17] As explained by Sir Robert Jennings,

> "[t]he *primary task* of a court of justice is not to 'develop' the law, but to dispose, in accordance with the law, of that particular dispute between the particular parties before it. This is not to say that development is not frequently a secondary part of the judge's task… and it is to say that any development should be integral and incidental to the disposal according to the law of the actual issues before the court. For the strength of 'case law' is precisely that it arises from actual situations rather than being conceived *a priori*."[18]

The development of the law is therefore but a natural consequence that arises from the exercise of its main function, namely, the settlement of

14 Alain Pellet, 'Article 38', in Andreas Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012), 731, 748; Stephan Wittich, 'The Judicial Functions of the International Court of Justice', in Isabel Buffard *et al* (eds.) *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008), 981, 988.

15 *Cf*. Chester Brown, 'Inherent Powers in International Adjudication', in Cesare Romano *et al* (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2015), 829, 833.

16 Nagendra Singh, *The Role and Record of the International Court of Justice* (Martinus Nijhoff Publishers 1989), 137; Hugh Thirlway, 'The Role of the International Court of Justice in the Development of International Law', (1995) 7 *Proceedings of the African Society of International and Comparative Law*, 103; Jose Álvarez, 'What Are International Judges For? The Main Functions of International Adjudication', in Cesare Romano *et al* (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2015), 158, 170; Christian J. Tams, 'Law-making in Complex Processes: The World Court and the Modern Law of State Responsibility', in Christine Chinkin *et al* (eds.) *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Oxford University Press 2015), 287, 304.

17 Robert Y. Jennings, 'The Proper Work and Purposes of the International Court of Justice', in A. Muller *et al* (eds.) *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff Publishers 1997), 33, 42; Christian J. Tams & Antonio Tzanakopoulos, *'Barcelona Traction at 40: the ICJ as Agent of Legal Development'*, (2010) 23 Leiden Journal of International Law, 781, 782; Vitalius Tumonis, 'Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement', (2013) 31 *Wisconsin International Law Journal*, 35, 39.

18 Robert Y. Jennings, *'The Role of the International Court of Justice'*, (1997) 68 British Yearbook of International Law, 41.

disputes.[19] Judge Yusuf, has recently referred to this role and function, in an individual opinion in the following terms,

> "As the principal judicial organ of the United Nations, the function of the Court is not only to 'decide in accordance with international law such disputes as are submitted to it', but also, in the exercise of such judicial functions, to contribute to the elucidation, interpretation and development of the rules and principles of international law. To this end, the Court must engage in a considered elaboration of such principles as they apply in a factual context to the case before it."[20]

This implicitly demonstrates that the development of the law, is an inevitable part of the judicial function and thus a legitimate role and function of the ICJ.[21]

In fact, the International Court of Justice itself has recognised that the development of the law is also part of its judicial function.[22] This does not, however, mean that it can render judgment *sub species lege ferendae*, or anticipate the law.[23] In other words, it does not therefore possess a (formal)

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19 In the statement given by President Golitsyn of the International Tribunal for the Law of the Sea, to the plenary of the sixty-ninth session of the United Nations General Assembly, he emphasised that "it is the role of the Tribunal in exercising its contentious jurisdiction and adjudicating cases to contribute to the development of international law and, in particular, the international law of the sea." *Cf*. International Tribunal for the Law of the Sea, *Address by the President*, (2015) 19 *Yearbook International Tribunal for the Law of the Sea*, 3. Former President of the ICJ, Winiarski, also referred to this aspect when noting that "[t]he function of the Court is to state the law as it is; it contributes to its development, but in the manner of a judicial body, for instance when it analyses out a rule contained by implication in another, or when, having to apply a rule to a specific instance, which is always individualized and with its own clear-cut features, it gives precision to the meaning of that rule… it has also been rightly said that there are problems of international law which cannot be studied without referring to the decisions of [the Court]." *Cf*. International Court of Justice, *Address by the President*, (1961 – 1962) 16 *International Court of Justice Yearbook*, 2.

20 *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, [2015] ICJ Rep. 665, (Declaration, Vice-President Yusuf), at p. 743, para. 3.

21 Lawrence R. Helfer & Karen Alter, 'Legitimacy and Lawmaking: A Tale of Three International Courts', (2013) 14 *Theoretical Enquiries in Law*, 479, 484.

22 Malcom N. Shaw, 'A Practical look at the International Court of Justice', in Malcom Evans (ed.) *Remedies in International Law: The Institutional Dilemma* (Hart Publishing 1998), 11, 27 – 28.

23 *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment of 25 July 1974, [1974] ICJ Rep 175, at p. 192, para. 45. However, it has also been argued that this *dictum* from the International Court does not mean that it cannot do it at any time. One needs to read the decision carefully and see that before these lines, the Court used the words "in the circumstances". This means that in the specific case concerning fisheries limits and fisheries conservation the Court could not do it as the issue was under negotiation in the Third United Nations Conference on the Law of the Sea. *Cf*. Franklin Berman, 'The International Court of Justice as an 'Agent' of Legal Development', in Christian J. Tams & Joan Sloan (eds.) *The Development of International by the International Court of Justice* (Oxford University Press 2013), 7, 11.

legislative role and function.[24] It has no *de jure* authority to determine the content of international law.[25] In one of its advisory opinions the International Court of Justice has confirmed this position. It thus noted in *Legality of the Threat or Use of Nuclear Weapons* to be,

> "clear that [it] cannot legislate, and, in the circumstances of the present case, is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present corpus juris is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend."[26]

Consequently, the development of international law takes place in the context of the application of international law and for the settlement of the dispute at hand.[27] It therefore refers, as noted by the Advisory Committee during the discussions of the Statute of the Permanent Court of International Justice, to the fact that judicial decisions have the effect of gradually moulding and modifying international law.[28] They have gained a greater weight than that accorded by its Statute.[29] Hence, when settling a dispute submitted to it, the ICJ has often to clear ambiguities as to the existence or scope of a rule (*e.g.* as a customary rule), as well as the interpretation of a

24 *Cf. South-West Africa Cases*, (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, at p. 48; *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Merits, Judgment of 19 December 2005, [2005] ICJ Rep. 168, p. 190, para. 26; Niels Petersen, 'Lawmaking by the International Court of Justice – Factors of Success', (2011) 12 *German Law Journal*, 1295, 1296.

25 Hugh Thirlway, 'The International Court of Justice: Cruising Ahead at 70', (2016) 29 *Leiden Journal of International Law*, 1103, 1105.

26 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226.

27 *Cf.* Juan J. Quintana, 'The International Court of Justice and the Formulation of General International Law: The Law of Maritime Delimitation as an Example', in A. Muller *et al* (eds.) *The International Court of Justice: Its Future Role after Fifty Years* (Martinus Nijhoff Publishers 1997), 367.

28 *Documents concerning the action taken by the Council*, *supra* note 259, at 38; Tullio Scovazzi, 'Where the Judge approaches the Legislator: Some Cases relating to the Law of the Sea', in Nerina Bischiero et al (eds.) *International Courts and the Development of International Law: Essays in Honour of Tulio Treves* (Springer 2013), 299.

29 Theodor Meron, 'Judge Thomas Buergenthal and the Development of International Law by International Courts', in Theodor Meron (ed.) *The Making of International Criminal Justice: The View from the Bench: Selected Speeches* (Oxford University Press 2011), 240, 242.

term contained in a provision to a multilateral treaty.[30] When doing so, it is potentially engaging in a law development function.[31]

The said possibility turns into an actual exercise of this role and function, when the clearance of the said ambiguities or the interpretation of a provision meets with the normative expectations of international law actors.[32] In the words of a former President of the International Court of Justice,

> "[t]he Court's responsibility lies in interpreting the provisions of the law and applying it to the facts of a case before it, and pointing out any sharp edges of the law that need the attention of the law-maker and the community that it serves."[33]

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30 Karin Oellers-Frahm, 'Lawmaking through advisory opinions?', (2011) 12 *German Law Journal*, 1033, 1046. See, *e.g.*, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Merits, Judgment of 31 March 2014, [2014] ICJ Rep. 226; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization*, Advisory Opinion of 8 June 1960, [1960] ICJ Rep. 150.

31 See, *e.g.*, Ram Prakash Anand, 'Role of International Adjudication', in Leo Gross (ed.) *1 The Future of the International Court of Justice* (Oceana Publications 1976), 1, 11; José Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences', (2003) 38 *Texas International Law Journal,* 405, 408; Tom Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', (2005) 46 *Virginia Journal of International Law*, 631, 673.

32 If the normative expectations of international law actors are not met, it is practically impossible that the interpretation made by the Court in a given case can count as law development. As it has been said somewhere else, "what other actors think to be normative is more important than what the ICJ or any other court may say." *Cf.* Fuad A. Zarbiyev, *'Judicial Activism in International Law – A Conceptual Framework of Analysis'*, (2012) 3 Journal of International Dispute Settlement, 247, 271; See also, Richard B. Bilder, 'International Dispute Settlement and the Role of International Adjudication', (1987) 1 *Emory Journal of International Dispute Resolution*, 142, 150; *Armin Von Bogdandy & Ingo Venzke*, 'The Spell of Precedents: Lawmaking of International Courts and Tribunals', in Cesare Romano *et al* (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2015), 503, 509 – 511; Franklin Berman, *supra* note 23, 8; Armin von Bogdandy & Marc Jacob, *'The Judge as Law-Maker: Thoughts on Bruno Simma's Declaration in the Kosovo Opinion'*, in Ulrich Fastenrath et al (eds.) From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (Oxford University Press 2011), 809, 822.

33 Nagendra Singh, *supra* note 16, 137. It should, however, be pointed out that, as noted by professor Laurence Boisson de Chazournes, "[t]here is, however, considerable difficulty in practice in confining the judge's role to that of the mere 'articulation' of the law, of avoiding the progressive development, if not creation, of the law. If interpretation is a legitimate judicial function, the boundary, which distinguishes the articulation of existing rules on the one hand and their progressive development or judicial legislation on the other, is often all the more unclear if the judge adopts a teleological approach. For although international law is a faithful servant of politics, in that to a large extent the law is a dependent variable whose con tours are sketched by the subjects of the international order, often that law is only sketched by states: Custom for instance is unwritten, principles maybe present but vague. The law is therefore frequently in need of precision. For this reason, the role of the judge in the international order is special: The judge, perhaps more than his or her internal counterpart, is, in determining a dispute between litigants, called upon to articulate or codify the law and, in so doing, gives precision and indeed colours to the sketch designed by states." *Cf.* Laurence Boisson de Chazournes & Sarah Heathcoat, 'The Role of the International Adjudicator', (2001) 95 *American Society of International Law Proceedings*, 129, 130.

In this regard, one instance[34] of a clear development of international law is to be found in the advisory opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.[35] In its advisory opinion, the International Court of Justice did not intend to legislate on the subject of reservations to multilateral treaties. It merely sought to reply to the questions presented by the General Assembly in its request for an advisory opinion. The fact that the reply to the said questions had the effect of being considered as the final (and correct) position to be adopted regarding reservations to multilateral treaties in the Vienna Convention on the Law of Treaties, is an instance of its contribution to the development of the law. The ICJ's opinion met with the normative expectations of international actors and therefore turned into the applicable law on reservations. An example in the opposite direction can be found in the PCIJ's decision in the case of the *S.S. "Lotus"*. The possibility of contributing to the development of the law was reversed, when embodying a principle to the contrary in the Convention for the Unification of Certain Rules relating to the Arrest of Sea-going Ships.[36]

Further, these functions of the International Court of Justice on the settlement of disputes and development of the law, may take place with respect to any theme. Pursuant to article 36 of its Statute, its jurisdiction comprises all cases that states refer to it.[37] In this sense, no limitation exists (other than those that states themselves may specify in the instrument constituting the basis for jurisdiction), as to the kind of disputes that may be submitted to it. The ICJ can therefore be seised States by states of disputes concerning the obligation to submit to arbitration a dispute in accordance with the terms of a treaty,[38] territorial and maritime delimitations,[39] the responsibility of states for violations of international environmental law[40] and the use and status of rivers.[41] In consequence, the extent of the jurisdiction *ratione materiae* of the International Court of Justice renders it possible that disputes concerning human rights violations may also be submitted to it.

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34 For further examples in this regard see, Manfred Lachs, 'Some Reflections on the Contribution of the International Court of Justice to the development of International Law', (1983) 10 *Syracuse Journal of International law and Commerce*, 239.

35 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15.

36 Jan Hendrik W. Verzijl, *International Law in Historical Perspective: Inter-state disputes and their settlement* (Martinus Nijhoff Publishers 1976), 529.

37 Statute of the International Court of Justice, (adopted 26 June 1945, entered into force 24 October 1945) 1 U.N.T.S. 993, article 36.

38 *Ambatielos (Greece v. United Kingdom)*, Merits, Judgment of 19 May 1953, [1953] ICJ Rep. 10.

39 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep. 351.

40 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, [2010] ICJ Rep. 14.

41 *Dispute over the Status and Use of the Silala River (Chile v. Bolivia)*, Application instituting proceedings filed in the Registry of the Court on 6 June 2016.

In fact, some of the past[42] and recent[43] cases that the ICJ has been seised of, arguably also had a human rights dimension.[44]

Nevertheless, since human rights cases are but one of the many different kind of disputes brought before the International Court of Justice, they constitute a small part of the ICJ's docket.[45] This trend has, however, recently changed[46] and the submission of human rights disputes is not uncommon anymore. Rosalyn Higgins has for instance noted that this change has taken place since human rights law finally found its proper place within international law.[47] Lastly, it is important to note that since the jurisdiction of the International Court of Justice comprises all matters provided in treaties and conventions in force, it can in principle be seised of a case concerning the violation of any human rights treaty.

3.1.2 Mandate of the Inter-American Court of Human Rights

Moving to the Inter-American Court of Human Rights, its creation is linked to the drafting of the American Convention.[48] This treaty was negotiated for the purpose of reinforcing and complementing the protection provided by the domestic laws of the American states, with a view to obtaining respect for the essential rights of the human person.[49] It has therefore been regarded as the corner stone of the Inter-American System of Protection of Human Rights.[50] It is in this context, that the Inter-American Court of Human

42 See, *e.g.*, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment of 30 November 2010, [2010] ICJ Rep. 639; *Armed Activities on the Territory of the Congo*, *supra* note 24; *Avena and other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, [2004] ICJ Rep. 12.

43 See, e.g., *Application of the International Convention on the Elimination of all forms of Racial Discrimination (Qatar v. United Arab States)*; Jadhav (India v. Pakistan);

44 See, *e.g.*, *Ahmadou Sadio Diallo*, *supra* note 42; *Armed Activities on the Territory of the Congo*, *supra* note 24; *Avena and other Mexican Nationals (Mexico v. United States of America)*, *supra* note 42.

45 John R. Crook, 'The International Court of Justice and Human Rights', (2004) 1 *Northwestern Journal of International Human Rights*, 1, 3.

46 A look at the ICJ's current docket shows that an important number of the pending cases are related to human rights, namely, *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Jadhav (India v. Pakistan)*, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)*, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab States)*.

47 Rosalyn Higgins, 'Human Rights in the International Court of Justice', (2007) 20 *Leiden Journal of International Law*, 745, 746.

48 J. Scott Davidson, *The Inter-American Court of Human Rights* (Darmouth 1992), 1.

49 American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978) 1144 U.N.T.S. 123, preamble; *Mémoli v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 26, 2013. Series C No. 265, at para. 42.

50 Ludovic Hennebel, *La Convention Américaine des Droits de l'Homme: Mécanismes de Protection et Étendue des Droits et Libertés* (Bruylant 2007), 36.

Rights was created with the mission (along with the existing Inter-American Commission on Human Rights) of protecting the rights delineated in the Convention.[51]

In fact, article 33 of the ACHR explicitly vests on the IACtHR jurisdiction with respect to matters relating to the fulfilment of the commitments made by the states parties.[52] The manner in which the Inter-American Court of Human Rights ensures that states fulfil the said commitments is through its two types of jurisdiction, namely, its contentious and advisory jurisdiction. By virtue of the former it can be seised of cases dealing with alleged violations of the rights consecrated in the ACHR to individuals within the jurisdiction of the member states. Concerning the latter, it is called to interpret the American Convention or any other treaty concerning the protection of human rights in the Americas, at the request of either the members states of the Organization of American States or organs from this international organization that are duly authorized; the Inter-American Court of Human Rights can also, in the exercise of its advisory jurisdiction, provide an opinion as to the compatibility of the domestic laws of a state with any of the binding instruments of the Inter-American System of Protection of Human Rights.

Although the IACtHR can exercise its contentious jurisdiction with regard to inter-state disputes, it has never had the opportunity to decide a case of this nature.[53] In consequence, it has only exercised its contentious jurisdiction in relation to the petitions filed by individuals before the Inter-American Commission of Human Rights, where it is argued that a state has not complied with its human rights contained in the American Convention. The IACtHR's main function is thus the protection and enjoyment of the rights delineated in the American Convention for all the persons in the Americas.[54] Yet, like the International Court of Justice, the IACtHR does not limit itself in the exercise of its contentious jurisdiction to this main function, *i.e.* to rule on the international responsibility of the state with respect to the specific victims in the case at hand. It takes advantage of its cases to establish general standards for the protection of the rights and duties enshrined in the ACHR.[55] The Inter-American Court of Human Rights

51 Lynda E. Prost, 'The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges', (1992) 14 *Human Rights Quarterly*, 171.

52 American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978) 1144 U.N.T.S. 123, art. 33.

53 Laurence Burgorgue-Larsen & Amanda Úbeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary* (Oxford University Press 2011), 28.

54 *Cf. Cruz Sánchez v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 17, 2015. Series C No. 292, para. 37.

55 Dina Shelton, 'Form, Function and the Powers of International Courts', (2009) 9 *Chicago Journal of International Law*, 537, 564 – 565.

therefore acts within the framework of a treaty embodying a common American order[56] and the individual petition procedure is therefore seen as a means to an end,[57] namely, the protection of human rights.

In fact, through the exercise of this jurisdiction, and by means of the interpretation that it makes of the ACHR, it has contributed to the protection of the peoples' rights in the Americas.[58] Its jurisprudence has for instance influenced public policies of national and local governments,[59] as it has been the case with regard to access to public information,[60] which it has declared a fundamental human right.[61] Consequently, the IACtHR ensures through its contentious jurisdiction that states parties to the American Convention adopt the necessary measures[62] for the effective protection of human rights of the people within the jurisdiction of member states.[63] Its

56 Steven Greer & Luzius Wildhaber. 'Revisiting the Debate about 'constitutionalising' the European Court of Human Rights', (2013) 12 *Human Rights Law Review*, 655, 674.

57 Luzius Wildhaber, 'The European Court of Human Rights in action', (2004) 21 *Ritsumeikan Law Review*, 83 91.

58 Brian D. Tittemore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law', (2005) 12 *Southwestern Journal of Law and Trade in the Americas*, 429; Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', (2011) 12 *German Law Journal*, 1203, 1224; Jorge E. Taiana, 'The Legacy and Current Challenges of the Inter-American Commission on Human Rights', (2013) 20 *Human Rights Brief*, 42, 43; Fabian Novak, 'The Inter-American Court of Human Rights and Its Contribution to the Protection of Children's Rights', in Nerina Boschiero *et al* (eds.) *International Courts and the Development of International Law* (2013), 513, 532; Ana Beduschi, 'The Contribution of the Inter-American Court of Human Rights to the Protection of Irregular Immigrants' Rights: Opportunities and Challenges', (Springer 2015) 34 *Refugee Survey Quarterly*, 45, 66.

59 As Alexandra Huneeus has put it, "the Court's judgments play a far greater role: they are untethered from the particular dispute that gives rise to them and take on a life as law-like rules that guide the subsequent behaviour of public actors and the outcome of disputes that never reach the Court. In some States the Court's judgments even come to shape policymaking and public debates, constraining the range of options that are put on the table." *Cf.* Alexandra Huneeus, 'Constitutional Lawyers and the Inter-American Court's varied Authority', (2016) 79 *Law and Contemporary Problems*, 179.

60 Diego García-Sayán, 'The Role of the Inter-American Court of Human Rights in the Americas', (2012) 19 *University of California Davis Journal of International Law & Policy*, 105, 108 – 109.

61 Eduardo A. Bertoni, 'The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards', (2009) 3 *European Human Rights Law Review*, 332, 347.

62 In complying with this duty to ensure the adoption of the necessary means for the protection of human rights, the IACtHR always takes into account that it does not exercise an executive or regulatory function. It therefore limits itself to indicate, the principles that the state must follow when adopting and implementing the principles indicated by it. *Cf. Galindo Cárdenas et al v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 2, 2015. Series C No. 301, (Dissenting Opinion, Judge Vio Grossi), p. 4.

63 See, e.g., David Kosar & Lucas Lixinski, 'Domestic Judicial design by International Human Rights Courts', (2015) 109 *American Journal of International Law*, 713.

jurisprudence has therefore had an important impact in preventing, or at least limiting, the concretization of subsequent violations of human rights.[64] As it itself has noted,

> "this special nature of [the ACHR] and [its] collective implementation mechanism entail the need to apply and interpret their provisions in accordance with their *object and purpose*, so as to ensure that the State Party guarantee compliance with them and their *effet utile* in their respective domestic legal systems."[65]

It is in fact with a view of effectively achieving the protection of the peoples in the Americas, that the Inter-American Court of Human Rights has made use of different "tools" that it has developed throughout the years in its judicial decisions. These tools are the conventionality control, the power to monitor compliance with its judgments and the system of reparations that it has implemented. Two additional aspects that have been central, in the exercise of its main judicial function are, the ample construction and application of certain concepts from public international law, such as *ius cogens* and *erga omnes* obligations.

The conventionality control finds its roots in the obligation contained in article 2 of the American Convention. States must adopt such legislative or other measures as may be necessary to give effect to the rights and freedoms contained therein.[66] In the exercise of this conventionality control, the Inter-American Court of Human Rights has either considered as devoid of legal effect certain internal laws[67] or ordered the national authorities to amend them,[68] though it has never indicated to the states the content that these amendments should comprise. Along with this control exercised by the IACtHR, in which it acts like a constitutional court,[69] it is noted that there is a diffuse conventionality control that must be exercised by all public authorities of the state. They have the duty to ensure that the American Convention, as well as the decisions of the Inter-American Court of Human Rights prevail over a state's internal laws.[70] In fact, several high courts from

64 Carlos Portales & Diego Rodriguez-Pinzón, 'Building Prevention to Protect: The Inter-American Human Rights System', (2017) 10 *Colombian Yearbook of International Law*, 261, 273.

65 *Case of the "Mapiripán Massacre" v. Colombia.* Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, para. 105.

66 American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978) 1144 U.N.T.S. 123, art. 2; Oswaldo Ruiz-Chiriboga, 'The Conventionality Control: Examples of (Un)Successful Experiences in Latin-America', (2010) 3 *Inter-American and European Human Rights Journal*, 200.

67 See, *e.g.*, *Almonacid Arellano et al v. Chile.* Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Serie C No. 165, paras. 123 – 125.

68 *Fermín Ramírez v. Guatemala*. Merits, Reparations and Costs. Judgment of June 20, 2005. Series C No. 126, para. 138(8).

69 Ludovic Hennebel, 'The Inter-American Court of Human Rights: The Ambassador of Universalism', (2011) 24 *Quebec Journal of International Law*, 57, 73.

70 *Gelman v. Uruguay*. Monitoring Compliance with Judgment. Order of March 20, 2013, at paras. 72 – 73.

Latin American states have indicated that the interpretation of the American Convention made by the IACtHR must be followed, even when the state is not a party to the proceedings.[71] Hence, it is through the conventionality control that it can make that its jurisprudence is multiplied in thousands of domestic courts, with the instant effect that human rights will be effectively protected, to the millions of people whose cases will never be heard directly.[72]

By the same token, the power to monitor compliance with its judgments has been considered by the Inter-American Court of Human Rights as fundamental,[73] in the pursuit of an effective protection of the rights enshrined in the American Convention.[74] As it has put it,

> "[m]onitoring compliance with judgments is one of the elements that comprises jurisdiction. To maintain otherwise, would mean affirming that the judgments delivered by the Court are merely declaratory and not effective. Compliance with the reparations ordered by the Court in its decision is the materialization of justice for the specific case and, ultimately, of jurisdiction; to the contrary, the *raison d'ê*tre for the functioning of the Court would be imperilled."[75]

In that sense, the Inter-American System of Protection of Human Rights exists in order to safeguard the interests of victims.[76] Non-compliance would therefore amount to a subsequent violation of the American Convention.[77] Consequently, the Inter-American Court of Human Rights itself would be acting in total contradiction of its judicial function, if it did not have the power to ensure compliance with its judgment. This explains why it has considered this function as an inherent power of its contentious jurisdiction.[78]

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71 Ibid, at paras. 75 – 76.

72 Diego García-Sayán, 'The Inter-American Court and Constitutionalism in Latin America', (2011) 89 *Texas Law Review*, 1835, 1836.

73 *Cf*. Magnus J. Lesko Langer & Elise Hansbury, 'Monitoring Compliance with the Decisions of Human Rights Courts: The Inter-American Particularism', in Laurence Boisson de Chazournes *et al* (eds.) *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers 2013), 213, 217.

74 *Cf*. Antonio A. Cançado Trindade, 'Prologue: An Overview of the contribution of International Tribunals to the rule of law', in Geert de Baere & Jan Wouters (eds.) *The Contribution of International and Supranational Courts and Tribunals to the Rule of Law* (Edward Elgar Publishing 2015), 3, 18.

75 *Baena Ricardo et al v. Panama*. Competence. Judgment of November 28, 2003. Series C No. 104, at para. 72.

76 Cecilia M. Bailliet, 'Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America', (2013) 31 *Nordic Journal of Human Rights*, 477, 479.

77 Antonio Augusto Cançado Trindade, *El Ejercicio de la Función Judicial Internacional: Memorias de la Corte Interamericana de Derechos Humanos* (Del Rey 2011), 37.

78 *Baena Ricardo et al v. Panama*, *supra* note 75.

Moreover, the importance that the IACtHR itself has attached to its power to monitor compliance, can also be understood in the light of the system of reparations that it has implemented. In other words, reparations go hand in hand with the power to monitor compliance. The former can be said to constitute (to a certain extent) the reason why the Inter-American Court has paid especially attention to monitoring compliance with its judgments.

Whereas other human rights courts (*e.g.* the European Court of Human Rights) mainly[79] order reparations aiming to obtain the *restitutio in integrum* for the injury caused to the victims in the case at hand,[80] the Inter-American Court of Human Rights has gone beyond the case at hand. It is through some of the reparations that it provides (*e.g.* training programmes for state agents,[81] dissemination of the judgment[82] or awareness campaigns),[83] that the IACtHR links the prevention of abuses to recognition of past wrongs.[84] For instance, in situations amounting to structural discrimination it has not only ordered reparations seeking to return the victims to the situation they were, before the violation of their rights took place. It has also ordered reparations that are designed to changing the said situation, so that its effect is not only of restitution, but also of rectification.[85] In this regard, the transformative redress sought by the Inter-American Court of Human Rights, constitutes an important form of reparation that moreover amounts to a guarantee of non-repetition.[86] As it noted in one of its judgments with regard to training programmes,

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79 Nonetheless, it should be acknowledged that the European Court of Human Rights has in some instances decided cases having a direct effect beyond the case hand. This happens in the context of the pilot judgment procedural regime. *Cf.* Markus Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights', in Armin Von Bogdandy & Ingo Venzke (eds.) *International Judicial Lawmaking* (Springer 2012), 329. It should also be acknowledged, however, that the implementation of the pilot judgment is a response to the increasing workload of the European Court due to the high number of repetitive applications. *Cf.* Dominik Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights* (Martinus Nijhoff Publishers 2013), 6.

80 See, *e.g.*, *Wilson, National Union of Journalists and Others v. United Kingdom*. Judgment of 2 July 2002. Applications No. 30666/96, 30671/96 and 30678/96, para. 54.

81 See, *e.g.*, *Case of Expelled Dominicans and Haitians v. Dominican Republic*. Preliminary Objections, Merits, Reparations and Cost. Judgment of August 28, 2014. Series C No. 282, para. 465.

82 See, *e.g.*, *Vera Vera et al v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of May 19, 2011. Series C No. 226, para. 158(4).

83 See, *e.g.*, *Case of Servellón-García et al v. Honduras*. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, paras. 201 – 202.

84 Cecilia M. Bailliet, *supra* note 76, 485

85 *González et al. ("Cotton Field") v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 450.

86 Ruth Rubio-Marín & Clara. Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment', (2011) 33 *Human Rights Law Quarterly*, 1062, 1087 – 1091.

> "the effectiveness and impact of the human rights education programs for public officials is also crucial to generate guarantees of non-repetition of events as those in the case at hand… This Court considers it important to enhance the institutional capacities of the bodies responsible for respecting and guaranteeing the said human rights… in order to prevent repetition of events such as those examined in this case."[87]

In a few words, the assurances and guarantees of non-repetition, as well as the obligation to investigate, prosecute and punish, and the granting of legislative measures, constitute means of reparation that are aimed at benefiting the society as a whole.[88]

All in all, at the heart of the IACtHR's function to seek the effective protection of the human rights enshrined in the American Convention (and the application of the "tools" implemented for this purpose), lays the application of the concepts of *ius cogens* and *erga omnes* obligations. It is through these two concepts that it has affirmed the binding legal character of all human rights[89] and the need to ensure their protection to all the people within the jurisdiction of a State.[90] With regard to the former, the Inter-American Court of Human Rights has moreover declared that at least, seven of the rights contained in the American Convention have a peremptory character (*e.g.* prohibition on torture, prohibition on slavery, non-discrimination). This judicial activeness from the IACtHR in this field constitutes one of the means through which, it attempts to fight the existing impunity in the Americas[91] and grant more extensive remedies.[92] In a few words, it has been argued that through the amplification of *ius cogens* the

87 *Case of Nadege Dorzema et al v. Dominic* Republic. Merits, Reparations and Costs. Judgment of October 24, 2012. Series C No. 251, para. 269.

88 Judith Schonsteiner, 'Dissuasive Measures and the Society as a Whole: A Working Theory of Reparations in the Inter-American Court of Human Rights', (2007) 23 *American University International Law Review*, 127, 145 – 153; Alexandra R. Harrington, 'Internalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights System', (2012) 26 *Temple International and Comparative Law Journal*, 1, 2.

89 Ludovic Hennebel, *supra* note 69, 80.

90 Antonio Augusto Cançado Trindade, 'Une Ere d'Avancees Jurisprudentielles et Institutionnelles souvenirs de la Cour Interamericaine des Droits de l'Homme', in Ludovic Hennebel & Helen Tigroudja (eds.) *Le Particularisme Interaméricain des Droits de l'Homme: En l'honneur de 40º anniversaire de la Convention Américaine des Droits de l'Homme* (Pedone 2009), 7, 37 – 46; C. Maia, 'Le *Jus Cogens* dans la Jurisprudence de la Cour Interamericaine des Droits de l'Homme', in Ludovic Hennebel & Helen Tigroudja (eds.) *Le Particularisme Interaméricain des Droits de l'Homme: En l'honneur de 40º anniversaire de la Convention Américaine des Droits de l'Homme* (Pedone 2009), 271, 289.

91 Ignacio Alvarez-Rio & Diana Contreras Garduno, 'A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on *Jus Cogens*', in Yves Haeck & Diana Contreras-Garduño (eds.) *The Realisation of Human Rights: When Theory meets Practice* (Intersetia 2013), 167, 190.

92 Gerald L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law*, 101, 117.

Inter-American Court of Human Rights also ensures the effective protection of human rights.

In addition to its jurisdiction over individual petitions, the IACtHR is also vested with advisory jurisdiction, as is the ICJ. The latter can be requested (in principle)[93] to give an opinion on a legal question submitted by organs of the United Nations or specialised agencies.[94] The purpose of the advisory proceedings is to assist the organ or specialised agency, in the fulfilment of its functions with regard to the situation giving rise to the request.[95] In consequence, the legal question constituting the subject of the request for an advisory opinion must be one arising within the scope of the activities of the requesting agency,[96] the General Assembly and the Security Council have general power to request. This explains why, the International Court of justice has consistently considered that (in view of the purpose of its advisory jurisdiction), it should not, in principle, refuse to give an advisory opinion unless compelling reasons may force it to do so.[97] Moreover, it is also to be noted that the development of the law is also present in the exercise of the advisory jurisdiction of the ICJ.[98] In that order of ideas, the most relevant difference between the exercise of the contentious and advisory jurisdictions is to be found in the fact that, one is aimed at settling disputes between states, whereas the latter seeks to furnish the requesting organ with the necessary juridical elements for its subsequent action.[99]

As for the Inter-American Court of Human Rights, it has explicitly noted that its advisory jurisdiction is more extensive than that enjoyed by any other existing international tribunal.[100] In view of this distinctive characteristic, the IACtHR has made use of its judicial function with the

93 Michael Wood, 'Advisory Jurisdiction: Lessons from Recent Practice', in Holger P. Hestermeyer *et al* (eds.) 1 *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers 2012), 1833, 1840.

94 F. Blaine Sloan, 'Advisory Jurisdiction of the International Court of Justice', (1950) 38 *California Law Review*, 830, 831.

95 *Cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, p. 162, para. 60.

96 *Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 66, pp. 71 – 72, para. 11.

97 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of 30 March 1950, [1950] ICJ Rep. 65, at p. 72; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion of 15 December 1989, [1989] ICJ Rep. 177, at pp. 190 – 191, paras. 37 – 39; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, p. 416, para. 31.

98 *Cf.* Teresa F. Mayr & Jelka Mayr-Singer, 'Keep the Wheels Spinning: The Contributions of Advisory Opinions of the International Court of Justice to the Development of International Law', (2016) 76 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 425.

99 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 95.

100 *"Other treaties" subject to the consultative jurisdiction of the Court (Art. 64 American Convention on Human Rights)*. Advisory Opinion OC-01/82 of September 24, 1982. Series A No. 1, para. 14.

aim of consolidating those principles that it has regarded as useful for the fulfilment of its mandate on the protection of the essential rights of the human persons.[101] In fact, it has had the opportunity to pronounce on aspects relevant for all states in the Americas (including those not parties to the American Convention).[102] These pronouncements have moreover been made with regard to aspects which have not been (or scarcely) addressed by the Inter-American through its contentious jurisdiction (*e.g.* restrictions to the death penalty,[103] the suspension of judicial guarantees during a state of emergency[104] and the protection of the environment and human rights)[105] or that have, until recent, been the subject of a decision in the exercise of the said jurisdiction (*e.g.* rights of migrants). In consequence, it is through its advisory jurisdiction that the Inter-American Court of Human Rights contributes to the clarification of the obligations of the American states.[106] As it has put it in its most recent advisory opinion,

> "the principal purpose of its advisory function is to obtain a judicial interpretation regarding one or various provisions of the Convention or other treaties related to the human rights protection in the American states. In that order of ideas, advisory opinions fulfil, to a certain extent, the function of a preventive conventionality control."[107]

Moreover, one must also bear in mind that states members of the Organization of American States can request an advisory opinion on the compatibility of their internal laws with any binding instrument of the Inter-American System of Protection of Human Rights. The advisory opinions rendered by

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101 Marie-Clotilde Runavot, 'La Fonction Consultative de la Cour Interamericaine des Droits de l'Homme: Splendeurs et Misères de l'Avis du Juge Interaméricain', in Ludovic Hennebel & Hellen Tigroudja (eds.) *Le Particularisme Interaméricain des Droits de l'Homme: En l'honneur de 40º anniversaire de la Convention Américaine des Droits de l'Homme* (Pedone 2009), 121, 134.

102 *Cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 41 – 42.

103 *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*. Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3.

104 *Judicial Guarantees in States of Emergency*. Advisory Opinion OC-8/87 of October 6, 1987. Series A No. 8.

105 *The Environment and Human Rights (States obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1)of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23.

106 Jo. M. Pasqualucci, 'Advisory Practice of the Inter-American Court of Human Rights: Contributing to the Evolution of International Human Rights Law', (2002) 38 *Stanford Journal of International Law*, 241; Hellen Tigroudja, 'La Fonction Consultative des Droits de l'Homme', in Alain Ondoua & David Szymczak (eds.) *La Fonction Consultative des Jurisdictions Internationales* (Pedone 2009), 67, 70.

107 *Entitlement of legal entities to hold rights under the Inter-American Human Rights System*. Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 26.

the ACtHR in this regard, are taken seriously by the states.[108] Consequently, in the exercise of this jurisdiction it also contributes to the protection of the human rights of the persons in the Americas. In other words, it can be said that the advisory function is therefore a complement to its contentious jurisprudence.[109]

In sum, the Inter-American Court of Human Rights pursues an end that resides in the protection of the human person.[110] Its jurisprudence is vital in this regard since its effects are not limited to the parties to the case, despite pursuant to article 67 of the American Convention, states should only comply with judgments to which they are parties. Judgments have also an *erga omnes* effect towards the other States of the Americas (not parties to the case at hand), to the extent that all national authorities are linked to the conventional effectiveness and interpretative criteria set forth by the IACtHR in its decisions,[111] with a view of ensuring the effectiveness of the rules contained in the American Convention.[112] This is why it is claimed that the IACtHR's judicial function is frame within a transformation project of Latin American[113] through the creation of a *Ius Constitutionale Commune* for the Americas; therefore acting as a constitutional court for the region.[114]

Lastly, with regard to both the International Court of Justice and the Inter-American Court of Human Rights, reference should also be made to an additional function that in recent years has started to be discussed, as a consequence of the phenomenon on the proliferation of international courts and tribunals.[115] The possibility of divergent approaches, from two or more

108 Ludovic Hennebel, *supra* note 50, 337.

109 Hellen Tigroudja, *supra* note 106, 79.

110 Hellen Tigroudja, 'La Cour Interaméricaine des Droits de l'Homme au Service de l'Humanisation du Droit International Public. Propos Autour des Récents Arrêts et Avis', (2006) 52 *Annuaire Français de Droit International*, 625.

111 Eduardo Ferrer Mac-Gregor, 'Eficacia de la Sentencia Interamericana y la Cosa Juzgada Internacional (sobre el cumplimiento del caso *Gelman v. Uruguay*)', in Armin von Bogdandy *et al* (eds.) *Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos* (UNAM 2014), 329, 345.

112 Ibid, 350.

113 Armin von Bogdandy, *'Ius Constitutionale Commune Latinoamericanum.* Una Aclaración Conceptual', in Armin von Bogdandy *et al* (eds.) *Ius Constitutionale Commune en América Latina: Rasgos, Potencialidades y Desafíos* (UNAM 2014), 3, 12; Marijke de Pauw, 'The Inter-American Court of Human Rights and the Interpretative Method of External Referencing', in Yves Haecks *et al* (eds.) *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersetia 2015), 3, 21.

114 Ludovic Hennebel, 'La Cour Interamericaine des Droits de l'Homme: Entre Particularisme at Universalisme', in Ludovic Hennebel & Hellen Tigroudja (eds.) *Le Particularisme Interaméricain des Droits de l'Homme: En l'honneur de 40º anniversaire de la Convention Américaine des Droits de l'Homme* (Bruylant 2009), 75, 91; Ariel E. Dulitzky, 'An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights', (2015) 50 *Texas Law Review*, 45, 92.

115 *Cf.* Benjamin Faude, 'How the Fragmentation of the International Judiciary Affects the Performance of International Judicial Bodies', in Teresa Squatrito *et al* (eds.) *The Performance of International Courts and Tribunals* (Cambridge University Press 2018), 234, 236.

courts and tribunals towards the same legal issue, possesses a risk for international law to be fragmented.[116] Examples have been presented regarding this risk.[117] It is therefore necessary to coordinate the multiple variables that exists (*i.e.* norms and actors) with a view of avoiding or at least mitigate the fragmentation of the law.[118] In this regard, it has been indicated that international courts and tribunals should devote attention to their colleagues' decisions, in order to seek the coherence in international law and ensure its unity.[119] In a few words, it is required for international courts and tribunals to embrace a judicial dialogue.[120]

In this call for a normative integration,[121] it has been suggested that the International Court of Justice should be empowered with a supervisory

116 August Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections from the Perspective of Investment Arbitration', in Isabelle Buffard *et al* (eds.) *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff Publishers 2008), 107; Philippe Couvreur, 'The International Court of Justice', in Geert de Baere & Jan Wouters (eds.) *The Contribution of International and Supranational Courts to the Rule of Law* (Edward Elgar Publishing 2015), 85, 116.

117 Tulio Treves, 'Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law', in Rüdiger Wolfrum *et al* (eds.) *Developments of International Law in Treaty Making* (Springer 2005), 587, 596 – 602.

118 Laurence Boisson de Chazournes & Sarah Heathcoat, *'The Role of the International Adjudicator', (2001) 95 American Society of International Law Proceedings, 129*, 132. For Chester Brown, it is noted that the problem with the proliferation of international courts and tribunals is the potential fragmentation of international law through the emergence of doctrinal inconsistencies. *Cf*. Chester. Brown, 'The Cross-Fertilization of Principles relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals', (2008) 30 *Loyola of Los Angeles International and Comparative Law Review*, 219, 220; Jonathan I. Charney, 'Is International Law Threatened by Multiple International Courts and Tribunals?', (1998) 271 *Recueil des Cours de l'Académie de Droit International de la Haye*, 101.

119 Gerald Hafner, 'Should One Fear the Proliferation of Mechanisms for the Peaceful Settlement of Disputes?', in Lucius Caflisch (ed.) *The Peaceful Settlement of Disputes between States: Universal and European Perspectives* (Martinus Nijhoff Publishers 1998), 25 40; Stephen Schwebel, *Justice in International Law: Further Selected Writings of Stephen M. Schwebel* (Cambridge University Press 2011), 107; Antonio Augusto Cançado Trindade, 'Contemporary International Tribunals: Their Contributing Jurisprudential Cross-Fertilization, with Special Attention to the International Safeguard of Human Rights', (2012) 1 *The Global Community Yearbook of International Law and Jurisprudence*, 188; Stephan. W. Schill & Katrine R. Tevde, 'Mainstreaming Investment Treaty Jurisprudence: The Contribution of Investment Treaty Tribunals to the Consolidation and Development of General International Law', (2015) 14 *The Law and Practice of International Courts and Tribunals*, 94, 96.

120 Philippe Couvreur, *supra* note 116, 116.

121 International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc. A/CN.4/L.682; Tomer Broude, 'Fragmentation(s) of International Law: On Normative Integration as Authority Allocation', in Yuval Shany *et al* (eds.) *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity: Essays in honour of Professor Ruth Lapidoth* (Hart Publishing 2008), 99, 101.

role,[122] with a view of preserving the said normative integration. The reason for such a proposition lays in the fact that it constitutes the principal judicial organ of the United Nations and a court of general jurisdiction. It is therefore in a better position to perform such function in matters of general international law, than any other international court or tribunal.[123] This makes the International Court to be regarded as an organ of the international legal order and not merely a judicial institution that settles disputes.[124] Nevertheless, this proposition has not been accepted.[125] Even though (theoretically speaking) it appears attractive,[126] it is also true that it might bring legal and practical complications.[127]

All in all, the function of the ICJ is to engage in jurisprudential interaction,[128] *i.e.* to be "inform[ed] more fully of the case law developed by [its] colleagues, conduct more sustain relationship with other courts and, in a word, engage in a more constant inter-judicial dialogue."[129] A remarkable instance in the exercise of this judicial interaction is to be found in the

122 Dietmar W. Prager, 'The Proliferation of International Judicial Organs: The Role of the International Court of Justice', in Niels Blokker & Henry Schermers (eds.) *Proliferation of International Organizations: Legal Issues* (Martinus Nijhoff Publishers 2001), 279, 288.

123 Suzannah Linton & Firew. K. Tiba, 'The International Judge in an Age of Multiple International Courts and Tribunals', (2009) 9 *Chicago Journal of International Law*, 407, 463.

124 Gleider I. Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of International Community', (2013) 83 *British Yearbook of International Law*, 13, 58.

125 See, *e.g.*, Pierre-Marie Dupuy, 'Competition among International Tribunals and the Authority of the International Court of Justice', in Ulrich Fastenrath *et al* (eds.) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press 2011), 862, 864.

126 It has been submitted, for instance, the International Court can contribute by integrating human rights into both the fabric of general international law and its various branches. To fulfil this task the International Court can render human rights arguments more readily acceptable to international law generalists by interpreting and applying substantive provisions of human rights treaties in a state-of-the-art way, compared, for instance, to the reading given to such provisions by certain General Comments by UN human rights treaty bodies. *Cf.* Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice', (2012) 3 *Journal of International Dispute Settlement*, 7, 27.

127 Hugh Thirlway, 'The Proliferation of International Judicial Organs: Institutional and Substantive Questions – The International Court of Justice and Other International Courts', in Niels Blokker & Henry Schermers (eds.) *Proliferation of International Organizations: Legal Issues* (Martinus Nijhoff Publishers 2001), 251, 278.

128 Thomas Buergenthal, 'Proliferation of International Courts and Tribunals: Is it Good or Bad?', (2001) 14 *Leiden Journal of International Law*, 267, 274.

129 Gilbert Guillaume, 'The Future of International Judicial Institutions', (1995) 44 *International and Comparative Law Quarterly*, 862; Gilbert Guillaume, 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order', (October 27, 2000), Speech by His Excellency Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations; Eric de Brabandere, 'The Use of Precedent and External Case Law by the International Court of Justice and the International Tribunal for the Law of the Sea', (2016) 15 *The Law & Practice of International Courts and Tribunals*, 24, 24 – 55.

decision on the merits of the *Diallo* case. With regard to the interpretation of article 13 of the International Covenant on Civil and Political Rights, it noted that,

> "[a]lthough [it] is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the [Human Rights] Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law."[130]

In the case of the Inter-American Court of Human Rights this need for judicial interaction is twofold. On the one hand, and despite it was established to move forward with the effective enforcement of human rights in line with regional needs, experiences and legal traditions,[131] it should take account of the jurisprudence from other human rights bodies, especially on issues they have already addressed.[132] This does not, however, mean that an obligation exists for the IACtHR to either follow or take into account the jurisprudence from around the globe. Nevertheless, as its former president has recently noted, if the criteria adopted by other international human rights bodies were disregarded, the IACtHR would enter in a judicial monologue that can be dangerous for the protection of human rights.[133] On the other hand, the judicial interaction means that it should also take into account, the jurisprudence from international courts and tribunals on question of general international law.[134]

In sum, differences and similarities exists between the International Court of Justice and the Inter-American Court of Human Rights, in several respects. The most notable differences are related to their mandate and jurisdiction *ratione materiae* in contentious and advisory proceedings. As to the similarities, judicial interaction is perhaps the most relevant. In the context of the right to append dissenting opinions, what is interesting with regard to these differences and similarities is whether and to what extent

130 *Ahmadou Sadio Diallo*, *supra* note 42, p. 664, para. 66.

131 Gerd Oberleitner, 'Towards and International Human Rights Court', in Mashood. A. Baderin & Manisuli Ssenyonjo (eds.) *International Human Rights Law: Six Decades after the UDHR and Beyond* (Routledge 2010), 359, at 363.

132 Cristina Domínguez, 'The Inter-American Court of Human Rights and the European Court of Human Rights: From Observations to Interaction on Human Rights', in Yves Haecks *et al* (eds.) *The Inter-American Court of Human Rights: Theory and Practice, Present and Future* (Intersetia 2015) 739, 744.

133 Eduardo Ferrer MacGregor, 'What Do We Mean When We Talk About Judicial Dialogue?: Reflections of a Judge of the Inter-American Court of Human Rights', (2017) 30 *Harvard Human Rights Journal*, 89, 97.

134 Frederic Vanesste, *General International Law before Human Rights Courts: Assessing the Speciality Claims of Human Rights Law* (Intersetia 2009); Anne van Aaken & Iulia Motoc (eds.) *The European Convention on Human Rights and General International Law* (Oxford University Press 2018).

they may result in differences in the exercise of the said right. Consequently, this issue will be analysed in the light of the following questions, which will moreover inform the subsequent analysis to be made in Chapter 4. These questions are

- Do judges of the International Court of Justice and the Inter-American Court of Human Rights explicitly refer to the main function in contentious and advisory proceedings, in the respective court, or to the need to develop the law in the exercise of the right to dissent? In this regard, is the exercise of this right similar or different at both courts?
- Is the exercise of the right to dissent from judges of the International Court of Justice, when seised of human rights cases, similar or different to exercise of the said right from judges of the Inter-American Court of Human Rights?
- Does the universal and regional character of the International Court of Justice and the Inter-American Court of Human Rights, respectively, inform the exercise of the right to dissent in any way? Do judges refer to this fact in their dissenting opinions?

3.2 Anatomy of the International Court of Justice and the Inter-American Court of Human Rights

3.2.1 Composition of the bench

Pursuant to articles 2, 3 and 9 of the Statute of the Court, the ICJ is to be composed of fifteen judges. The most relevant characteristics from the requirements that these judges should met, as put it by Shabtai Rosenne, those related to the professional and political requirements that they must fulfil to be elected.[135] Judges (*ad hoc* included) must be persons of a high moral character, who moreover should either possess the qualifications required in their respective countries for the appointment to the highest judicial offices, or be jurisconsults of recognized competence in international law. These are the professional requirements. In addition, in choosing the members that should compose the bench of the International Court of Justice, special attention should also be paid to the need to ensure that these members constitute the representation of the main forms of civilization and the principal legal systems of the world. These two last aspects are considered as judges' political qualifications.[136]

The need for the members of the Court to be persons of a high moral character, indicated that judges should have personalities inclined to strengthen or guarantee the independence and impartiality of the ICJ in its

135 Shabtai Rosenne, 1 The Law and Practice of the International Court: 1920 – 2005 (Martinus Nijhoff Publishers 2006), 361.

136 Ibid.

functioning.[137] As it has been noted somewhere else, "[o]nly persons of a truly high moral character can oppose any kind of strong pressure, linking his or her personal ethics with their tenure as judges."[138]

As for the second set of professional requirements, an analysis on the practice of the composition of the bench shows that they have been interpreted in a liberal manner. In other words, the provision containing the professional requirements (article 2) is only declaratory of the principles to be observed.[139] In that sense, the requirement of being a jurisconsult of recognized competence in international law is not restricted to persons that have been international scholars or jurists, in the proper sense of the term.[140] The broad interpretation of this requirement has permitted people whose previous experience is related to having occupied positions at the presidential or cabinet level in their respective home states, or previously working as legal advisers, ambassadors, members of a state delegation to the United Nations or other international organizations, to be part of the bench.[141] Throughout the ICJ's history, the largest group of judges has been the one comprising academics, legal advisers and professors; the group comprising legal practitioners and diplomats has been less represented.[142]

It is also important to note that, the professional requirement as to the recognized competence in international law, in the case of members who have previously worked as legal advisers, diplomats or high ranking official in their home state, has not in general terms been regarded incompatible, with their need of being persons of a high moral character, in order to ensure their independence and impartiality. The practice of the International Court of Justice in its contentious and advisory proceedings shows that, a judge whose recognized competence in international law is linked to having previously worked for a state, has not been prevented from participating in a decision. So far, the only instance in which a member of the International Court of Justice did not participate in a decision occurred because he recused himself. In the *Anglo-Iranian Oil Co.* case, Sir Benegal Rau recused himself taking into account that he was the representative of India on the Security Council, when the United Kingdom brought before it the failure from India to comply with the provisional measures indicated by the ICJ.[143]

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137 Robert Kolb, *The International Court of Justice* (Hart Publishing 2013), 112.

138 Mariano J. Aznar-Gómez, 'Article 2', in Andreas Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012), 233, 244.

139 Shabtai Rosenne, *supra* note 135, 358.

140 Chittaranjhan Felix Amerasinghe, 'Judges of the International Court of Justice – Election and Qualifications', (2001) 14 *Leiden Journal of International Law*, 335, 343.

141 Norman J. Padelford, 'The Composition of the International Court of Justice: Background and Practice', in Karl L. Deutsch & Stanley Hoffmann (eds.) *The Relevance of International Law: Essays in Honor of Leo Gross* (Schenkman Publishers 1968), 219, 233 – 235.

142 Robert Kolb, *supra* note 137, 112.

143 See, Shabtai Rosenne, 'The Composition of the Court', in Leo Gross (ed.) *1 The Future of the International Court of Justice* (Oceana Publishers 1976), 377, 388.

The rest of instances in which a judge has previously participated in the discussion of a dispute in another fora, did not result in his lack of participation in the decision of the ICJ. These instances have taken place due to the challenge advanced by a state party to the proceedings. In all of them, the International Court of Justice has concluded that this circumstance does not give rise to prevent him from participating in the decision.[144] The same conclusion applies in the case of members whose previous competence in international law relates to having occupied the position of legal adviser of a state.[145]

On the other hand, the requirement concerning the need that the main forms of civilization and the principal legal systems of the world[146] should be represented in the ICJ, has been considered as a manifestation of power politics.[147] In other words, it constitutes the means to reconcile the wish of the great powers to always be represented in the International Court of Justice and the right for smaller states to also be represented, by virtue of the principle of equality of states.[148] In that order of ideas, all judges belong to different regions of the world, which differ between them in terms of culture, language, traditions, political systems and needs.[149] The Committee of Jurists noted in this regard that,

> "[g]ranted that all States are sovereign States, are they not made equal by this very fact, no matter what the extent of their influence may actually be, from a political point of view, upon the common interests of mankind? (…) however, from a psychological point of view (…) the fact that a certain number of States claimed a permanent judge, on the ground of their position as great Powers, would be opposed to the principle of equality [of states]. It therefore became

144 *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Order of 18 March 1965, [1965] ICJ Rep. 3; *Legal Consequences for States of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, Order No. 1 of 26 January 1971, [1971] ICJ Rep. 9; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, Order of 30 March 2004, [2004] ICJ Rep. 3.

145 Shabtai Rosenne, *supra* note 143, 391.

146 Kenneth J. Keith, 'International Court of Justice: Reflections on the Electoral Process', (2010) 9 *Chinese Journal of International Law*, 49, 67 – 71.

147 Bardo Fassbender, 'The Representation of the "Main Forms of Civilization" and of the "Principal Legal Systems of the World" in the International Court of Justice', in Denis Alland *et al* (eds.) *Unity and Diversity in International Law: Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff Publishers 2014), 581, 583.

148 In this regard, the *South-Africa* cases is instructive since, after the ICJ's decision on the second phase the composition was readjusted in order to make it more representative of the various components of the international community. *Cf*. George Abi-Saab, 'The International Court as a World Court', in Vaughan Lowe *et al* (eds.) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Martinus Nijhoff Publishers 1996), 3, 5; Arthur Eyffinger, *The International Court of Justice 1946 – 1996* (Kluwer Publishers 1996), 252.

149 See, *e.g.*, Christine M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', (989) 38 *International and Comparative Law Quarterly*, 850.

> necessary to find a system which would almost certainly ensure that the great Powers would be represented by judges, with the free consent of the other Powers, as their great civilising influence and juridical progress entitle them to be, even though no weight were attached to the fact that it would be greatly to the interest of the Court to include them on the Bench, to increase respect for its sentences, which could not be put into execution without the all-important support of their military, economic and financial powers."[150]

This discussion within the Advisory Committee, on the construction of article 9 of the Statute of the Court explains why, the need for a national from each of the five permanent members of the Security Council in the bench of the International Court of Justice, is considered as an aspect that constitutes an integral part of the requirements to be taken into account, with regard to the composition of the ICJ.[151] Along with this explanation, it has also been indicated that this requirement for the main forms of civilization and the principal legal systems of the world to be represented, seeks to combat the unwillingness of certain states to have recourse to the International Court of Justice.[152] Be it as it may, the purpose of this requirement (from a juridical perspective) is to give the possibility to all (or at least the main) legal systems of the world, to contribute in the shape of international law.[153] Consequently, if the International Court of Justice is to speak with the authority of a world court, it must certainly be (in its composition) a world court;[154] otherwise, concerns about the legitimacy of its decision may be argued.[155]

With a view of securing that both, the main forms of civilization and the principal legal systems of the world are present at the bench, an equitable and geographical distribution of the 15 seats seems to have been agreed between states.[156] Hence, three judges from the Americas (one always from the United States), three from Africa, three from Asia (one always from the

150 *Procès-Verbaux of the Proceedings*, of the Committee June 16th – July 24th, 1920 with annexes (1920), 528 – 529.

151 It has also been noted in this regard, that this settled practice regarding the presence of a national from each of the five permanent members of the Security Council, makes the requirements as to their moral character and qualification have been put on the back burner. *Cf.* Budislav Vukas, 'The Composition of the International Court of Justice', in Nerina Boschiero *et al* (eds.) *International Courts and the Development of International Law: Essays in Honour Tulio Treves* (Springer 2013), 213, 215.

152 Shabtai Rosenne, *supra* note 143, 379.

153 See, *e.g.*, Prince Bola A. Ajibola, 'Africa and the International Court of Justice', in Calixto A. Armas Barea *et al* (eds.), *Liber Amicorum 'In Memoriam' of José María Ruda* (Martinus Nijhoff Publishers 2000), 352, 362 – 366.

154 Robert Y. Jennings, 'The Internal Judicial Practice of the International Court of Justice', (1988) 59 *British Yearbook of International Law*, 31, 35.

155 See. *e.g.*, Harlan Grant Cohen *et al*, 'Legitimacy and International Courts – A Framework', in Nienke Grossman *et al* (eds.) *Legitimacy and International Courts* (Cambridge University Press 2018), 1, 2.

156 Mohammad Talaat al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff Publishers 1968), 6.

Peoples' Republic of China),[157] four from Western Europe (one always from France and the United Kingdom) and two from Eastern Europe (one always from the Russian Federation) compose the International Court.

Anyhow, as a matter of law the said agreement can be abandoned at any time, since article 9 does not require that the distribution of seat should strictly be made, in the way that it has been effected.[158] This tacit agreement can be said to recently be broken, by means of the withdrawal of former judge Christopher Greenwood, from the United Kingdom, who sought his re-election. The decision was taken, due to the impossibility to secure the necessary number of votes in the General Assembly. The withdrawal of his candidacy permitted judge Dalveer Bandhari, from India, to obtain the necessary votes in the Security Council and as a consequence obtain a seat that was expected to belong to the United Kingdom.

For its part, the composition of the bench of the Inter-American Court of Human Right, has some elements that clearly differentiate it from the International Court of Justice. In the first place, it is composed of only seven judges. The fact that it is a regional court, may explain why the number of judges is less. Remarkably, the nationality of these judges is not limited to nationals of states parties to the American Convention. They can be nationals of any of the members of the Organization of American States. This explains why some of its previous members, were nationals from states that have not ratified the American Convention (e.g. United States).

The objective conditions for the eligibility of the judges are set forth in article 52 of the American Convention. First, the person should be a jurist of the highest moral authority. Second, he should be of recognized competence in the field of human rights. Lastly, he should possess the qualifications required for the exercise of the highest judicial functions in his home state (or the one that is nominating him).[159]

Throughout the Inter-American Court's (short) history, persons having different backgrounds and whose competence in the field of human rights is dissimilar have been elected as judges. In this regard, persons that have previously been in academia (on the subjects of constitutional law or human rights), ambassadors, ministers (of internal or foreign affairs), judges in the high courts of their states or persons previously working for the United

157 Save for the period of time between 1967 and 1985, in which a judge of its nationality was not part of the bench, due to the contention between the People's Republic of China and Taiwan regarding who represented China at the international level. *Cf.* Sean D. Murphy, *Principles of International Law* (West Academic Publishing 2006), fn 74.

158 Edward McWhinney, 'Law, Politics and 'Regionalism' in the Nomination and Election of World Court Judges', (1986) 13 *Syracuse Journal of International Law & Commerce*, 1, 17; Bardo Fassbender, 'Article 9', in Andreas Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012), 292, 311 – 312.

159 Oswaldo Ruiz-Chiriboga, 'The Independence of the Inter-American Judge', (2011) 11 *The Law & Practice of International Courts and Tribunals*, 111, 117.

Nations, have been elected as judges.[160] The requirement of a recognized competence in the field of human rights has therefore been interpreted in a liberal manner. It does not require working experience (in the field). The academic experience or previous exercise of functions related to international law (in general) seems to be enough. This has led to instances in which, persons without any expertise and adequate commitments, have been elected as members of the Inter-American Court of Human Rights.[161] In consequence, it is argued that not all of the appointments are in keeping with the requirement of having a recognized competence in the field of human rights.[162] Politics have therefore had an important incidence in the process of election.[163] Lastly, reference should also be made to a situation, which may be illustrative of the need for judges to be jurist of the highest moral authority. On 14 May, 2018, judge and former president Roberto Caldas resigned from the Inter-American Court. His resignation took place after his wife instituted judicial proceedings in Brazil, for alleged acts of domestic violence committed against her. Judge Caldas accepted the allegations for verbal violence and acknowledged these are unjustifiable acts. In consequence, he decided to resign from the IACtHR.

In addition, compared to the composition of the bench at the International Court, it is not necessary that these seven judges that compose the Inter-American Court should constitute the representation of any group whatsoever, *e.g.* the main forms of civilization or the principal legal systems of the world.[164] Both the American Convention and the Statute of the Inter-American Court are silent on the matter. The aspect of guaranteeing the representativeness of the different legal system of the region corresponds to the organs of the Organization of American States in charge of electing the judges, should they consider that some representativeness is necessary.[165] It is, however, noted that a certain geographical balance is contained in these instruments, in view of the fact that the American Convention forbids that

160 See, Laurence Burgorgue-Larsen, 'El Contexto, las técnicas y las consecuencias de la interpretación de la Convención Americana de los Derechos Humanos', (2014) 12 *Estudios Constitucionales*, 110, 113 – 119.

161 Pedro Nikken, 'Una Revisión Crítica del Sistema Interamericano de Derechos Humanos: Pasado, Presente y Futuro', (2007) 3 *Anuario de Derechos Humanos*, 51, 57.

162 Jo. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press, 2013), 8.

163 *Cf.* Erik Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights', (2007) 61 *International Organization*, 669.

164 It should be noted that, even though no political requirements exist, some proposals have been made in this regard. It has been argued for instance, that the composition of the bench should assure a more equitable distribution of seats, considering a major representativeness in terms of gender and ethnicity. *Cf.* Laurence Burgorgue-Larsen, 'Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights', (2015) 5 *Notre Dame Journal of International & Comparative Law*, 29, 60.

165 *Article 55 on the American Convention of Human Rights*. Advisory Opinion OC-20/09 of September 29, 2009. Series A No. 20, para. 65.

in the composition of the bench two of its members may be nationals of the same state.[166] Similarly, it has also been suggested that the composition of the Inter-American Court should take account of gender.[167] As of 2016, only four women (out of the thirty nine judges that have composed it in its history) have been elected as judges.[168]

In addition, a historic review of the composition of the bench of the Inter-American Court shows that, only a few members of states belonging to the common law system have been part of the bench. Likewise, only a few of them come from English speaking states. Lastly, whereas an important number of these judges (nearly 60% of them) are nationals of states from South America, only a few members are from Central America (24%), the Caribbean (8%) and North America (8%). These numbers are indicative of the existence of an Anglo-Latin divide in the Inter-American Court. Due to this divide that exists in the IACtHR, only a few from the common law tradition have been members of the Inter-American Court.[169] In fact, it has been argued that the said divide is prejudicial to its judicial function, since it is contrary to its quest of an effective protection of human rights in the Americas. Important differences exist between the anglo and civil traditions.[170]

Lastly, it is important to note with regard to the members of the IACtHR that, in the draft Statute that it presented to the Organization of American States, the Inter-American Court sought to be considered as a permanent tribunal consisting of full-time judges.[171] However, this was not accepted by the member states of the organization considering that it would be expensive. Judges are not therefore prevented from having any other positions in their home countries, while being members of the court,[172] unless that position is incompatible with the principles of impartiality and independence.

166 Centro por la Justicia y el Derecho Internacional (CEJIL), *Documentos de Coyuntura: Aportes para el Proceso de Selección de Miembros de la Comisión y Corte Interamericana de Derechos Humanos* (2005), 10.

167 Ibid, at 13.

168 *Cf*. Laurence Burgorgue-Larsen, 'Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members', (2015) 5 *Notre Dame Journal of International and Comparative Law*, 29, 43.

169 During its first twelve years, the Inter-American Court always included at least one judge belonging from the common law system. Nevertheless, the said practice has changed and, nowadays, all of the members of the Inter-American Court come from civil law traditions and are moreover from Latin-American states. *Cf*. Lynda E. Frost, 'The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Past Judges', (1992) 14 *Human Rights Quarterly*, 171, 172 – 173.

170 Paolo G. Carozza, 'The Anglo-Latin divide and the future of the Inter-American System of Human Rights', (2015) 5 *Notre Dame Journal of International and Comparative Law*, 153, 159 – 163.

171 Thomas Buergenthal, 'The Inter-American Court of Human Rights', (1982) 76 *American Journal of International Law*, 228, 232.

172 Ibid, 233; Lea Shaver, *supra* note 1, 646.

All in all, clear and important differences exist between both courts in terms of the composition of its benches. They will be summarised in the following questions and will moreover guide the analysis of Chapter 4 as to whether and to what extent they may result in differences in the exercise of the right to append dissenting opinions.

– Do judges of the International Court of Justice and the Inter-American Court of Human Rights refer to their professional or regional background as a reason to exercise their right to dissent? Does the fact that a judge originates from the common rather than the continental law system otherwise influence the exercise of the right to dissent?

3.2.2 Judges ad hoc and national judges

The composition of the International Court of Justice is complemented by the possibility for national judges and judges *ad hoc* to take part in the proceedings, in which their state of nationality is a party to the proceedings. Pursuant to article 31 of the Statute of the Court, a judge of the nationality of the parties, shall retain his right to sit in the said case.

This is an aspect that has been the subject of controversy in academic literature. The said controversy centres on a potential lack of independence and impartiality, when taking part of a decision against its government. As Manfred Lachs has put it,

> "if an international court is to exist at all, nations must submit to be judged by persons of other nationalities. For it is inevitable and in fact feature of the international judiciary that every judge comes to the bench with all his cultural, social and intellectual baggage, including his nationality… there are critics who, while accepting the baggage of some judges as desirable, simultaneously describe that of others as impediments."[173]

It has therefore been noted that, members of the International Court of Justice sitting in cases where the state of their nationality is a party to the dispute, often vote in favour of their government.[174] In fact, Hersch Lauterpacht indicated that this cannot be regarded as a mere coincidence.[175] This explains why, instances in which national judge votes against his government are regarded as exceptional and moreover registered with astonishment.[176]

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173 Manfred Lachs, 'A Few Thoughts on the Independence of Judges of the International Court of Justice', (1987) 25 *Columbia Journal of Transnational Law*, 593, 594.

174 William Samore, 'The World Court Statute and the Impartiality of the Judges', (1954) 34 *Nebraska Law Review*, 618, 627; Thomas R. Hensley, 'National Bias and the International Court of Justice', (1968) 12 *Midwest Journal of Political Science*, 568, 580.

175 Hersch Lauterpacht, The Development of International Law by the International Court (Cambridge University Press 1958), 230.

176 William Samore, 'National Origins v. Impartial Decisions: A Study of World Court Holdings', (1956) 34 *Chicago-Kent Law Review*, 193, 193 – 194.

A somewhat similar discussion has also taken place, with regard to judges *ad hoc*. Article 31 of the Statute of the Court indicates that, when there is no judge of the nationality of one (or both) of the parties to the dispute, the said party has the right to appoint a judge for the purpose of the specific dispute. When the Committee of Jurists discussed the issue of judges *ad hoc*, it stressed the importance of giving the parties the possibility to appoint a representative, in order to protect their interests and enable the Permanent Court of International Justice to understand certain questions requiring a highly specialised knowledge, due to the differences between legal systems.[177] Likewise, this would legitimise the adjudication process[178] and the acceptance of the judgment from the parties to the dispute.[179] The appointment of the judge *ad hoc* was therefore considered as a prerogative of states party to the proceedings.

Much has been written in academic literature regarding judges *ad hoc*. An important number of these references are related to the discussion whether a role and function exist for these judges. The institution of judges *ad hoc* is reminiscent of arbitral proceedings, where each of the parties is entitled to appoint a member of the panel. Consequently, they often vote in favour of the appointing state, since they are believed to represent it. A classic example in this regard is constituted by the vote of Sir Alexander Cockburn (appointed by Her Britannic Majesty) in the award rendered in the *Alabama Claims of the United States of America against Great Britain*.[180]

Hence, it has been noted that judges *ad hoc* are an echo of the old arbitral justice[181] that do not serve any purpose whatsoever.[182] Their independence and impartiality seems therefore to be compromised, [183] especially by taking into account that the person chosen as judge ad hoc cannot be considered as a third party in accordance with the principle that one should be judge in his own case. [184] Moreover, an analysis of the voting patterns of these judges

177 *Procès-Verbaux of the Proceedings of the Committee June 16th – July 24th, 1920 with annexes* (1920), *supra* note 246, 528 – 529. See, *e.g.*, *"Enrica Lexie" Incident (Italy v. India)*, Provisional measures, Order of 24 August 2015, ITLOS Reports 2015, (Declaration Judge *ad hoc*, Francioni), pp. 4 – 5, paras. 10 – 15.

178 Martin Kuijer, 'Voting Behaviour and National Bias in European Court of Human Rights and the International Court of Justice', (1997) 10 *Leiden Journal of International Law*, 49, 52.

179 *Procès-Verbaux of the Proceedings of the Committee June 16th – July 24th, 1920 with annexes* (1920), 536.

180 *Alabama Claims of the United States of America against Great Britain* (1872) 29 RIAA 125 – 134.

181 Robert Kolb, *supra* note 137, 119.

182 Ian Scobbie, '"Une Heresie en Matiere Judiciaire"? The Role of the Judge *ad hoc* in the International Court', (2005) 4 *The Law and Practice of International Courts and Tribunals*, 421, 462.

183 Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933), 236 – 243.

184 Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press 2006), 288.

shows, that the objections as to their lack of independence and impartiality are stronger than in the case of national judges. Judges *ad hoc* tend to vote in support of the appointing state position.[185] This has led to claims in which it is argued that the judge *ad hoc* is nominally a judge but materially not.[186] In other words, judges *ad hoc* constitute an anachronism that is not fully in keeping with the judicial function of the ICJ.[187]

On the other hand, and with regard to national judges, Shabtai Rosenne has pointed out that, since 1947 no instance has occurred in which, a titular judge (*i.e.* a national of one of the parties to the dispute) is alone in his view.[188] Nonetheless, this trend was recently broken in the request for interpretation of the judgment on the merits of the *Avena* case. Judge Bernardo Sepúlveda-Amor was alone in his position with regard to three subparagraphs of the *dispositif*.[189] The reason for the existence of only one instance, is to be found in the views provided by a former judge of the International Court of Justice, who had noted that, in the case of a national judge it is not possible to easily know beforehand his position on a case, in which the state of his nationality is a party to the proceedings; on the contrary in the case of a judge *ad hoc* his views are known, since he is in the position of advocating the point of view of the state which has chosen him.[190]

In spite of all of the above, it has been noted that none of the reasons indicated can support that the role of the judge *ad hoc* or a national judge is meaningless. First of all, because even when practice shows that these judges have voted in support of the position from the appointing state, they do not always do so.[191] Secondly, because the vote in support of the position from the appointing state is the result of a concordance between the views of the judge *ad hoc* and the appointing state. Hence, the support from this judge of the arguments and evidence presented by the appointing state does not necessarily mean that she or he is an advocate or counsel for

185 See, *e.g.*, Michel Dubuisson, *La Cour Internationale de Justice* (Librairie générale de droit et t de jurisprudence 1964), 65; Il Ro Suh, "Voting Behaviour of National Judges in International Courts", (1969) 63 *American Journal of International Law*, 230; John Greenwood Collier & Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford University Press 1999), 131.

186 Id.

187 Serena Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?* (Springer 2014), 32.

188 Shabtai Rosenne, *1 The Law and Practice of the International Court: 1920 – 1996* (Martinus Nijhoff Publishers 1997), 204 – 205.

189 *Request of Interpretation of the Judgment of 31 March 2004 in the Case Concerning* Avena and Other Mexican Nationals (Mexico v. United States) *(Mexico v. United States)*, Judgment of 19 January 2009, [2009] ICJ Rep. 3.

190 Kotaro Tanaka, 'Independence of International Judges', in Roberto Ago *et al* (eds.) *Il Processo Internazionale: Studi in Onore di Gaetano Moreli* (Giufreé 1975), 855, 868.

191 Stephen Schwebel, *'National Judges and Judges ad hoc of the ICJ'*, 48 International and Comparative Law Quarterly, 889, 895 – 896.

the state.[192] What tends to occur is that this concordance of views is usually a precondition[193] for accepting to be a judge *ad hoc*.[194] As has been put in a recent academic article, judges *ad hoc*,

> "are intellectually disposed to a legal reasoning broadly resembling that of the State with whom they have the closest connection, and that such judges will arrive at similar conclusions to the said States '*par afinité, parenté ou identité intellectuelle.*' Accordingly, one can identify objectively an intellectual affinity of international judges with the policies of States, a wholly different argument than that of *institutional control* by States."[195]

These judges should not in principle be identified with the interests of the appointing state.[196] The fact that a state party to the dispute appoints them, does not therefore in itself compromise their impartiality.[197] In consequence, their role and function should be understood as the need to ensure that the arguments in favour of the appointing state have been fully appreciated. It is believed that one of the most authoritative pronouncements in this regard was made by Sir Elihu Lauterpacht, in the separate opinion that he appended to the second request for the indication of provisional measures, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,[198] where he acted as judge *ad hoc* for Bosnia-Herzegovina. In his view,

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192 Institut de Droit International, 'Study of Amendments to be made in the Statute of the International Court of Justice', (1854) 45 *Annuaire de l'Institut de Droit International*, 534; Nicolas Valticos, 'L'evolution de la notion du juge *ad hoc*', (1977) 30 *Revue Hellénic du Droit International*, 1, 11.

193 Connie Peck & Roy S. K. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to celebrate the 50th Anniversary of the Court* (Martinus Nijhoff Publishers 1997), 378 – 379.

194 A relevant a recent example that illustrates this situation, can be found in the appointment of former President of the International Court, Mohammed Bedjaoui, as judge *ad hoc* for the Marshall Islands in the case concerning *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. It is possible to assert that the reason for his appointment, is to be found in the declaration he appended to the advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. In the said opinion he expressed his views on the issue that constituted the subject-matter of the Marshall Islands application against the United Kingdom, Pakistan and India. A concordance of views seems to therefore exist between the views of judge *ad hoc* Bedjaoui and his appointing state.

195 Gleider I. Hernández, "Impartiality and Bias at the International Court of Justice", (2012) 1 *Cambridge Journal of International and Comparative Law*, 183, 199.

196 Nagendra Singh, supra note 33, 192 – 193.

197 Jose Luis Jesus, "Judges *ad hoc* in the International Tribunal for the Law of the Sea", in Holger P. Hestermeyer *et al* (eds.), 2 *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (Martinus Nijhoff Publishers 2012), 1661, 1663.

198 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further Request for the Indication of Provisional Measures, Order of 13 September 1993, [1993] ICJ Rep. 325.

> "[the judge *ad hoc*] has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write."[199]

This view has also been complemented by noting that it would be excessive to reduce (by means of the bonds to a state party to the dispute) the role and function of this kind of judges to a mere control of the analysis of the arguments by the International Court.[200] Consequently, it is pointed out that a judge *ad hoc* (when the latter is a national of the appointing state) may contribute providing knowledge about the internal laws of the state[201] and the appraisal of certain evidence from sources belonging to the state.[202] Similarly, he is expected to bring to the ICJ a perspective of the region with which the application deals and more detailed familiarity with its background.[203]

It is in view of all the above, that is has been claimed by some academics that despite the various objections to judges *ad hoc* and national judges, their utility outweighs the defects, especially where states are hesitant to resort to an international court or tribunals.[204] Hence, both institutions, as set forth in the governing instruments of the International Court, are essential to its good functioning.[205]

This overview as to the role of judges *ad hoc* and national judges from the International Court of Justice, is to be contrasted with the operation of both institutions in the Inter-American Court of Human Rights, where other

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199 *Ibid*, (Separate Opinion, Judge *ad hoc* Lauterpacht), p. 409, para. 6.

200 "Au Sujet de Juge ad hoc", in Julio A. Barberis *et al* (eds.), *Liber Amicorum 'In Memoriam' of Judge Jose María Ruda* (2000), 287 – 288.

201 Pieter H. F. Bekker, "Diffusion of Law: The International Court of Justice as a court of transnational justice", in Rudolf Dolzer *et al* (eds.) *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press 2010), 417, 478; See, *e.g.*, *Enrica Lexie" Incident (Italy v. India)*, *supra* note 177.This view, however, has been vigorously criticised by persons such as Sir Elihu Lauterpacht. For him, this argument is not especially persuasive as it assumes to things that do not always happen. First, that the judge *ad hoc* is a national of the appointing states. Second, in certain occasions he has not had an acquaintance with the relevant domestic rules and that can therefore be superior to the knowledge that other members of the court would gain, after analysing the arguments from the parties. *Cf.* Connie Peck & Roy S. K. Lee (eds.), *supra* note 193, 375.

202 Stephen Schwebel, "National Judges and Judges *ad hoc*", in René-Jean Dupuy (ed.), *Mélanges en l'Honneur de Nicolas Valticos: Droit et justice* (Pedone 1999), 319, 328.

203 *Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *case*, Order of 22 September 1995, [1995] ICJ Rep. 288, (Dissenting Opinion, Judge *ad hoc* Sir Geoffrey Palmer), p. 420, para. 118.

204 Michael W. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Martinus Nijhoff Publishers 1971), 479.

205 Shabtai Rosenne, *supra* note 188, 407.

considerations as to its judicial function have outweighed the role that these judges may play within the IACtHR.

When the ACHR was drafted, article 55 included the possibility for a state party to a contentious case before the Inter-American Court of Human Rights (i) to allow a judge of its nationality to retain the right to hear that case; and, (ii) if there is no judge of its nationality, the right for the said state to appoint a judge *ad hoc*. Similarly, article 10 of the Statute of the Inter-American Court of Human Rights (as adopted by the General Assembly of the Organization of American States) and article 17 of the 1980 Rules of the Court regulated all the aspects concerning these judges.

In application of these provisions, the Inter-American Court has allowed states parties to a case to appoint a judge *ad hoc*[206] (who is moreover not required to be a national from the state party to the case),[207] as well as for a member of the court who is a national of the said state to hear the case.[208] Participation of national judges and judges *ad hoc*, however, has been the subject of significant changes in recent years.

In spite of this longstanding practice of the Inter-American Court of Human Rights, some objections have been made. It was for instance argued that the use judges *ad hoc* has turned into an abuse, since some states have sought to appoint as judges people who dissented from otherwise unanimous decisions.[209] A much stronger opposition to judges *ad hoc* and notational judges, however, started to take place after the amendment of the Rules of the Court effected in 2003. Among the several changes implemented in this amendment, the most important was to give the victims

206 See, *e.g.*, *Neira-Alegría et al v. Peru*. Preliminary Objections. Judgment of December 11, 1991. Series C No. 13; *"White Van" (Paniagua Morales et al) v. Guatemala*. Preliminary Objections. Judgment of January 25, 1996. Series C No. 23; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua v. Nicaragua*. Preliminary Objections. Judgment of February 1, 2000. Series C No. 66; *Case of the 19 Merchants v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109; *Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 6, 2008. Series C No. 184; *Rios et al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194.

207 For instance, the Republic of Colombia appointed Mr. Julio A. Barberis, from Argentina, as judge *ad hoc* in the case of *Las Palmeras v. Colombia*. Similarly, the Republic of Ecuador appointed Mr. Diego Rodríguez-Pinzón, from Colombia, as judge *ad hoc* in the case of *Salvador Chiriboga v. Ecuador*.

208 As examples of this practice, one may refer to the following cases where a judge of the nationality of a state party to the said case took part in the deliberations: *Caballero Delgado and Santana v. Colombia* (judge Rafael Nieto Navia), *"The Last Temptation of Christ" (Olmedo-Bustos et al) v. Chile* (judge Maximo Pacheco Gómez), *Huilca-Tecse v. Peru* (judge Sergio Garcia-Sayán), *Ximenes Lopez v. Brazil* (judge Antonio A. Cançado Trindade), *Heliodoro Portugal v. Panama* (judge Manuel E. Ventura Robles).

209 Lea Shaver, *supra* note 1, 645.

direct access to the IACtHR, *i.e. locus standi in judicio*.[210] Victims had no longer to be represented by the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights. They were therefore allowed to present arguments and evidence.[211] In the light of these changes, it has been argued that the institution of judges *ad hoc* "is a "fossil" figure borrowed from areas of international law where the interests of states have traditionally played a central role".[212]

Hence, it was created for inter-state proceedings with a view of ensuring equality of arms between both states parties to the proceedings, when either one or both parties do not have a judge of their nationality on the bench.[213] In consequence, and bearing in mind that the object and purpose of the American Convention refers to the protection of the basic rights of individual human beings (and not to serve the interests of states), it was submitted that the institution of *ad hoc* judges should be limited for inter-state complaints.[214] Moreover, allowing the respondent state to appoint a judge *ad hoc* would run counter to the equal procedural balance between the parties to the case, *i.e.* the victims and the state.[215]

These objections seem to have echoed in the Republic of Argentina who, on August 14, 2008, requested from the Inter-American Court an advisory opinion on the interpretation of article 55 of the American Convention. The Republic of Argentina indicated that the considerations giving rise to the request centred on the doubt as to whether the possibility for national judges to retain their seat, as well as the appointment of judges *ad hoc* is "contrary to the object and purpose of the American Convention of Human Rights."[216]

Consequently, in its request the Republic of Argentina asked the following two questions:

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210 Manuel Ventura Robles, 'El Acceso Directo de la Víctima a la Corte Interamericana de Derechos Humanos: Un Ideal y una Lucha de Antonio A. Cançado Trindade', in Sergio Antonio Fabris (ed.) 2 *Trends in the International Law of Human Rights, Studies in Honour of Professor Antonio Augusto Cançado Trindade* (Nuria Fabris 2005), 213, 57.

211 Cecilia Medina Quiroga, 'Modificación de los reglamentos de la Corte Interamericana de Derechos Humanos y de la Comisión Interamericana de Derechos Humanos al procedimiento de peticiones individuales ante la Corte', (2011) 7 *Anuario de Derechos Humanos*, 110, 118.

212 Monica Feria Tinta, 'La Víctima ante la Corte Interamericana de Derechos Humanos a 25 años de su funcionamiento', (2006) 43 *Revista Instituto Interamericano de Derechos Humanos*, 159, 196.

213 Monica Feria Tinta, '"Dinosaurs" in Human Rights Litigation: The use of *Ad Hoc* Judges in Individual Complaints before the Inter-American Court of Human Rights', (2004) 3 *The Law & and Practice of International Courts and Tribunals*, 79, 85.

214 Id.

215 Ibid, 109.

216 *Article 55 on the American Convention of Human Rights*, *supra* note 165, para. 3.

> "[1]. In accordance with the terms of article 55(3) of the American Convention of Human Rights, should the possibility of appointing a Judge ad hoc be limited to those cases in which the application submitted to the Court arises from an inter-state petition?
>
> [2]. For those cases arising from an individual petition, should a Judge who is national of the respondent State Party disqualify himself from taking part in the deliberation and decision of the case in order to guarantee an impartial and unbiased decision?"[217]

On the first question, Argentina argued that judges *ad hoc* should only be limited to inter-state petitions, since the participation of a judge *ad hoc* in the system of individual petitions would affect the principle of equality of arms and the right for the victims to have their petition to be resolved by an independent and impartial tribunal.[218] With regard to the second question, it argued that if article 55 of the American Convention was interpreted harmoniously with the rest of its provisions, the national judge would only be allowed to retain his seat in inter-state petitions. Moreover, it highlighted that its position regarding national judges was not exclusively related to the allege lack of independence or impartiality. It is also therefore related to a potential jeopardy of the procedural balance between the parties, if the national judge is able to retain his seat.

The Inter-American Court of Human Right's answer to both questions was in the affirmative, *i.e.* it concluded that the possibility of appointing a judge *ad hoc* should be limited to inter-state petitions, and that a national judge should disqualify himself in contentious cases (arising from individual petitions) against his state. Regarding judges *ad hoc* the IACtHR noted that the ordinary meaning of the expressions contained in article 55 presume the participation of more than one state party in the case.[219] In consequence, the said provision only makes sense within the context of contentious cases originate from inter-state communications.[220] The preservation of judges *ad hoc* in individual petitions could come into conflict with the special nature of modern human rights and the idea of collective guarantee,[221] more exactly with the principles of equality and non-discrimination (that in the IACtHR's view are part of *ius cogens*).[222]

As for national judges, the Inter-American of Human Rights also noted that their possibility to retain their seat responds to the need to maintain procedural balance between the parties, when both of them are states.[223]

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217 Id.
218 Ibid, para. 21.
219 Ibid, para. 30.
220 Ibid, para. 36.
221 Ibid, para. 37.
222 Ibid, para. 54.
223 Ibid, para. 75.

Hence, even when it is believed that their presence is necessary to guarantee a better understanding of the legal system of the respondent state, their presence also generates a twofold procedural imbalance. First, towards a state party to the American Convention that, in the course of contentious proceedings arising from a petition filed by an individual, does not have a national as a titular judge.[224] Second, with respect to the applicant in contentious proceedings (*i.e.* the victims), in the context of the individual petitions system. In addition, the IACtHR highlighted that the common practice from its judges, as well as of judges from other judicial and quasi-judicial human rights bodies, is to disqualify themselves in contentious cases originating from individual petitions, against their state of nationality.[225] Hence, despite of the fact that by judging the state of his nationality the national judge cannot be considered as lacking impartiality of independence, it is also true that by not participating the perception of both, the judge's impartiality and the justice applied by the Inter-American Court of Human Rights, are strengthened.[226]

As a consequence of this advisory opinion, the case of *Cabrera García and Montiel-Flores*[227] was the last contentious case originated in an individual petition in which a state appointed a judge *ad hoc*.[228] In fact, in the most recent amendment that the Inter-American Court conducted to its Rules of the Court, some changes were made to the provision that regulated the appointment of judges *ad hoc*. The said amendment sought to put the Rules of the Court in line with the Inter-American Court's interpretation of article 55 of the American Convention. Current article 19 therefore consecrates that a judge, who is a national of the respondent state, should not be able to participate in the hearing; likewise, article 20 limits the appointment of judges *ad hoc* to inter-state cases.

In sum, a manifest difference exist between the International Court of Justice and the Inter-American Court of Human Rights, on the permissibility of judges *ad hoc* and national judges. It must, however, be noted that the ban regarding these two kinds of judges at the Inter-American Court of Human Rights, is recent. For some decades both courts therefore allowed for judges ad hoc and national judges to be part of their benches. In the light of this fact, as well as on the aspects addressed in this subsection regarding the role of these judges, some questions arise that are useful for guiding the subsequent analysis on the right to append dissenting opinions, to be made in Chapter 4.

224 Ibid, para. 76.
225 Ibid, paras. 82 – 83.
226 Ibid, paras. 84 – 85.
227 *Cabrera García and Montiel-Flores v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220.
228 It should also be highlighted that, the institution of judges *ad hoc* has not had the chance to be used in inter-state petitions. The Inter-American Court has never been seised of a case of this nature.

– Is there a difference in how judges ad hoc and national judges exercise their right to dissent at the International Court of Justice and the Inter-American Court, during the time that judges *ad hoc* were allowed at the latter?

3.2.3 Deliberations and the moment to disclose the content of dissents

The current process of deliberation and drafting of judgments at the International Court of Justice, is to be found in its resolution concerning its internal judicial practice. This resolution condenses the experience and discussions that took place since the creation of the Permanent Court.[229] The resolution is moreover strictly devoted to set forth the rules and process to be followed by the International Court for the drafting of its judgments and decisions. Consequently, it does not present the entire picture of this process. The writings of former judges and officials of the International Court are therefore useful as a complement for the understanding of the whole process.[230]

Be it as it may, the format of deliberations followed by the ICJ is interesting since it takes into account and is in line with, the requirements concerning the composition of its bench.[231] As explained above (section 3.2.1) in the election of judges account should be taken of the fact that the main forms of civilization and principal legal systems of the world, must be represented at the bench. The ICJ's format of deliberations assures that all judges and hence the main forms of civilization and principal legal systems of world, have a say in the drafting of the judgment.[232] This format also fosters a spirit of collegiality among the judges.[233]

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229 It has been noted, for instance, that early in its history the Permanent Court implemented the appointment of a judge rapporteur, for the drafting of its judgments. *Cf.* Manley O. Hudson, *The Permanent Court of International Justice, 1920 – 1942: A Treatise* (Ayer Co. Publishers 1943), 511. Nevertheless, this method for the drafting of decisions was rejected soon and was only followed in a few decisions. *Cf.* Richard B. Lillich & Edward White, 'The Deliberation Process of the International Court of Justice: A Preliminary Critique and some Possible Reforms', (1976) 70 *American Journal of International Law*, 29. It is argued that a reason for not implementing the system of judge rapporteur, can be found in the fact that the great jurists from 1922 to 1940 were habituated to do research and work individually and without any frequent meetings and deliberations. *Cf.* André Gros, 'Observations sur le mode de Délibération de la Cour Internationale de Justice', in Roberto Ago *et al* (eds.) *Il Processo Internazionale: Studi in Onore di Gaetano Moreli* (Pedone 1975), 377, 380.

230 Philippa Webb, *International Judicial Integration and Fragmentation* (Oxford University Press 2013), 191.

231 André Gros, *supra* note 229, 380.

232 *Cf.* Kenneth J. Keith, 'Resolving International Disputes: The Role of Courts', (2009) 7 *New Zealand Yearbook of International Law*, 255, 264.

233 David H. Anderson, 'Deliberations, Judgments and Separate Opinions in the practice of the International Tribunal for the Law of the Sea', in Myron H. Nordquist *et al* (eds.) *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (Martinus Nijhoff Publishers 2001), 63, 65 – 66.

There are four moments during the whole process of the drafting of judgments in which the International Court of Justice holds deliberations. Its commencement takes place after the closure of the written proceedings. In these deliberations, the judges have the possibility to exchange views and bring to the notice of the rest of their colleagues any points that they may deem necessary for the ICJ to address during the oral proceedings. In that sense, this deliberation is partial. It is limited to the discussion of certain aspects of the case, and which are moreover aimed at setting the stage for the arguments to be presented by the parties during the oral proceedings. A quite similar deliberation takes place after the closure of the oral proceedings. The ICJ bench gathers to discuss the list of issues that are to be discussed and deserve a decision on the merits. Hence, no substantive discussion takes place on any of the arguments presented by the parties to the case. It is right after this deliberation that time is given to each of the judges, for the preparation of a written note that, under the basis of anonymity,[234] is circulated to the rest of his colleagues. These notes should supposedly be restricted to the list of issues outlined by the President. Nonetheless, the judges tend to write their notes as they see fit, and therefore not always confine their note to the said list of issues.[235]

Having read the notes from the rest of her or his colleagues, all judges gather once again to present (in inverse order of seniority) their views on the case. This constitutes the exact moment where the substantive deliberation commences. Every judge tries in the course of this deliberation, to do his best to convince the rest of his colleagues, that the note he has written contains the most adequate solution and represents the best way for the ICJ to express it.[236] The former member and president of the ICJ, Sir Robert Jennings, has noted that, in the course of this deliberation no dialogue among the judges takes place. Due to the formality of this meeting, the dialogue among judges must be informal, in small groups, or between just two of them.[237]

234 Mohammed Bedjaoui, 'La Fabrication des Arrets de la Cour Internationale de Justice', in Jean Boulouis *et al* (eds.) *Le Droit International au Service de la Paix, de la Justice et du Développement. Mélanges Michel Virally* (Pedone 1991), 87, 97.

235 Hugh Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations', (2006) 5 *Chinese Journal of International Law*, 15, 16 – 17.

236 Sture Petrén, 'Forms of Expression of Judicial Activity', in Leo Gross (ed.) *1 The Future of the International Court of Justice* (Oceana Publications 1976), 445, 449.

237 Robert Y. Jennings, *supra* note 154, 37.

It is based on the views expressed during this deliberation that a drafting committee is chosen, from among the judges whose views most closely and effectively reflect the opinion of the majority of the International Court of Justice, for the drafting of its judgment.[238] The committee is to be composed of three judges, one of them always being the President of the ICJ (unless he is not part of the majority, as it appears to exist).

This drafting committee should submit a preliminary draft that is circulated to the rest of judges, who may moreover propose amendments. In that sense, all members of the International Court, either in the majority or minority (that was constituted according to the preliminary vote held for choosing the drafting committee), are invited to contribute in the improvement of the text.[239] The discussions mainly take place in the light of the views that each of the judges has formed, during the preparation of the written notes.[240] Hence, having considered the said amendments, the drafting committee submits a revise draft that is discussed in first reading. Each of the paragraphs of the draft is read aloud. In each of the paragraphs, a member of the drafting committee should take the floor and explain which of the amendments proposed by other judges have been incorporated, as well as which have not been accepted and the reason its rejection.[241]

It is after this first reading, that those judges, who are contemplating to append a separate or dissenting opinion, must make their text available within a time-limit.[242] It is also based on the separate and dissenting opinions that the drafting committee, should work on a second draft, as it may wish to take into consideration one or some of the points developed in these opinions.[243] In other words, the drafting committee proposes amendments that seek either to reply to the issues addressed by the separate or dissenting opinions,[244] or to include the issues contained in those opinions, with a view to trying to obtain the maximum number (unanimity if possible)

238 Resolution concerning the Internal Judicial Practice of the Court (Rules of Court, Article 19) adopted on 12 April 1976, articles 5 and 6.

239 Mohammed Bedjaoui, *supra* note 234, 100.

240 The former member of the International Court Sture Petrén has for instance referred to this discussion during the first reading of the draft, as the fate of a whale attacked by a school of killer-whales which tear big chunks of flesh from its body, after which sometimes only a skeleton is left for the second reading. *Cf.* Sture Petrén, *supra* note 236, 450 – 451.

241 Robert Y. Jennings, *supra* note 154, 42.

242 Resolution concerning the Internal Judicial Practice of the Court, *supra* note 238, article 7.

243 Robert Y. Jennings, *supra* note 154, 29.

244 Hugh Thirlway, *supra* note 235, 19.

of judges in favour[245] of what will constitute the ICJ's decision.[246] In that sense, it is possible to assert that the dissenting judges are always contributing to the improvement and clarification of the majority judgment, just as the majority (represented in the drafting committee) is always contributing to the drafting of the dissenting opinion.[247] Lastly, after the second reading of the draft judgment, judges give their final vote on each of the operative clauses of the *dispositif*.

Compared to the ample attention that the format of deliberations from the International Court of Justice has attracted, this is an aspect which has received little attention (not to say, no attention whatsoever) in the case of the Inter-American Court of Human Rights. In fact, the current Rules of the Court (article 15) are limited to consecrate that deliberations shall be in private and remain secret. Similarly, no resolution concerning its internal judicial practice (as it is the case in the International Court) exists. Moreover, doctrine has not yet analysed this aspect. In consequence, only a few aspects, regarding the way in which the Inter-American Court deliberates, are known.

The format of deliberations within the Inter-American Court of Human Rights follows that that is used in the majority of states in the Americas. Pursuant to article 46 of the 1980 Rules of the Court, when the case is ready for a decision, the Inter-American Court meets in order to take a preliminary vote and names one or various rapporteurs for writing the

245 The International Court's Resolution concerning its internal judicial practice does not, however, make an explicit statement indicating that this as an objective to be achieved (to the fullest extent possible) by the drafting committee. Nonetheless, it is in the minds of its members, without the need for it to be spelled out. *Cf*. David H. Anderson, 'The Internal Judicial Practice of the International Tribunal for the Law of the Sea', in Patibandla Chandrasekhara Rao & Rahmatullah Khan (eds.) *The International Tribunal for the Law of the Sea: Law and Practice* (Martinus Nijhoff Publishers 2001), 199, 209.

246 Nonetheless, it has been noted that it is sometimes difficult to make a dissenting judge change her or his position. The early composition of written notes tends to crystallise their views and therefore stultify any chance, of making the (until this moment) dissenting judges change their vote. *Cf*. Manfred Lachs, 'The Revised Procedure of the International Court of Justice', in Frits Kalshoven (ed.) *Essays on the Development of the International Legal Order: In memory of Haro F. Van Panhuys* (Martinus Nijhoff Publishers 1980), 21, 47. In other words, judges often consider that their written notes reflect their definitive point of view, and therefore stick to it during the course of deliberations. *Cf*. Gilbert Guillaume, 'Cultures Juridique et Delibere Judiciaire', in Societe Français pour le Droit International (ed.) *International Law and Diversity of Legal Cultures* (Pedone 2008), 399, 401. This is explained by the fact that (as noted above) there is no obligation for judges to circumscribe their written notes to the list of issues presented by the President. It is due to this situation, that the International Tribunal for the Law of the Sea has deviated in some aspects from the internal judicial practice of the ICJ. Consequently, it has established that the method of exchanging views is through an oral debate that, only when necessary is supplemented by written notes. *Cf*. David H. Anderson, *supra* note 245, 65.

247 Robert Y. Jennings, *supra* note 154, 43; Mohammed Shahabuddeen, Precedent at the World Court (Cambridge University Press 1996), 195.

judgment of the court.[248] The judge appointed for this assignment therefore takes some time to analyse the submissions from the parties, with a view of presenting a draft judgment to the rest of his colleagues, during the next (ordinary or extraordinary) sessions of the Inter-American Court. The deliberations among the judges take place during the sessions. In some cases, and depending on the issues to be addressed with regard to the case, these deliberations may take place several days or even be suspended until the next session.[249] It is during the deliberations that each of the members of the IACtHR presents his views, with regard to the judge rapporteur's draft. He can therefore take these views from his colleagues into account, for the pertinent changes to be made to his draft with a view of obtaining the greatest number of votes in favour of the court's judgment. At the end of these deliberations each judge must vote in the affirmative or negative on each of the submissions.[250]

With regard to the manner deliberations are conducted, two issues are worth to be highlighted. On the one hand, that since its members do not work full-time, the IACtHR can only hold sessions on specific dates. It is during these sessions that the judges should address all the matters that require a decision from all the members of the court. Hence, when the Inter-American Court of Human Rights is sitting, along with the deliberations regarding the decision to be adopted on a case, it should also deal with advisory proceedings, requests for provisional measures, as well as it should also hold meetings to monitor compliance with its judgments. It must therefore take advantage to the fullest extent possible of each of the sessions; in consequence, there is not enough time for long deliberations in which, each of the paragraphs of the draft judgment may for instance be read out loud.

On the other hand (and coupled with the issue mentioned above), from what it is known with regard to deliberations, no indication exists as to whether the judge rapporteur takes into account the content of any dissenting opinions to be appended, with a view of making the necessary amendments (if he considers so) to the majority judgment. Pursuant to article 59 of the current Rules of the Court, any dissenting opinions that judges intend to append must be submitted to the President, in order to enable the rest of his colleagues to take cognizance of its content prior to the notification of the judgment. The terms, in which this provision is couched, seems to imply that the dissenting judge is not under a duty to make known the content of his opinion during deliberations. In fact, it is possible that the dissenting opinion is written by the judge after deliberations have taken place. Even though the views expressed in the said opinion might have

248 Nonetheless, this reference concerning this aspect of the deliberation process was deleted the subsequent versions (including current) of the Rules of the Court do not contain a reference as to this aspect of the deliberations.

249 Jo. M. Pasqualucci, *supra* note 162, at 178.

250 Id.

already been presented by the judge throughout deliberations, they are more developed in the opinion. In that order of ideas, the dissenting judge decides the exact moment to circulate his opinion, which in any case must be prior to the notification of the majority judgment.

All these differences with regard to the format of deliberations and the moment for judges to disclose the content of their dissenting opinion, and their possible incidence in the exercise of the right to append dissenting opinions, will be addressed in the subsequent Chapter 4, in the light of the following question.

– How does the drafting process of the main judgment and the moment for disclosing the content of dissenting opinions, inform the exercise of the right to append dissents?

3.2.4 Scope and publicity of dissenting opinions

Pursuant to article 57 of the Statute of the International Court, judges are entitled to deliver a separate opinion. They are not therefore under any obligation whatsoever to append a dissenting opinion, when voting against the majority in the operative part of the judgment. The said provision is limited to consecrating a right for judges to make their views known. In consequence, they are free to append an opinion.

In any case, if the dissenting judge wants to make his personal views known, his dissent should be made public. Article 95 of the Rules of the Court establishes the points that a judgment shall contain. In this regard, it is indicated in its second paragraph that individual opinions form an integral part of the judgment and in consequence, the International Court is under the obligation to attach it to the judgment.

On the other hand, the question as to the scope of dissenting opinions is an aspect that encounters serious difficulties in practice. This is so, because when compared to publicity of decisions, no statutory or regulatory provision deals with these two aspects. In fact, the lack of a statutory or regulatory provision has created (not only uncertainty but) problems. This is an issue that has moreover been scantily considered and in which there is no clear and definitive position. As it is the case with regard to the concept of dissenting opinions, it is also for each judge to decide the scope of his dissent.

In the case of the Inter-American Court of Human Rights, pursuant to article 66 of the American Convention, when the judgment does not represent in whole or in part the unanimous decision of the judges, those that are not part of the majority shall be entitled to have his dissenting opinion attached to the judgment. In this sense and as a general rule, the dissenting opinions should be made public. As it is the case at the International Court of Justice, article 66 is couched in terms that confer upon judges a right to append their opinion; it is therefore also possible that (should the judge consider it appropriate) the opinion is not made public. In any case, the

decision not to publish the opinion rests on the judge himself and not on any statutory limitation whatsoever.

In clear contrast to this lack of a clear scope for dissenting opinions in the case of the International Court of Justice, this aspect is clearly settled by the version of the Rules of the Court approved in 2000 (an effective as of June 2001). Article 55, paragraph 2 of the said version of the Rules of the Court (current article 65, paragraph 2, after the amendments made in 2009) establishes the limits regarding the aspects that a dissenting (as well as a separate opinion) is entitled to address. This provision stipulates that any individual opinion to be appended to a judgment, shall only refer to the issues covered in the majority judgment.

Interestingly, article 55 of the previous version of the Rules of the Court (1996), limited itself to establish that any judge who has taken part in the consideration of a case is entitled to append a separate opinion, concurring or dissenting, to the judgment. In this regard, among the various changes introduced by the 2000 Rules of the Court, this one regarding the scope of dissenting opinions passed unnoticed.[251] No records exist that might shed some light on the reasons why the Inter-American Court of Human Rights decided to introduce this amendment to article 55 (current article 65).

All in all, it is clear that a difference exists in the scope of the dissenting opinions that judges are entitled to append in the International Court of Justice and the Inter-American Court of Human Rights. This is a peculiar difference since, compared to other differences mentioned in previous subsections, it occurs on account of what the governing instruments do not say. In this sense, the silence of the governing instruments of the International Court of Justice seems to make the scope of a dissenting opinion dependent on the judge's view. A question arises from this difference on the scope of the dissenting opinions. It is useful to guide the subsequent analysis of Chapter 4. This question can be couched in the following terms:

– Whether and to what extent judges have gone beyond the legal questions and content of the majority judgment, in the exercise of their right to append dissenting opinions?

251 For instance, the President of the Inter-American Court in 2000, Antonio Augusto Cançado Trindade, has highlighted only those amendments that have contributed to the *locus standi* of the human being in the procedure before the IACtHR. *Cf.* Antonio Augusto Cançado Trindade, *La humanización del Derecho Internacional Contemporáneo* (UNAM 2014), 92 – 120.

4 The differences between the International Court of Justice and the Inter-American Court and their influence on the exercise of the right to append dissenting opinions

The previous chapter (Chapter 3) has addressed the mandate, jurisdictional and procedural features of the International Court of Justice and the Inter-American Court of Human Rights. To be more precise, in addressing the judicial function and anatomy of both courts, Chapter 3 has highlighted fundamental differences between both courts and formulated concrete questions, on how these differences may inform the exercise of the right to append dissenting opinions at the respective courts. Guided by these questions, this chapter illustrates, how and to what extent the differences in mandate, jurisdictional and institutional design may influence the exercise of the right to append dissenting opinions. It will be made by offering insight trough illustration of the practice from judges from the International Court of Justice and the Inter-American Court of Human Rights, in the exercise of their right to append dissenting opinions. It will moreover not be limited to pointing out the *differences* in the exercise of the right to append dissenting opinions that arise from the differences in the judicial function and anatomy. It also includes aspects where, despite the differences between both international courts, *similarities* exist in the exercise of the right to append dissenting opinions.

This chapter will be divided in four sections. Each section refers to an aspect of mandate, jurisdiction and procedure of the International Court of Justice and the Inter-American Court of Human Rights, addressed in Chapter 3 (*i.e.* judicial function, composition of the bench, judges *ad hoc* and national judges, deliberations and the moment to disclose the content of dissents and the scope and publicity of dissenting opinions). In turn, each section will be divided in subsections and aims to answering to each of the questions formulated in order to guide analysis as to how and to what extent the differences in mandate, jurisdictional and institutional design may influence the exercise of the right to append dissenting opinions.

4.1 The judicial function of the International Court of Justice and the Inter-American Court of Human Rights and its influence on the right to append dissenting opinions

4.1.1 The main function of the International Court of Justice and the Inter-American Court of Human Rights in the context of the exercise of the right to append dissenting opinions

The most significant of the differences between the International Court of Justice and the Inter-American Court of Human Rights refers to what can

be said to constitute their main judicial function. The ICJ is entrusted with the function of the settlement of disputes that states submit to it. For its part, the Inter-American Court has a completely different judicial function. It relates to the protection of human rights; to be more precise it is related to an allegation from a person concerning the violation from a state of its duty to ensure or guarantee the protection of his human rights.

The dissenting judges may refer to main function of the respective courts in varying degrees and different ways or with a view to different types of outcomes. In the case of the International Court of Justice, there are 34 instances in which judges have explicitly referred to the main function of the ICJ, as a core reason for their decision to append a dissenting opinion.[1] The following four examples are illustrative of how the main function of the International Court of Justice informs the exercise of the right to dissent. The first instance is the dissenting opinion appended by judge Onyeama to the ICJ's judgments on the merits of the cases concerning *Fisheries Jurisdiction* instituted by Iceland against Germany and the United Kingdom. This judge noted,

1 *Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*, Preliminary Question, Judgment of 15 June 1954, [1954] ICJ Rep. 19, (Dissenting Opinion, Judge Levi Carneiro); *Nottebohm (Liechtenstein v. Guatemala)*, Merits, Judgment of 6 April 1955, [1955] ICJ Rep. 4 (Dissenting Opinion, Judge Klaestad) and (Dissenting Opinion, Judge Read); *Certain Norwegian Loans (France v. Norway)*, Preliminary Objections, Judgment of 6 July 1957, [1957] ICJ Rep. 9, (Dissenting Opinion, Judge Guerrero); *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment of 12 April 1960, [1960] ICJ Rep. 6, (Dissenting Opinion, Judge Moreno Quintana); *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment of 25 July 1974, [1974] ICJ Rep 3, (Dissenting Opinion, Judge Gros) and (Declaration, Judge Ignacio-Pinto) and (Dissenting Opinion, Judge Onyeama) and (Dissenting Opinion, Judge Petrén); *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment of 25 July 1974, [1974] ICJ Rep 3, (Dissenting Opinion, Judge Gros) and (Declaration, Judge Ignacio-Pinto) and (Dissenting Opinion, Judge Onyeama) and (Dissenting Opinion, Judge Petrén); *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 253, (Joint Dissenting Opinion, Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock) and (Dissenting Opinion, Judge de Castro); *Nuclear Tests Case (New Zealand v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 457, (Joint Dissenting Opinion, Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock) and (Dissenting Opinion, Judge de Castro); *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, [1998] ICJ Rep. 432, (Dissenting Opinion, Judge Bedjaoui) and (Dissenting Opinion, Judge Ranjeva) and (Dissenting Opinion, Judge Vereschtein); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, [2007] ICJ Rep. 832, (Dissenting Opinion, Judge Bennouna) and (Dissenting Opinion, Judge Al-Khasawneh) and (Separate Opinion, Judge Abraham) and (Declaration, Judge Simma); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, [2010] ICJ Rep. 14, (Joint Dissenting Opinion, Judges Simma and Al-Khasawneh); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] ICJ Rep. 422, (Dissenting Opinion, Judge *ad hoc* Sur); *Jurisdictional Immunities of the State (Germany v. Italy)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99, (Dissenting Opinion, Judge Cançado Trindade) and (Dissenting Opinion, Judge Yusuf); *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 833, (Dissenting Opinion, Judge Robinson).

> "that the Court settled an issue on which the Parties were not in dispute. In my view the Court's approach to the entire case has led it to refrain from deciding the sole dispute before it, and to consider and settle an issue on which the Parties were not shown to be in difference and on which the Court's jurisdiction is very much in doubt."[2]

A perhaps more challenging pronouncement was made by judge Gros in the dissent that he appended to this same judgment. This judges expressed his dissenting views as follows,

> "[t]he Court has not fulfilled its mission in the present case, since it has not decided the legal question which the Parties to the 1961 agreement had envisaged laying before it (…) such a judgment cannot therefore be effective for the settlement of the real substantive dispute, even there were an intention to achieve this (…) the States -of which there are now not many- which come before the Court do not do so to receive advice, but to obtain judicial confirmation of the treaty commitments which they have entered into, according to established international law."[3]

In addition, an also relevant instance is to be found in the dissenting opinions appended by the judges who voted against one subparagraph of the *dispositif* of the ICJ's judgment on preliminary objections in the case concerning *Territorial and Maritime Dispute*.[4] With regard to a claim advanced by Nicaragua and the way it was addressed by the majority in its judgment, judge Bennouna noted in his opinion that,

> "[f]or if any pat could nip in the bud an argument on the merits at a point where the other party had not had the opportunity to discuss it fully, as is its right, the question would arise as to whether international justice had been prevented from performing its principal task, which is to settle a dispute once the States have exhausted all their arguments on the subject. It is the very credibility of the International Court of Justice as the principal judicial organ of the United Nations which is at stake here."[5]

The last instance that exemplifies the relation between the main function of the International Court of Justice and dissents, is the opinion appended by judge Yusuf in the recent judgment in the case on *Jurisdictional Immunities of the State*. The majority noted in its decision as a matter of surprise and regret, that despite the significant steps taken by Germany in order to compensate Italian victims, it decided to exclude the Italian prisoners of war from these measures.[6] In this regard, judge Yusuf noted that,

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2 *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *supra* note 1, (Dissenting Opinion, Judge Onyeama), p. 164, para. 1.

3 Ibid, (Dissenting Opinion, Judge Gros), at pp. 148 – 149, para. 34.

4 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1.

5 Ibid, (Dissenting Opinion, Judge Bennouna), p. 927.

6 *Jurisdictional Immunities of the State (Germany v. Italy)*, supra note 1, p. 143, para. 99.

> "[t]he dispute before the Court is not about the general applicability of immunity to unlawful acts committed by the armed forces of a State in a situation of armed conflict. This is a very broad subject which is best left for academic papers and scholarly discussions. The dispute in this case is about the decisions of Italian courts to set aside the jurisdictional immunity of Germany to allow certain categories of Italian victims (…) instead of assessing the impact that this failure to make reparations (…) the Court limits itself to state that [it] considers that it is a matter of surprise — and regret — that Germany decided to deny compensation. It bears to be recalled in this connection that disputes between States are not submitted to an international adjudicatory body, and particularly to the principal judicial organ of the United Nations, for expressions of surprise and regret, but for their appropriate settlement on the basis of international law."[7]

On the other hand, in the case of the Inter-American Court of Human Rights there are 10 instances in which dissenting judges expressly referred to the main the court's main function.[8] In these opinions the judges have argued that the IACtHR has either failed in protecting the human rights either of the victims in the case at hand or that the exercise of its main function may have negative consequences for the protection of the human rights of the population in general.

In the case of an instance where a decision from the IACtHR may have negative consequences for the protection of human rights of the population in general, a relevant example is the partial dissenting opinion appended by judge Sierra Porto in the case of *Cuscul Pivaral et al v. Guatemala*. The majority of the IACtHR declared a violation of article 26 of the American Convention (progressive development) by virtue of Guatemala's failure to guarantee full medical care to people with HIV. Consequently, the Inter-American Court of Human Rights ordered Guatemala to *inter alia* imple-

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7 Ibid, (Dissenting Opinion, Judge Yusuf), pp. 293 – 294, paras. 7 – 10.

8 *Gangaram Panday v. Suriname*. Merits, Reparations and Costa. Judgment of 21 January 1994. Series C No. 16, (Joint Dissenting Opinion, Judges Picado Sotela, Aguilar Aranguren and Cançado Trindade); *El Amparo v. Venezuela.* Reparations and Costs. Judgment of 14 September 1996. Series C No. 28, (Dissenting Opinion, Judge Cançado Trindade); *Caballero Delgado y Santana v. Colombia*. Reparations and Costs. Judgment of January 29, 1997. Series C, No. 31, (Dissenting Opinion, Judge Cançado Trindade); *Serrano Cruz Sisters v. El Salvador.* Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, (Dissenting Opinion, Judge Cançado Trindade); *Serrano Cruz Sisters v. El Salvador*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, (Dissenting Opinion, Judge Cançado Trindade); *Brewer Carías v. Venezuela*. Preliminary Objections. Judgment of May 26, 2014. Series C No. 278, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor); *Landaeta Mejia Brothers t al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, (Partial Dissenting Opinion, Judge Caldas); *Duque v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 26, 2016. Series C No. 310, (Dissenting Opinion, Judge Vio Grossi); *Campos del Lago v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340, (Dissenting Opinion, Judge Vio Grossi); *Cuscul Pivaral et al v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 23 August, 2018. Series C No. 358, (Partial Dissenting Opinion, Judge Sierra Porto).

menting mechanisms for improving accessibility, availability and quality of health benefits for people living with HIV and ensuring the provision of antiretrovirals and other medication to any affected person.[9] Judge Sierra Porto noted with respect to this order, that despite the practice of the IACtHR to ordering administrative or public policy measures with an impact beyond the concrete victims of the case, it is necessary to adopt a cautious approach when excessively broad reparations refer to aspects that require action by the public authorities.[10] In his view, it is therefore necessary to also take into account that,

> "while the present case deals with the right to health, specifically in relation to people living with HIV, it is necessary to bear in mind that, together with them, there is people whose access to food, housing, water, is not satisfied either (…) [hence] it is necessary to adopt an approach that takes into account the needs of the society as a whole, rather than focusing in the specific needs of a particular group (…) therefore, in a region where financial resources are limited (…) the role of a regional human rights court should not be to order inflexible measures. This may lead, not only to the impossibility of complying with these measures, but also to a negative effect on the allocation of financial resources for other rights whose satisfaction is the same or more urgent."[11]

An additional instance that clearly exemplifies this relation between the main function of the Inter-American Court of Human Right and the exercise of the right to append dissenting opinions, with respect to the alleged failure from the IACtHR to protecting the human rights of the victim, is to be found in the case of *Brewer Carías v. Venezuela*. Judges Ventura Robles and Ferrer MacGregor, who appended a joint dissent, noted that,

> "the failure to analyse the merits of the case of the criminal prosecution of Mr. Brewer Carías restricted what should be the main task of an international human rights court: the defense of the human being in the face of the high-handedness of the State. An international court of human rights must, above all else, defend the rule of law."[12]

Further, an analysis of the content of the opinions appended by dissenting judges shows that certain methods are used when they exercise their right to append dissents, with a view to contributing to the fulfilment of the main function of the International Court of Justice and the Inter-American Court of Human Rights.

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9 *Cuscul Pivaral et al v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 23 August, 2018. Series C No. 358, operative paragraph 14.

10 Ibid, (Partial Dissenting Opinion, Judge Sierra Porto), para. 13.

11 Ibid, (Partial Dissenting Opinion, Judge Sierra Porto), paras. 13, 14, 17.

12 *Case of Brewer Carías v. Venezuela*. Preliminary Objections. Judgment of May 26, 2014. Serie C No. 278, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), paras. 2, 124 - 125.

In the case of the ICJ, the method takes account of the subject-matter of the dispute that states bring before it, their submissions and the point of fact and law that sustain them. In this regard, it is in principle for the applicant state to indicate in its application the subject matter of the dispute.[13] This does not, however, mean that the International Court of Justice is not limited to consider the dispute in the contours set forth by the applicant states. It is free to make its own assessment as to the subject-matter of the dispute,[14] with a view to isolate the real issue in the case and to identify the object of the claim.[15] In addition, with regard to the submissions and the points of fact and law that sustain them, the ICJ is not bound to address all of them. It is at liberty to address only those points either of fact or law, that it considers as necessary for the settlement of the dispute.[16] Consequently, having in mind that its judicial function refers to the settlement of the dispute, the International Court of Justice has,

> "the freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose."[17]

It is against this background, that the exercise of the right to append dissenting opinions, with a view to contributing to the main function of the International Court of Justice (*i.e.* the settlement of disputes), takes account of an assessment of the subject-matter of the dispute, the submissions of the parties and the points of fact and law that sustain them.

A relevant instance in this regard is the case concerning *Territorial and Maritime Dispute*[18] between Nicaragua and Colombia. Nicaragua requested *inter alia* from the ICJ, a declaratory judgment concerning its sovereignty over certain maritime features in the Caribbean Sea. An important aspect of this claim was the submission concerning, the invalidity or termination of the 1928 Esguerra-Bárcenas treaty. In its judgment on preliminary

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13 Judge Schwebel for instance noted in his separate opinion appended to the first judgment on jurisdiction and admissibility in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* that, "It is (…) a commanding feature of the jurisprudence of this Court that the submissions of the Parties define the parameters of a judgment, that is the function of the *dispositif* of the judgment to rule upon and dispose of those submissions (unless exceptional considerations rendered them moot)." *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 1 July 1994, [1994] ICJ Rep. 112, (Separate Opinion, Judge Schwebel), p. 130.

14 Juan J. Quintana, Litigation at the International Court of Justice (Martinus Nijhoff Publishers 2015), 264.

15 See, *e.g.*, *Nuclear Tests* case, *supra* note 1, p. 466, para. 30; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 1, pp. 441 – 445, paras. 44 – 55.

16 Robert Kolb, The International Court of Justice (Hart Publishing 2013), 305.

17 *Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, [1958] ICJ Rep. 55, p. 62.

18 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, supra note 1.

objections, the majority of the ICJ decided that the subject-matter of the dispute exclusively related to issues concerning sovereignty over territory and the subsequent determination of the maritime boundary between the parties. Nicaragua's claim as to the invalidity or termination of the 1928 Esguerra-Bárcenas treaty, was not therefore part of the subject-matter of the dispute.[19] Consequently, in the interest of the sound administration of justice, it decided to address the invalidity or termination of the 1928 Esguerra-Bárcenas treaty, in the preliminary objections phase.[20] In this regard, the majority concluded that since more than 50 years have passed until Nicaragua claimed the said invalidity for the first time; the 1928 Esguerra-Bárcenas treaty was therefore valid and in force.

The three judges that voted against this decision from the majority, noted that the ICJ's conclusion has denied the current existence of a dispute concerning the invalidity of the 1928 Esguerra-Bárcenas treaty. Moreover, the manner in which the majority addressed the claims of invalidity, did not satisfactorily settle this aspect. For instance, Judge Al-Khasawneh noted in his dissenting opinion that the majority "sought to avert this eventuality [*i.e.* that a an answer in the preliminary objections phase, regarding the validity of the 1928 Esguerra-Bárcenas treaty, would determine an element of the merits of the dispute] by resort to the simple device of first defining the subject-matter of the dispute narrowly so as to exclude the status of the Treaty and Protocol from its ambit."[21] For judge Al-Khasawneh, such a course of action taken by the majority completely disregarded the submissions of Nicaragua.[22]

An also relevant instance in the case of the International Court of Justice, is to be found in the joint dissenting opinion appended to the majority judgment in the *Nuclear Tests* case. The judges who authored this opinion noted that,

> "the basic premise of the Judgment, which limits the Applicant's submissions to a single purpose, and narrowly circumscribes its objective in pursuing the present proceedings is untenable (…) the Judgment fails to account of the purpose and utility of a request for a declaratory judgment and even more because its premise fails to correspond to and even changes the nature and scope of New Zealand's formal submission as presented in the Application."[23]

Based on New Zealand's submission, these judges observed that a declaration as to the violation of its rights by means of the conduct by France of nuclear tests, constitutes the main prayer in the application.[24] Hence, "[t]he

19 Ibid, p. 849, para. 42.
20 Ibid, pp. 851 – 852, para. 76.
21 Ibid, (Dissenting Opinion, Judge Al-Khasawneh), p. 882, para. 12.
22 Ibid, at p. 883, para. 13.
23 *Nuclear Tests* case, *supra* note 1, (Joint Dissenting Opinion, Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock), p. 494, para. 2.
24 Ibid, p. 498, para. 11.

interpretation made by [the majority of] the Court constitutes in our view not an interpretation but a complete revision of the text, which ends in eliminating what constitutes the essence of that submission."[25] Consequently, the majority erred in concluding that the dispute between the parties has disappeared, since the said conclusion was "based on the premise that the sole purpose of the Application was to obtain a cessation of tests as from the date of the Judgment."[26]

The last instance to be mentioned is the case concerning the *Arbitral Award of 31 July 1989* between Guinea Bissau and Senegal. For the majority of the International Court of Justice, the fact that the answer provided in the arbitral award did not permit a complete settlement of the disputes between the two states, did not mean that a complete answer was not provided in the said award.[27] Based on this assertion from the majority, judges Aguilar Mawdsley and Ranjeva noted in their joint dissenting opinion that,

> "[i]t is incumbent on the court seised of a dispute to take simultaneously into account the three constitutive elements of an international agreement: the letter, the object and the purpose of the agreement (…) [in the light of these elements] the Court should have taken it upon itself to carry the analysis to its conclusion by drawing the appropriate legal conclusion from the omission and the failure of which it took note (…) the Court should, in our opinion, having regard to this omission, have called into question the soundness of the Award inasmuch as the necessary respect for the right of the Parties to a proper administration of international justice was at stake."[28]

On the other hand, in the case of the Inter-American Court of Human Rights the method used by judges takes account of the factual framework of the case that has been submitted to it, as well as the *iura novit curia*[29] and *pro homine* principles.[30] In this regard, the IACtHR has noted that it is its duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.[31] As a consequence, it can declare the violation of rights contained in the ACHR and other relevant treaties,

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25 Ibid, p. 499, para. 12.

26 Ibid, p. 502, para. 18.

27 *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep 53, p. 73, para. 60.

28 Ibid, (Joint Dissenting Opinion, Judges Aguilar Mawdsley and Ranjeva), pp. 124 – 129, paras. 14, 16 and 25.

29 Rafael Nieto Navia, 'La Aplicación del Principio *Jura Novit Curia* por los órganos del Sistema Interamericano de Derechos Humanos', in Ernesto Rey Caro & Maria Cristina Rodríguez (eds.) *Estudios de Derechos Internacional en Homenaje a la Dra. Zlata Drnas de Clément* (Advocatus 2014), 619.

30 Yota Negishi, 'The *Pro Homine* Principle's Role in Regulating the relationship between Conventionality Control and Constitutionality Control', (2017) 28 *European Journal of International Law*, 457, 468 – 473.

31 *Hilarie, Constantine and Benjamin et al v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of 21 June, 2002. Series C No. 94, para. 107.

even though the victims have not referred to these rights in its application.[32] In this order of ideas, a declaration as to the violation of additional rights is permitted, as long as the facts that sustain the said declaration do not surpass the factual framework of the case submitted to the Inter-American Court of Human Rights.[33]

A relevant instance of the method concerning the framework of the submitted before the IACtHR is present in the opinion appended by judge Ferrer MacGregor in the case of *Suarez Peralta v. Ecuador.* The majority of the Inter-American Court of Human Rights concluded that a failure from the state to establish quality standards for public and private health care institutions, as well as a failure to supervise and control health services, amounted to a violation of the right to personal integrity.[34] Despite voting with the majority, judge Ferrer MacGregor appended an opinion in which he noted that, without approaching the right to health directly and autonomously (*i.e.* without a declaration as to the violation of article 26 of the American Convention) no real justice and human rights protection would be effective in the case at hand. In his view,

> "the Inter-American Court could have approached the problem taking into account what really caused this case to reach the Inter-American system… [namely] the implications for the 'right to health', owing to medical malpractice with State responsibility that had a serious impact on the health of a woman of 22 years of age, mother of three children, leading to several operations and ailments affected her human dignity… this situation could have been considered explicitly, so that the considerations of the judgment… could have dealt with the question fully, and the implications in the case for the right to health could have been examined autonomously."[35]

The need for the Inter-American Court of Human Rights, to approach the right to health directly and autonomously is necessary for judge Ferrer MacGregor, since the protection of economic, social and cultural rights indirectly and in connection with other civil and political rights, does not fully accord full efficacy and effectiveness to them.[36] He therefore devotes his opinion to addressing the direct justiciability of economic, social and cultural rights (especially the right to health). Based on the views expressed therein, he concludes that, despite the interdependence of the right to health with the right to life and the right to personal integrity, this fact did not

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32 *Cf.* Dina Shelton, 'The Rule and the Reality of the of Petition Procedures in the Inter-American Human Rights System', (2004) *The Future of the Inter-American Human Rights System Working Paper No. 2*, 1, 20 – 32.

33 *Mendoza and others v. Argentina.* Preliminary Objections, Merits and Reparations. Judgment of 14 May, 2013. Series C No. 260, para. 57.

34 *Suarez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2003. Series C No. 261, paras. 139 – 154.

35 Ibid, (Concurring Opinion, Judge Ferrer MacGregor), paras. 2 – 3.

36 Ibid, para. 11.

justify the majority decision to deny its autonomous and direct application. It is only through its autonomous and direct application that specific arguments on the reasonableness and proportionality of public policy measures on this right can be assessed, there will be certainty with regard to the obligations surrounding the right to health, and there will be a specific methodology to assess compliance with the obligations to respect and guarantee the right.[37]

In the context of the application of the *iura novit curia* and *pro homine* principles, there are three instances that exemplify how these principles, in the context of the IACtHR's main function, inform the exercise of the right to dissent. These instances are the dissenting opinion appended by judge Cançado Trindade to the request for the judicial review of the judgment on the merits in the case of *Genie Lacayo v. Peru*, the joint dissenting opinion appended by judges Ventura Robles and Ferrer MacGregor to the judgment on preliminary objections in the case of *Brewer Carías v. Venezuela* and the partial dissenting opinion appended by judge Ferrer MacGregor in the case of the *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*.

Judge Cançado Trindade noted in his dissent that a decision from the Inter-American Court of Human Rights concerning the admissibility of an appeal for revision of a judgment, although there ACHR or the rules of procedure are silent in this regard, should not be based,

> "much by analogy with general international law (reflected in the aforementioned provision of the Statute of the International Court of Justice), as claimed by the complainant party in the present *Genie Lacayo* case, but rather on the basis – in application of the principle *iura novit curia* – of general principles of procedural law, and making use of the powers inherent to its judicial function."[38]

For its part, judges Ventura Robles and Ferrer MacGregor, noted with respect to the assessment made by the majority as to some arguments advanced by the victim that,

> "the arguments and consideration of this aspect should have been interpreted by the Court pursuant to Article 29 of the American Convention, which establishes an interpretation that is preferentially *pro homine* (…) the majority opinion admits the position of the State; in other words, the more restrictive interpretation of the right of access to justice of the presumed victim, which is evidently prohibited by Article 29 of the American Convention and runs counter to the *pro homine* principle."[39]

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37 Ibid, para. 102.

38 *Genie Lacayo v. Peru*. Application for Judicial Review of the Judgment of Merits, Reparations and Costs. Order of September 13, 1997. Series C No. 45, (Dissenting Opinion, Judge Cançado Trindade), para. 7.

39 *Brewer Carías v. Venezuela*, *supra* note 8, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), paras. 44, 98.

As for judge Ferrer MacGregor, he noted with respect to the majority decision as to the instant nature of Panama´s failure to pay the economic compensation owed to the indigenous people, as a consequence of the expropriation of its territory in 1972 for the purpose of constructing a hydroelectric, that,

> "it is pertinent to clarify that in accordance with the proven facts of this case, in accordance with international law and specially to international human rights law, there were enough judicial decisions (…) that if applied in accordance with the *pro homine* principle, would have led this Inter-American Court to a different decision."[40]

Lastly, it should be noted that, despite the importance that the Inter-American Court has given in it jurisprudence to the concepts of *ius cogens* and *erga omnes* obligations (section 3.1 above), they are not a method that judges often use in their dissenting opinions with a view to contributing to the fulfilment of the IACtHR's main function in contentious proceedings.

On the other hand, in the context of the advisory jurisdiction of the International Court of Justice and the Inter-American Court of Human Rights, the difference between these courts refers to the main judicial function that both are expected to exercise. As already noted, the ICJ holds an ample jurisdiction that seeks to providing an answer on questions of a legal nature submitted by organs of the United Nations or specialised agencies, with a view to assisting the requesting organ or specialised agency, in the fulfilment of its functions. The functions from certain organs are fairly broad and with regard to nearly all aspects of international law (*e.g.* the General Assembly of the United Nations). In that sense, the questions of a legal nature, from which an advisory opinion is sought, can nearly refer to any topic. In contrast, the advisory jurisdiction of the IACtHR is limited to the interpretation of the American Convention or other human rights treaties related to the protection of human rights. In a few words, even though the only actors authorised to request an advisory opinion are organs and states members of the Organization of American States, their request should be limited to the protection of human rights in the Americas.

Reference to this main judicial function in advisory proceedings, is mentioned by dissenting judges in their opinions. In the case of the International Court of Justice, 6 are the instances in which the right to append

40 *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2014. Series C No. 284, (Partial Dissenting Opinion, Judge Ferrer MacGregor), para. 77.

a dissenting opinion was informed by the main function of the ICJ,[41] as they explicitly referred to this function as the reason for dissent. In contrast, in the case of the Inter-American Court of Human Rights there are only 3 instances in which the exercise of the right to append dissenting opinions was informed by its main function in advisory proceedings.

Two examples from the ICJ are useful to illustrate how its main function in advisory proceedings informs the exercise of the right to dissent. The first instance is the most recent advisory opinion rendered by the ICJ with regard to the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Judge Tomka appended a dissenting opinion where he noted that,

> "The Court is, however, convinced that its replies in the present Advisory Opinion will assist the General Assembly in the performance of the latter's functions and that 'by replying to the request, the Court is [not] dealing with a bilateral dispute' (…) the Court is thus willing to provide "its advice" to the General Assembly on an issue which the latter had not considered for half a century, despite the undisputable role assigned to the General Assembly by the Charter of the United Nations in matters of decolonization. If one accepts this course of action, one must also exercise caution to go further than what is strictly necessary and useful for the requesting organ (…) [in that order of ideas] there was no need to decide on matters of States responsibility in order to answer the General Assembly's second question and to 'assist it in the performance of its functions'."[42]

An also relevant instance is the dissenting opinion appended by judge Skotnikov to the advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*. With respect to the fact that the ICJ decided not to refrain from exercising its advisory jurisdiction, he noted that,

> "In its Advisory Opinion on *Legal Consequences of the Construction of a Wall*, the Court reaffirmed that 'advisory opinions have the purpose of furnishing to the requesting organs the elements of law for them in their action. In the present case, the General Assembly is not an organ which can usefully benefit from 'the elements of law' to be furnished by the Court. The Assembly, when it receives the present Advisory Opinion, will be precluded by virtue of Article 12 of the

41 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, (Dissenting Opinion, Judge Koroma) and (Dissenting Opinion, Judge Shahabuddeen); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, (Separate Opinion, Judge Keith), (Dissenting Opinion, Judge Bennouna) and (Dissenting Opinion, Judge Skotnikov); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion Advisory Opinion of 25 February 2019, [not yet published in the ICJ Reports], (Declaration, Judge Tomka).

42 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 41, (Declaration, Judge Tomka), paras. 6, 9.

> United Nations Charter, from making any recommendation with regard to the subject-matter of the present request, unless the Security Council so requests."[43]

In the case of the Inter-American Court of Human Rights, the 3 existing instances clearly show that the judges have exercise their right to appended dissents opinions, because the majority opinion has not contributed to the fulfilment of the IACtHR's judicial function in the exercise of its advisory jurisdiction, namely, the construction of the ACRH or other treaties concerning the protection of human rights in the American states, with a view of contributing to the protection of human rights in the Americas.

The first of these instances is the opinion appended by judge Piza Escalante to the advisory opinion concerning the *Enforceability of the Right to Reply or Correction*. In general terms, the request for an advisory opinion presented by Costa Rica centered on the interpretation of article 14 of the ACHR (right of reply).[44] In his separate opinion, judge Piza Escalante noted with respect to the three questions submitted by Costa Rica that,

> "the answer given to the first and second questions, although correct, are expressed in such a general manner they are merely a repetition, almost word for word, of the norms of the Convention, and that they do not completely answer the concrete, although confusing, request of the Government of Costa Rica (…) the Government [of Costa Rica] manifested in clarifying an ambiguous situation, which exists in the context of its domestic legal system, but which is also directly related to the fulfillment of its obligations as a State Party to the Convention and the responsibility that it might incur if it did not comply on the international plane."[45]

Also relevant in this regard, is the dissenting opinion appended by judge Jackman to the advisory opinion on the *Juridical Condition and Human Rights of the Child*. He noted that the request by the Inter-American Commission on Human Rights for an interpretation of articles 8 and 25 of the ACHR was vague, almost to the point of meaningless. He signaled that,

> "[r]epeatedly in its examination of the scope of the 'broad ambit' of its consultative function, the Court has insisted that the fundamental purpose of that function is to render a service to member-states (…) in order to assist them 'in fulfilling and applying treaties that deal with human rights (…) I would suggest that a request to provide 'general and valid guidelines' to cover a series of hypothesis that reveal neither public urgency nor juridical complexity is, precisely, an invitation to engage in 'purely academic speculation' of a kind which assuredly

43 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra* note 41, (Dissenting Opinion, Judge Skotnikov), pp. 516 – 517, para. 3.

44 *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights*. Advisory Opinion OC-07/86 of August 28, 1986. Series A No. 7, paras. 13 – 17.

45 Ibid, (Separate Opinion, Judge Piza Escalante), para. 4.

> 'would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court.'"[46]

Lastly, reference is to be made of the opinion appended by judge Pérez to the recent advisory opinion that concerned the *Entitlement of legal entities to hold rights under the Inter-American Human Rights System*. This dissent constitutes an interesting example, since it also shows the methods that dissenting judges use in their opinions, with a view to contributing to the fulfilment of the judicial function of the Inter-American Court of Human Rights in advisory proceedings.

The request for an advisory opinion presented by Panama, sought an answer to the question whether the applicability and protection afforded by the ACHR, is limited to natural persons. Judge Perez only voted in favour of two of the six operative paragraphs of the majority opinion. In his partial dissenting opinion, he noted that the approach adopted by the majority was not in keeping with the protection of human rights. In his words,

> "[t]he main objection to this advisory opinion adopted by the Court by majority, is that it is not addressed from the standpoint of international human rights law (as all its pronouncements should be), but from the standpoint of classic international law. The international law norms whose content is related to the consecration and protection of fundamental rights, differs from the traditional norms of international law in many respects, particularly what concerns its interpretation, which is govern by the *pro homine* principle (…) Had [the Court] focused [its answer] as part of international human rights law, few words would have been necessary to answer the first and most important of Panama's questions."[47]

In that order of ideas, the majority of the Inter-American Court of Human Rights should have construed the ACHR, in accordance with the rules of interpretation contained in the Vienna Convention on the Law of Treaties, but without losing sight of the fact that the ACHR is a human rights treaty. In the light of this approach, account should have been taken of the object and purpose of the American Convention, namely, the protection of the fundamental rights of human beings; this object and purpose demonstrates that it was created with the sole and exclusive purpose of protecting natural persons.[48] Consequently, the juridical person itself is not entitled to any of the rights contained in the American Convention. In sum, being the natural person the only subject of protection in the Inter-American System of Protection of Human Rights, it was wrong for the majority to conclude that natural persons may exercise their rights through a juridical person and that they sometimes can exhaust local remedies on behalf of the natural person.

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46 *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, (Dissenting Opinion, Judge Jackman), p. 2.

47 *Entitlement of legal entities to hold rights under the Inter-American Human Rights System*, Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, (Dissenting Opinion, Judge Perez), paras. 2 – 3.

48 Ibid, para. 12.

4.1.2 The exercise of the right to append dissenting opinions at the International Court of Justice in the adjudication of human rights cases

As already noted (section 3.1. above), in view of the ample jurisdiction *ratione materiae* of the International Court of Justice, it is possible for states to submit before it, disputes concerning human rights violations. This possibility for the ICJ to be seised of this kind of disputes is interesting for two reasons. First of all, because it is not a human rights court in the contemporary sense of the term.[49] Secondly, because this fact makes inevitable the existence of a concurrence with specialised human rights bodies.[50]

The International Court of Justice is regarded as a generalist court,[51] whose engagement with human rights cases takes place in an inter-state context.[52] Consequently, the role that it plays with regard to human rights is not necessarily in the area of direct enforcement;[53] it is directed towards what Bruno Simma has called the mainstreaming of international law, *i.e.* integrating international human right law into the fabric of general international law, as well as other branches of law.[54] In clear contrast, specialised human rights courts and tribunals such as the IACtHR that do not exclusively act in an inter-state context, should seek in their jurisprudence "the balance in the quantum of cases is tilted further towards matters of detailed application to the facts as distinct from fundamental contests over the meaning of the legal norms themselves."[55]

In fact, in cases with a human rights dimension, the opinions appended by dissenting judges show that they are informed by the ICJ's role in this context, namely, to provide an interpretation on fundamental issues,[56] in connection with the whole gamut of international law; not so much on the protection of human rights. The dissenting opinions appended in four cases are relevant to exemplify this aspect.

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49 Stephen Schwebel, 'Human Rights in the World Court', (1991) 24 *Vanderbilt Journal of Transnational Law*, 945, 946.

50 Marcelo Kohen, 'Considerations about What is Common: The I.C.J. and Specialised Bodies', in Pierre d'Argent & Jean Combacau (eds.) *Reflections on What Remains Private: Essays on the Limits of International Law. Liber Amicorum Joe Verhoeven* (Bruylant 2014), 287, 289.

51 Samanta Besson, 'International Courts and the Jurisprudence of Statehood', (2019) 10 *Transnational Legal Theory*, 30.

52 *Cf.* Sandy Ghandi, 'Human Rigths and the International Court of Justice: The *Ahmadou Sadio Diallo Case*' (2011) 11 *Human Rights Law Review*, 527.

53 Sandesh Sivakumaran, 'The International Court of Justice and Human Rights', in Sarah Joseph & Adam McBeth (eds.) *Research Handbook on International Human Rights Law* (Edward Elgar Publishing 2010), 299, 325.

54 Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice', (2012) 3 Journal of International Dispute Settlement, 7, 27.

55 Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties', (2013) 12 *Chinese Journal of International Law*, 639, 652.

56 Ibid, 677.

In the first place, reference should be made of the dissenting opinion appended by judge Oda to the ICJ's judgment on the merits of the *LaGrand* case. He noted that he was always aware of the humanitarian concerns raised by the fate of the LaGrand brothers; nonetheless, he was not

> "convinced of the correctness of the Court's holding that the Vienna Convention on Consular Relations grants foreign individuals any rights beyond those which might necessarily implied by the obligations imposed on States under that Convention (…) If the Vienna Convention on Consular Relations is to be interpreted as granting rights to individuals, those rights are strictly limited to those corresponding to the obligations borne by the States under the Convention and do not include substantive rights of the individual, such as the rights to life, property, etc."[57]

Also relevant is the opinion appended by judge Xue in the case concerning *Questions relating to the Obligation or Prosecute or Extradite*. She voted against the ICJ's decision concerning the admissibility and subsequent breach of article 6 and 7 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. With regard to the admissibility of the claim, judge Hanqin pointed out that the characterisation of the obligations contained in the said convention as *erga omnes* obligations is abrupt and unpersuasive. The ICJ's case law shows that the concept of *erga omnes* refers to substantive law and "in terms of standing, however, the Court only spelt out the conditions for the breach of obligations in bilateral relations and stopped short of the question of standing in respect of obligations *erga omnes*."[58] Moreover, this conclusion as to the *erga omnes* character of the obligations contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is contrary to the rules on state responsibility. This is so since,

> "the mere fact that a State is a party to the Convention does not, in and by itself, give [a] State standing to bring a case in the Court. Under international law, it is one thing that each State party has an interest in the compliance with these obligations, and it is another that every State party has standing to bring a claim against another State for the breach of such obligations in the Court."[59]

The third of the cases to be mentioned is *Jurisdictional Immunities of the State* between Germany and Italy. The opinions appended by judges Yusuf and

57 LaGrand (Germany v. United States of America), Merits, Judgment of 27 June 2011, [2001] ICJ Rep. 466, (Dissenting Opinion, Judge Oda), at p. 537, para. 27.

58 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 1, (Dissenting Opinion, Judge Xue), at p. 574, para. 15.

59 Ibid, at p. 575, para. 17.

Bennouna,[60] centre on the integration of the law on the immunities of states with human rights, rather than on the violations of the victims of the case at hand. Judge Yusuf for instance noted in his dissenting opinions that,

> "[i]t is true that State immunity is a rule of customary international law and not merely a matter of comity (…) its coverage has, however, been contracting over the past century, in light of the evolution of international law from a State-centred legal system to one which also protects the right of human beings *vis-à-vis* the State."[61]

In view of this evolution, judge Yusuf indicated that when there is a conflict between jurisdictional immunities and fundamental rights consecrated under human rights and international humanitarian law, it is necessary to struck a balance between both set of rules.[62] Such a balance is necessary since "[i]n today's world, the use of State immunity to obstruct the right of access to justice and the right to an effective remedy may be seen as a misuse of such immunity."[63] In that order of ideas, to recognise the rights of access to justice and an effective remedy will result in bringing the rules on state immunity in line with the normative weight that the international community nowadays attaches to the protection of human rights and humanitarian law.[64] In a similar vein, judge Bennouna noted with regret in his opinion that,

> "the Court's reasoning was not founded on the characteristics of contemporary international law, where immunity, as one element of a mechanism for the allocation of jurisdiction, could not be justified if it would ultimately pose an obstacle to the requirements of the justice owed to victims."[65]

Consequently,

> "when it arises in connection with international crimes, as in the present dispute, the question of jurisdictional immunity raises fundamental ethical and juridical problems for the international community as a whole, which cannot be evaded simply by characterizing immunity as a simple matter of procedure."[66]

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60 It should be noted that judge Bennouna appended a separate opinion. It must, however, amounts to a dissent since (as he explicitly indicated in the opening paragraph of the opinion) he could not "endorse the approach adopted by the majority, or support the logic of its reasoning." *Cf. Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 1, (Separate Opinion, Judge Bennouna), at p. 172, para. 1.

61 Ibid, (Dissenting Opinion, Judge Yusuf), at p. 296, para. 21.

62 Ibid, at p. 298, para. 28.

63 Id.

64 Ibid, at p. 306, para. 52.

65 Ibid, (Separate Opinion, Judge Bennouna), at p. 177, para. 31.

66 Ibid, at p. 173, para. 9.

In his view, account should be taken of exceptional circumstances, as it is the case when a state that is the author of a serious human rights violation, rejects any engagement of its responsibility in whatever form. In a situation of this kind, the state must lose its benefit of immunity before the courts of the forum state,[67] especially in current international law where "[t]he Westphalian concept of sovereignty is thus gradually receding, as the individual takes centre stage in the international legal system."[68]

All in all, the views expressed by both judges are directed towards the integration of the law on state immunity with human rights law, especially in the light of the recent developments in this regard.

The last instance to be mentioned is the decision on preliminary objections in the case concerning *Armed Activities on the Territory of the Congo*. Judge Koroma was one of the two members who voted against the finding that the International Court of Justice had no jurisdiction to entertain the filed by the Democratic Republic of Congo. In his dissenting opinion, judge Koroma expressed his disagreement with regard to the majority's decision concerning the Convention on the Prevention and Punishment of the Crime of Genocide. The majority concluded that the reservation formulated by Rwanda to article IX was not contrary to its object and purpose of the treaty, as it does not affect substantive obligations.[69] In clear contrast with the position adopted by the majority, judge Koroma noted in his dissenting opinion that, while a reservation to a provision concerning dispute settlement is not *prima facie* incompatible with the object and purpose of the treaty, the said reservation turns incompatible if the provision to which it refers relates constitutes the *raison d'être* of the treaty.[70]

In his view, "[t]he object and purpose of the Genocide Convention is the prevention and punishment of the crime of genocide, and this encompasses holding a State responsible whenever it is found to be in breach of its obligations under the Convention."[71] Article IX constitutes the only means for adjudicating on the responsibility of a state for its failure to prevent or punish the crime of genocide. Consequently, a reservation to the said article is contrary to it object and purpose. In addition, the failure from a state to object a reservation of this kind is irrelevant. In the case of human rights treaties, that are not based on reciprocity between states, but seek to protect individuals and the international community as a whole, the rule concerning the acceptance or objection of the reservation is not applicable.[72]

67 Ibid, at p. 174, para. 15.
68 Ibid, at p. 175, para. 18.
69 *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep. 6, at p. 32, para. 67.
70 Ibid, (Dissenting Opinion, Judge Koroma), at p. 57, para. 11.
71 Ibid, (Dissenting Opinion, Judge Koroma), at p. 57, para. 12.
72 Ibid, (Dissenting Opinion, Judge Koroma), at p. 58, para. 14.

In sum, the views expressed by judge Koroma are an attempt to put together the law on reservations and human rights treaties, by taking into account some aspects that differentiate these treaties from those that states conclude for other purposes.

4.1.3 The development of the law in the exercise of the right to append dissenting opinions

Just as judicial decisions are capable in practice to contribute to the development of the law, dissenting opinions are also suitable to contributing in this regard. In this sense, judges may exercise their right to append dissenting opinions by being informed by the development of the law. In the case of the International Court of Justice, there are 10 instances in which judges have taken account of this function as the reason for appending a dissenting opinion.[73] A relevant example is to be found in the dissenting opinion appended by judge Cançado Trindade to the judgment on the merits of the case concerning *Jurisdictional Immunities of the State*. He noted that he,

> "thus present with the utmost care the foundations of [his] entirely dissenting position on the whole matter dealt with by the Court in the Judgment which it has just adopted (…) to this effect, [he] shall dwell upon all the aspects concerning the dispute brought before the Court which forms the object of its present Judgment, in the hope of thus contributing to the clarification of the issues raised and to the progressive development of international law."[74]

As for the Inter-American Court of Human Rights, there are 9 instances in which the exercise of a judge's right to append a dissenting opinion has

73 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, (Dissenting Opinion, Judge Badawi Pasha) and (Dissenting Opinion, Judge Krylov); *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116, (Dissenting Opinion, Judge Alvarez); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15, (Joint Dissenting Opinion, Judges Guerrero, McNair, Read, Hsu Mo); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment of 11 June 1998, [1998] ICJ Rep. 275, (Dissenting Opinion, Judge Weeramantry) and (Dissenting Opinion, Judge Koroma) and (Dissenting Opinion, Judge *ad hoc* Ajibola); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, note Preliminary Objections, Judgment of 18 November 2008, [2008] ICJ Rep. 412, (Dissenting Opinion, Judge Ranjeva); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment of 30 November 2010, [2010] ICJ Rep. 639, (Joint Dissenting Opinion, Judges Al-Khasawneh and Yusuf); *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 1, (Dissenting Opinion, Judge Cançado Trindade).

74 *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 1, (Dissenting Opinion, Judge Cançado Trindade), at p. 182, para. 2.

been informed by the development of the law.[75] One of these instances that clearly exemplify this attempt to develop the law is present in the partial dissenting opinion that judge Vio Grossi appended to the judgment in the case of *Amrhein et al v. Costa Rica*. This judge noted that,

> "what is indicated in this text is in the hope that the jurisprudence of the Court in this regard, is in the future modified according to its intrinsic nature, *i.e.* as an auxiliary source of international law or means for the determination of international law rules and therefore not immutable, except for the case in which the respective judgment has been rendered."[76]

Despite the examples above, the actual contribution of a dissenting opinion to the development of international law is not to be found in the judge's intention. Considering what was explained above (section 3.1.), it is only when the views expressed by the judge (irrespective of his intention) meet with the normative expectations of international law actors, that the said views actually contribute to the development of the law. In consequence, there is only one instance from each court in which it can be said that a dissenting opinion has actually contributed to the development of international law.

In the case of the International Court of Justice, this instance is the dissenting opinion appended by judge Lauterpacht to the judgement on preliminary objections in the *Interhandel* case. Shabtai Rosenne has signalled that this opinion, in conjunction with the separate opinion also appended by judge Lauterpacht in the *Norwegian Loans* case, has had a marked effect

75 *Artavia Murillo et al (In Vitro Fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257 (Dissenting Opinion, Judge Vio Grossi); *Lagos del Campo v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340 (Dissenting Opinion, Judge Vio Grossi); *Amrhein et al v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 25, 2018. Series C No. 354 (Dissenting Opinion. Judge Vio Grossi); *Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375 (Dissenting Opinion, Judge Vio Grossi); *Díaz Loreto et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 19, 2019. Series C No. 392 (Dissenting Opinion, Judge Vio Grossi); *Gómez Virula et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 393 (Dissenting Opinion, Judge Vio Grossi); *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394 (Dissenting Opinion, Judge Vio Grossi); *Hernández and others v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 22, 2019. Serie C No. 395 (Dissenting Opinion, Judge Vio Grossi); *López and others v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2019. Series C No. 396 (Dissenting Opinion, Judge Vio Grossi).

76 *Amrhein et al v. Costa Rica*, *supra* note 75, (Partial Dissenting Opinion, Judge Vio Grossi), at para. 5.

on the attitudes of governments with regard to their unilateral declarations of acceptance of the compulsory jurisdiction of the International Court of Justice. In that sense, following judge's Lauterpacht opinion states deliberately abandoned the so-called automatic reservation of their unilateral declarations of acceptance of the ICJ compulsory jurisdiction; likewise, after his opinion no new declaration incorporating the automatic reservation was made.[77]

In the case of the Inter-American Court of Human Rights, the actual contribution of a dissenting opinion to the development of international law is to be found in the opinion appended by judge Cançado Trindade, in the case of *Caballero Delgado and Santana v. Colombia*. In general terms, he noted that the two general obligations enshrined in the American Convention (article 1) and that of harmonizing domestic law (article 2), are ineluctably intertwined. In consequence, regardless of the fact that the majority has not declared a violation of the obligation to harmonize domestic law with the provisions of the American Convention, "the finding of non-compliance with the general duty of Article 1(1) is *per se* sufficient to determine to the State Party that it ought to take measures, including of legislative character, to guarantee to all persons under its jurisdiction the full exercise of all the rights protected by the American Convention."[78] This views expressed by judge Cançado Trindade were subsequently adopted by the majority of the Inter-American Court of Human Rights in the case of *Suarez Rosero v. Ecuador*, where it was noted that "Ecuador is obliged, in accordance with the general duties to respect rights and adopt provisions under domestic law (Article 1(1) and 2 of the Convention), to adopt such measures that may be necessary to ensure that violations as those established in the instant case never again occur in its jurisdiction."[79]

On the other hand, account should also be taken of an additional means for a dissenting opinion to contribute to the development of international law. In view of the fact that judicial decisions are in practice cogent *erga*

77 Shabtai Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', (1961) 55 *American Journal of International Law*, 825, 852 – 853.

78 *Caballero Delgado and Santana v. Colombia*. Reparations and Costs. Judgment of January 29, 1997. Series C No. 31 (Dissenting Opinion, Judge Cançado Trindade), at para. 19.

79 *Suarez Rosero v. Ecuador.* Merits. Judgment of November 12, 1997. Series C No. 35, at para. 106.

omnes,[80] whose effects cannot be limited to the parties to the dispute[81] (especially when it is necessary for international courts and tribunals to ensure consistency of jurisprudence, predictability and stability),[82] they are not therefore prevented from having persuasive force.[83] The International Court of Justice has for instance noted that,

> "It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding [a state] to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."[84]

It is against this background that a dissenting opinion may also contribute to the development of the law when it constitutes, in Charles Evans Hughes words, "an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting justice believes the court have been betrayed." [85]

In this sense, the dissenting opinion constitutes an attempt to either limiting the applicability of the majority decision[86] (in terms of its *ratio*

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80 Shabtai Rosenne, *supra* note 295, 1578; María Angélica Benavides-Casals, 'El Efecto Erga Omnes de las Sentencias de la Corte Interamericana de Derechos Humanos', (2015) 27 *International Law, Revista Colombiana de Derecho Internacional*, 141; Adam Bodnar, '*Res Interpretata:* Legal Effect of the European Court of Human Rights' judgments for other States Than Those Which Were Party to the Proceedings', in Yves Haeck & Eva Brems (eds.) *Human Rights and Civil Liberties in the 21st Century* (Springer 2014), 226.

81 The International Court of Justice has explicitly referred to this difficulty in its judgment on preliminary objections in the case concerning the *Aegean Sea Continental Shelf*, where it noted with regard to the status of the General Act for the Pacific Settlement of International Disputes that, "[a]lthough under Article 59 of the Statute the decision of the Court has no binding force except between the parties and in respect of that particular case, it is evident that any pronouncement from the Court as to the status of the 128 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey." *Cf. Aegean Sea Continental Shelf (Greece v. Turkey)*, Questions of Jurisdiction and Admissibility, Judgment of 19 December 1978, [1978] ICJ Rep. 3.

82 Hersch Lauterpacht, The Development of International Law by the International Court (Cambridge University Press 1958), 19.

83 Maurice Mendelson, 'The International Court of Justice and the Sources of International Law', in Vaughan Lowe *et al* (eds.) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996), 60, 81; Michal Balcerzak, 'The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights', (2004) 27 *Polish Yearbook of International Law*, 131, 132.

84 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *supra* note 73, at p. 292, para. 28; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *supra* note 73, at pp. 428 – 429, para. 53.

85 Charles Evans Hughes, The Supreme Court of the United States: Its Foundation, Method and Achievements (Columbia University Press 1928), 68.

86 Godefridus J. H. Hoof, *Rethinking the Sources of International Law* (Kluwer 1983), 172.

decidendi, to the factual circumstances to which it has been applied),[87] or warning as to the repercussions of the pronouncement of the international court or tribunal for other states in their relations. In this attempt to limit the scope of the majority decision, the dissenting opinions therefore seeks to prevent the law to develop in line with the content of the majority decision and, as a consequence, providing room for a subsequent development of international law in a different direction.

In fact, the exercise of the right to append a dissenting opinion, for the purposes of limiting the scope of the majority decision (and therefore providing room for a subsequent development of international law), is an aspect in which the exercise of the right to append dissenting opinions, is similar at the International Court of Justice and the Inter-American Court of Human Rights.

In the case of the International Court of Justice, dissents appended in 19 cases have attempted to limit the scope of the decision or warn as to the repercussions of the judgment for other states in their relations.[88] In some of these judgments, a plural number of dissents have been appended.

87 Maurice Kelman, 'The Forked Path of Dissent', (1985) *Supreme Court Review*, 227, 242 – 257; Diane P. Wood, 'When to Hold, When to Fold, and When to Reshuffle: The Art of Decision making on a Multi-Member Court', (2012) 100 *California Law Review*, 1445, 1452.

88 *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO*, Advisory Opinion of 23 October 1956, [1956] ICJ Rep. 77 (Dissenting Opinion, Judge Cordova); *Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, *supra* note 17, (Dissenting Opinion, Judge Lauterpacht); *Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment of 26 May 1959, [1959] ICJ Rep. 127, (Joint Dissenting Opinion, Judges Lauterpacht, Percy Spender and Wellington Koo); *Nuclear Tests Case (Australia v. France)*, *supra* note 1, (Joint Dissenting Opinion, Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock); *Continental Shelf (Tunisia/Lybian Arab Jamahiriya)*, Merits, Judgment of 24 February 1982, [1982] ICJ Rep. 18, (Dissenting Opinion, Judge Gros) and (Dissenting Opinion, Judge Oda); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, [1984] ICJ Rep. 246, (Dissenting Opinion, Judge Gros); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984, [1984] ICJ Rep. 392, (Dissenting Opinion, Judge Schwebel); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep. 351, (Dissenting Opinion, Judge Oda); *Fisheries Jurisdiction (Spain v. Canada)*, *supra* note 1 , (Dissenting Opinion, Judge Bedjaoui) and (Dissenting Opinion, Judge Ranjeva); *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70, (Separate Opinion, Judge Abraham) and (Separate Opinion, Judge Donoghue); *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, (Dissenting Opinion, Judge Yusuf), (Dissenting Opinion, Judge Robinson), (Dissenting Opinion, Judge Crawford), (Dissenting Opinion, Judge Bennouna) and (Dissenting Opinion, Judge *ad hoc* Bedjaoui); *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, [2016] ICJ Rep. 100, (Joint Dissenting Opinion, Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower).

In contrast, the number of judgments from the Inter-American Court of Human Rights, where a dissenting opinion has been appended in an attempt to limit the scope of the majority decision, is limited to one.[89]

From the dissenting opinions at the International Court of Justice, those appended in the following three cases clearly exemplify how the exercise their right to append a dissent is informed by the need to limit the scope of the majority decision. The first instance is the separate opinion appended by judge Donoghue to the judgment on preliminary objections in the case concerning *Application of the International Convention on the Elimination of all forms of Racial Discrimination* between Georgia and Russia. She noted that,

> "The Judgment's test for determining whether there is a dispute and its conclusion regarding the meaning and effect of this particular compromisory clause have implications that could go beyond this case. In particular, while I am confident that this is not the intention of those who voted in favour of the Judgment, I am concerned that the Judgment will work to the disadvantage of States with limited resources and those that have little or no experience before this Court."[90]

The second instance is the joint dissenting opinion appended by judges Lauterpacht, Percy Spender and Wellington Koo in the *Aerial Incident of 27 July 1955*. In this case, the majority of the ICJ decided that it was without jurisdiction to proceed to the merits of the case, since article 36, paragraph 5 of its Statute was not applicable to the declaration of acceptance of the compulsory jurisdiction from the Republic of Bulgaria. For the majority of the ICJ, the text of article 36, paragraph 5 of the Statute does not explicitly indicate that its effects should include those states that (as Bulgaria) were neither represented at the San Francisco Conference, nor signed both treaties. At the time of the adoption of the Statute of the ICJ a difference was envisaged between signatory states and other states that may later be admitted as members of the United Nations.[91]

In its joint opinion, the dissenting judges addressed the consequences that the majority decision might have in practice and in law. Hence they noted that to admit that a provision of the Statute is only applicable to certain states parties to it, would run counter to the proposition that the United Nations should be considered as a universal community of states and the equality of rights and obligations of its members.[92] Moreover, in

89 *Brewer Carías v. Venezuela*, *supra* note 12, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor).

90 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 88, (Separate Opinion, Judge Donoghue), at p. 338, para. 22.

91 *Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment of 26 May 1959, [1959] ICJ Rep. 127, at p. 136.

92 Ibid, (Joint Dissenting Opinion, Judges Lauterpacht, Wellington Koo and Sir Percy Spender), at p. 177.

practical terms, this interpretation would restrict the operation of unilateral declarations from states such as Thailand, who although not participating in the San Francisco Conference (i) renewed its declaration of acceptance of the compulsory jurisdiction on 3rd May, 1940, for a ten years period, (ii) acceded to the Charter of the United Nations on 16th December, 1946; and (iii) when the ten years period expired, she renewed her declaration on 3rd May, 1950, for an additional ten years period.[93]

This joint dissent, has led some scholars to considered that the majority decision was unsatisfactory, since "[i]t rests upon an unfortunate departure from established rules of interpretation and gratuitously introduces into the Constitution of the United Nations the notion of an unequal status of different members attended by varying rights and duties."[94] In addition, the views expressed in the joint dissenting opinion had had a importance influence in the subsequent cases where a declaration of acceptance of the compulsory jurisdiction deposited before the Permanent Court of International Justice, was advanced as a basis for the jurisdiction of the International Court.

For instance, in the decision on preliminary objections in the *Temple of Preah Vihear*, the majority of the ICJ concluded that Thailand's position was not substantially the same as that of Bulgaria in the *Aerial Incident of 27 July 1955*;[95] in consequence, the latter decision was not applicable to this case. This approach adopted by the majority took place in view of their disagreement with the majority decision in the *Aerial Incident of 27 July 1955* and subsequent approval of the views expressed in the joint dissenting opinion.[96] In fact, all the judges that appended a separate opinion or a declaration to the majority decision on preliminary objections in the *Temple of Preah Vihear* case noted that, taking into account the close connection between this case and the *Aerial Incident of 27 July 1955*, they wanted to clarify that the fact that they concurred with the former does not thereby imply that they concur with the decision in the *Aerial Incident of 27 July 1955*. Judges Fitzmaurice and Tanaka for instance noted in their joint declaration that,

> "[the] preliminary objection [from Thailand] is based on the conclusion concerning the effect of paragraph 5 of article 36 of the Statute which the Court reached in its decision of 26 May 1959, given in the case of the *Aerial Incident July 27th, 1955 (Israel v. Bulgaria)*. The objection necessarily assumes the correctness of that conclusion (…) The view that this conclusion was in fact incorrect would, for

93 Ibid, at pp. 182 – 183.

94 Chava Shachor – Landau, 'The Judgment of the International Court of Justice in the Aerial Incident Case between Israel and Bulgaria', (1960) 8 *Archiv des Völkerrechts*, 277, 289 – 290.

95 *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, [1961] ICJ Rep. 17, at p. 26.

96 *Cf.* Jan Hendrik W. Verzijl, 'International Court of Justice: Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)', (1962) 9 *Netherlands International Law Review*, 229, 235; Shabtai Rosenne, *supra* note 259, 1553.

> anyone holding that view, furnish a further reason for rejecting the objection, and a much more immediate one than any of those contained in the present Judgment (…) This is precisely our position since, to our regret, we are unable to agree with the conclusion which the Court reached in the *Israel v. Bulgaria* case (…) we need not give our reasons for this, for they are substantially the same as those set out in the Joint Dissenting Opinion of Judges Sir Hersch Lauterpacht and Sir Percy Spender, and of Judge Wellington Koo. Furthermore, it is not our purpose to call in question or attempt to reopen the decision in that case."[97]

By the same token, this joint dissenting opinion was also important for the interpretation of other provisions, such as article 37 of the Statute of the Court, that confer jurisdiction based on the consent previously given by states to the Permanent Court of International Justice. In this regard, since the dissenting judges also addressed in their opinion the drafting history of article 37 of the Statute of Court, it may be argued that the majority of the ICJ decided to follow their approach and reasoning in the decision on preliminary objections in the *Barcelona Traction* case.[98]

As third instance to exemplify how, the exercise their right to append a dissent is informed by the need to narrow down the scope of the majority decision, is to be found in the in the case concerning *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*. The majority of the International Court (by the casting vote of the President) concluded to be with jurisdiction to adjudicate on the merits of Nicaragua's request for a delimitation of the continental shelf beyond 200 nautical miles. The ICJ arrived to this conclusion by noting that it did not decide on the merits of this claim in the case concerning *Territorial and Maritime Dispute*.[99] Consequently Nicaragua's application was not precluded by the *res judicata* principle from being adjudicated on its merits.[100] Along with criticising the reasoning contained in the majority decision, the dissenting judges emphasised in their opinion, the practical consequences that this decision might entail. In that sense, they noted that the purpose of the *res judicata* principle is to put an end

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97 *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, [1961] ICJ Rep. 17, (Joint Declaration, Judges Fitzmaurice and Tanaka), at p. 37.

98 This conclusion is to be reinforced by the comments made by some judges in their individual opinions. For instance, Judge Tanaka (who voted with the majority on this objection) noted that "[a]s one who shares the view of the Joint Dissenting Opinion concerning the interpretation of Article 36, paragraph 5, I consider that the Court should have overruled the Judgment of 1959 in the *Aerial Incident* case… Furthermore, I assume that the Court's opinion is, in its fundamental reasoning, not very far from that of the Joint Dissenting Opinion in the *Aerial Incident* case". C*f.* Ibid, (Separate Opinion, Judge Tanaka), at p. 77. See also, Juan J. Quintana, Litigation at the International Court of Justice (Martinus Nijhoff Publishers 2015), 99.

99 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1, at pp. 662 - 670, paras. 104 – 131.

100 *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*, *supra* note 88, at pp. 128 - 132, at paras. 72 – 88.

to a dispute and protect the respondent from repeat litigation.[101] In consequence,

> "[b]y casting the rejection of Nicaragua's request for delimitation in the *Territorial and Maritime Dispute* case as a decision to which *res judicata* does not attach, the Court may be seen by some as being open repeat litigation, which cannot be the case… But [if the ICJ] is to continue to be regarded as [the principal judicial organ of the United Nations], it cannot afford to be seen to allow States to bring the same disputes over and over again. Such a scenario would undercut the certainty, stability and finality that judgments of this Court should provide."[102]

In this way, the dissenting judges sought to limit the scope of the judgment by trying to argue that it should be considered as an exception; states should not thus interpret it as a message indicating the flexibility of the *res judicata* principle.

The last of the instances to be mention is *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament*, where the ICJ had to assess whether a dispute existed between the Marshall Islands and the three respondent states. In making this assessment, the majority used as the relevant criterion for the determination of a dispute whether "on the basis of the evidence, that the respondent, was aware, or could not have been unaware, that its views were positively opposed by the applicant."[103] Applying this criterion, ICJ concluded that no dispute exist because the statements from the Marshall Islands in multilateral fora, were made in hortatory terms and could not therefore be understood as an allegation that any of the respondent states was in breach of its obligations.[104] In consequence, the statements did not call for a specific reaction by the respondent states;[105] none of the respondents were therefore not aware or could not have been unaware, that they were in breach of their obligations concerning nuclear disarmament.

The articulation and application, for the first time in the ICJ's case law of an awareness criterion[106] (for the determination of the existence of a dispute), was the basis of the disagreement of the dissenting judges. Judge Robinson for instance noted that, in articulating and applying this criterion, the majority "seem to introduce to the back door a requirement that the Court has previously rejected, i.e. an obligation on the applicant

101 Ibid, (Joint Dissenting Opinion, Judges Yusuf, Cançado Trindade, Xue, Gaja, Bhandari, Robinson and judge *ad hoc* Brower), at p. 161, para. 65.

102 Ibid, at p. 162, paras. 66 – 67.

103 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, p. 18, para. 41.

104 Ibid, p. 20, para. 49.

105 Ibid, p. 21, para. 50.

106 Fernando Lusa Bordin, 'Procedural Developments at the International Court of Justice', (2017) 16 *The Law and Practice of International Courts and Tribunals*, 307, 312.

to notify the other State of its claim."[107] In similar terms, judge Bennouna indicated that, in order to support its contention as to the existence of the awareness criterion, the majority had relied on previous decisions that,[108] "cannot be used as a lifeline for a decision which is no way related to the well-established case law of the Court on this question."[109] In consequence, and bearing in mind that the introduction of the new requirement would have an impact on all kind of proceedings that require the previous establishment of the existence of a dispute,[110] each of the dissenting judges set out in their opinions, how the case law of the ICJ and its predecessor has been consistent in indicating that, the existence of a dispute is a matter for objective determination. Their purpose is to show that the ICJ's approach has been characterised for its flexibility.[111] In that sense, the introduction of the awareness criterion marks a shift towards formalism, which carries profound implications.[112] In fact, dissenting judges such as Robinson, Bennouna, *ad hoc* Bedjaoui refer to the undermining of the sound administration of justice and the peaceful settlement of disputes, as part of the consequences from this decision.[113] Their opinions therefore seek to point out these aspects, in an attempt to narrow down the scope of the decision, sending a message that the awareness test should not be considered as a new criterion, for the determination of the existence of a dispute.

Moving to the Inter-American Court of Human Rights, as already noted it is only possible to find one instance in which the exercise of the right to append dissenting opinions is informed by an attempt to limit the scope of the majority decision. This instance is the joint dissenting opinion appended by judges Ventura Robles and Ferrer MacGregor appended to the

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107 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, (Dissenting Opinion, Judge Robinson), p. 7, para. 24.

108 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 88; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, [2016] ICJ Rep. 3.

109 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, (Dissenting Opinion, Judge Bennouna).

110 Béatrice I. Bonafé, 'Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications', (2018) 45 *Questions of International Law*, 3, 23.

111 Vincent-Joël Proulx, 'The *Marshall Islands* Judgments and Multilateral Disputes at the World Court: Whither Access to International Justice?', (2017) 111 *American Journal of International Law Unbound*, 96, 97.

112 Vincent-Joël Proulx, 'The World Court's Jurisdictional Formalism and Its Lost Market Share: The *Marshall Islands* decision and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes', (2017) 30 *Leiden Journal of International Law*, 925, 930.

113 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, (Dissenting Opinion, Judge Yusuf), p. 866, paras. 24 – 26; Ibid, (Dissenting Opinion, Judge Bennouna), pp. 905 – 906; Ibid, (Dissenting Opinion, Judge Robinson), pp. 1082 - 1084, paras. 52 – 55; Ibid, (Dissenting Opinion, Judge *ad hoc* Bedjaoui), pp. 1129 – 1131, paras. 81 – 86.

judgment in the case of *Brewer Carías v. Venezuela*. The case concerned the alleged lack of judicial guarantees and protection throughout the proceedings instituted against Mr. Brewer Carías, for the crime of conspiracy with regard to a change to the Venezuelan Constitution. One of the preliminary objections put forward by Venezuela related to the lack of exhaustion of local remedies, by the alleged victim. It argued that the proceedings against Mr. Brewer Carías were at an intermediate stage, have not advanced due to his absence in the proceedings and, any adverse decision is subject to appeal, cassation and appeal for review. For its part, the victim argued that the adequate local remedies were exhausted, by means of the filing of two requests for the annulment of the proceedings, which were still pending.

For the majority of the IACtHR, since the decision of first instance was still pending, *i.e.* it is at an early stage, it is not possible to rule on the alleged violation of the judicial guarantees of Mr. Brewer Carías. In that sense, "it is not possible to analyse the negative impact that the decision could have if taken at in the early stages when such decisions may be rectified or corrected by means of the remedies or actions established in domestic law."[114] The majority therefore upheld the preliminary objection put forward by Venezuela and did not proceed to an analysis of the merits of the case.

Judges Ventura Robles and Ferrer MacGregor dissented from the majority decision, considering that the approach taken by the majority concerning (i) the lack of exhaustion of the adequate and effective local remedies and, (ii) that none of the exceptions to the rule on the exhaustion of local remedies is met. But above all, the main reason for appending the opinion, is related to the fact that,

> "[they] observe with concern that, for the first time in history, the Court does not proceed to examine the merits of a litigation because it finds admissible a preliminary objection of failure to exhaust domestic remedies… In addition, as analysed below, the Judgment includes some considerations that, in our opinion, are not only contrary to the Inter-American Court's case law, but also represent a dangerous precedent for the Inter-American system for the protection of human rights as a whole."[115]

In their view, the Inter-American Court should have decided that the two requests for the annulment of proceedings against Mr. Brewer Carías constituted the adequate and effective local remedies that the victim was required to exhaust.[116] The real crux of the matter for them is therefore to be found, in the application of a new criterion in the analysis of the rule of exhaustion of local remedies, namely, that proceedings are in an early stage. It is in this respect that the majority decision constitutes a disturbing precedent

114 *Case of Brewer Carías v. Venezuela*, *supra* note 12, para. 96.
115 Ibid, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), para. 2.
116 Ibid, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), para. 44.

contrary to the approach adopted by the Inter-American Court in its case law, for more than 26 years.[117]

For the dissenting judges,

> "[t]he new theory of the 'early stage' used in this Judgment represents a step backwards that affects the whole of the Inter-American system as regards the matters before the Inter-American Commission and the cases pending the decision of the Court, because it has negative consequences for the presumed victims in the exercise of the right of access to justice. Accepting that, at the 'early stages' of the proceedings, no violations can be determined (because they could eventually be remedied at subsequent stages), creates a precedent entail ranking the severity of the violations based on the stage of the proceedings.[118]

The ideas expressed throughout their joint opinion, seek therefore to downplay the decision of the majority in an attempt to impede the introduction of a new criterion in the rule concerning the prior exhaustion of local remedies.

4.1.4 The exercise of the right to append dissenting opinions in a universal and a regional international court or tribunal

The position of the International Court of Justice and the Inter-American Court of Human Rights, in the universe of international courts and tribunals, is completely different. It refers to the fact that the ICJ is the principal judicial organ of the United Nations, whereas the Inter-American Court on Human Rights is a regional judicial organ. In that sense, the International Court of Justice is open to all states, not only to those members of the organization. In contrast, the Inter-American Court of Human Rights is open to the states from the Americas that are moreover members of the Organization of American States. Moreover, the universal and regional character of each of these courts is not only limited to the aspect of access from states. This universal and regional character is also related to the aspect (already mentioned) that relates to the kind of cases that each court can adjudicate. Consequently, the universal character of the International Court of Justice also means that states can submit disputes concerning any question of international law. It is therefore conceived as the general court of the international community.[119] For its part, the regional character of the IACtHR also means that it can only adjudicate certain kind of cases, namely, those related to the responsibility of states for the violation of human rights, contained in the American Convention, to a person subject to its jurisdiction. With

117 Ibid, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), para. 47.

118 Ibid, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), at para. 56.

119 Karin Oellers-Frahm, 'Article 92', in Bruno Simma *et al* (eds.) *2 The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012), 1897, 1912.

respect to this last aspect from the Inter-American Court of Human Rights, it is also important to note that the Americas (especially Latin America), is a region where the violation of certain human rights and under certain circumstances (*e.g.* forced disappearance, rights of indigenous communities, extrajudicial killings), is usual and has taken place in the majority of states. In consequence, it is usual for the IACtHR to decide similar cases.

This universal and regional character of both courts, is relevant in the adjudication of a case and in consequence informs the exercise of the right to append dissenting opinion. This aspect was in fact highlighted by judge Ranjeva in the dissent that he appended to the judgment on preliminary objection in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between Croatia and Serbia. In the opening paragraph of his opinion, judge Ranjeva noted that,

> "[r]endering justice under the law in a judicial institution having a universal jurisdiction is a particularly difficult exercise (…) An arbitral court, unconstrained in its decisions, is responsible for its judgment only to parties which have consented to its jurisdiction. A court of law, on the other hand, acts within the context of a concept of legal policy; it has a heritage to uphold embodied in its jurisprudence, which helps promote legal certainty and the consistency of the law."[120]

It is against this background that the exercise of the right to append dissenting opinions is informed by the universal and the regional character of the International Court of Justice and the Inter-American Court of Human Rights, respectively. Principally, the universal and regional character informs the exercise of the right to append dissents, when judges attempt to need to narrow down the scope of the majority decision. This is so since the universal character of the International Court of Justice, makes it less likely to be seised in more than one occasion of a dispute on the same subject-matter; in consequence, it cannot easily revisit an aspect that it is expected to address in its decisions. On the contrary, the regional character of the Inter-American Court of Human Rights, coupled with the fact that certain human rights violations are recurrent in the Americas, makes it more likely to be seised of cases on the same subject-matter; in consequence, it can easily revisit an aspect in subsequent cases.

In this order of ideas, the universal and regional character is one of the factors that may explain why, a significant difference exist in the number of instances in which judges exercise their right to append dissenting, with a view of limiting the scope of the majority decision.

120 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *supra* note 73, (Dissenting Opinion, Judge Ranjeva), at p. 482, para. 1.

4.2 The institutional design of the International Court of Justice and the Inter-American Court of Human Rights and its influence on the right to append dissenting opinions

4.2.1 The composition of the bench of the International Court of Justice and the Inter-American Court of Human Rights and its influence on the right to append dissenting opinions

The bench of the International Court of Justice is heterogeneous, whereas in the case of the Inter-American Court of Human Rights, the requirements for the composition of its bench make it more homogeneous. This heterogeneity/homogeneity divergence in their composition has a significant influence, on the role and function of dissenting opinions appended to their judgments. To be more precise, this influence can be appreciated in two facts. First, since it is useful for explaining the reasons of a judge for dissent;[121] second, it may constitute one of the factors in order to explain why despite the Inter-American Court of Human Rights has rendered more judgments than the International Court of Justice, fewer dissents have been appended to the latter's judgments and advisory opinions.

The heterogeneity in the composition of the International Court of Justice comprises several factors. They are aptly summarised and associated to the fact that they may constitute a source of disagreement between the members of the ICJ, by judge Herczegh in the declaration that he appended to the ICJ's advisory opinion concerning *Legality of the Threat or Use of Nuclear Weapons*, where he noted that,

> "[a]ccording to Article 9 of the Statute of the International Court of Justice, 'the representation of the main forms of civilization and of the legal systems of the world should be assured' in the membership of the Court. It is inevitable therefore that differences of theoretical approach will arise between the Members concerning the characteristic features of the system of international law and of its branches, the presence or absence of gaps in this system, and the resolution of possible conflicts between its rules, as well as on fundamental relatively fundamental issues."[122]

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121 See, *e.g.*, Andrea Bianchi, 'Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes again in the *Marshall Islands* case', 111 *American Journal of International Law Unbound* (2017), 81, 85.

122 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 41, (Declaration, Judge Herczegh), at p. 275. Similarly, judge Levi Carneiro noted in his dissenting opinion appended to the preliminary objections judgment in the *Anglo-Iranian Oil Co.*, that "it is inevitable that every one of [the members of] this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Court is to be representative of 'the main forms of civilization' and of the principal legal systems of the world. *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objections, Judgment of 22 July 1952, [1952] ICJ Rep. 93, (Dissenting Opinion, Judge Levi Carneiro), at p. 161, para. 14.

In that sense, the fact that a judge has been educated under a certain legal system has an influence on how she or he conceives the law and, in consequence, on how she or he approaches an issue.[123] The judge is moreover, in accordance to the wording of article 9 of the Statute of the International Court of Justice, a representative of both, one of the main forms of civilization and a legal system of the world. She or he might therefore be expected to exercise the right to append a dissenting opinion, based on these factors.

In this regard, reference is to be made of the joint dissenting opinion appended by judges Bedjaoui, Ranjeva and Koroma to the judgment on the merits in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain.* With respect to the decision from the majority to refuse to apply the *uti possidetis iuris* principle, these judges noted that,

> "as representatives of the various legal systems of the continent of Africa, we are committed to that principle and have never lost sight of its importance for the post-colonial phase of State development in Africa under conditions of stability and peace."[124]

An also relevant example is the dissenting opinion appended by judge Moreno Quintana to the decision on the merits in the case concerning the *Temple of Preah Vihear*, where he noted to be,

> "unable to agree with the majority of my colleagues in the decision of this case. It is my firm conviction that sovereignty over the portion of territory of the Temple of Preah Vihear belongs to Thailand. The dissenting opinion which I express hereunder gives the reasons on which it is based. In American international law questions of sovereignty have, for historical reasons, a place of cardinal importance. That is why, I could not, as a representative of a legal system depart from it."[125]

Another and more significant example can be found in the *Asylum* and *Haya de la Torre* cases. Both cases constitute the judicial facet of the saga related to the granting of asylum to Mr. Raúl Haya de la Torre by the Colombian Government, considering that he qualified as a political offender in accordance with the Montevideo Convention on Political Asylum; in consequence, the Colombian Government requested the safe-conduct necessary for Mr. Haya de la Torre to leave Peru. Nevertheless, Peru refused to grant the said safe-conduct, by noting that he was a common criminal not entitled

123 See, *e.g.*, Kazimierz Grzybowski, 'Socialist Judges in the International Court of Justice', (1964) 21 *Duke Law Journal*, 536.

124 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *supra* note 62, (Joint Dissenting Opinion, Judge Bedjaoui, Ranjeva and Koroma), at p. 214, para.

125 *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment of 15 June 1962, [1962] ICJ Rep. 6, (Dissenting Opinion, Judge Moreno Quintana), at p. 67.

to asylum.[126] In view of the divergence of opinions, both parties decided to bring the dispute before the International Court of Justice, requesting it to answer whether Colombia (based on treaties and American international law) had the right to qualify the nature of the offence, and whether Peru was under the obligation to give the necessary assurances and guarantees for the departure of Mr. Haya de la Torre from the country.

For the majority of the ICJ, both states have equal rights in the qualification of the offence. Hence, Colombia was not entitled to unilaterally qualify the offence, in spite of the fact that "[t]his institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied."[127] As for the second of the questions presented, the ICJ by relying on a construction of the Convention on Asylum of February 20th, 1928, noted that it is only after the territorial state asks the refugee to leave its territory, that the state granting asylum can afterwards request the necessary assurances and guarantees for the departure of the refugee.[128] Having Peru not asked Mr. Haya de la Torre to leave the country, Colombia was not therefore entitled to request the said assurances and guarantees.

In this case, four of the five dissenting judges belonged to American countries (Álvarez, Azevedo, Read and judge *ad hoc* Caicedo Castilla). In their view, the majority erred in concluding that the granting of asylum to Mr. Haya de la Torre was contrary to the Convention on Asylum. In other words, they considered that the majority of the International Court of Justice has disregarded the nature and practice of asylum in Latin America. As judge Azevedo has put it in his opinion, "it is very difficult to adopt and interpret a text without regard to the special circumstances in which it was drafted; these circumstances are both numerous and varied."[129] Hence, as noted by judge Álvarez,

> "in order to understand an institution and to give an adequate solution to the questions which it raises, it is necessary to know the political and social environment which gave it birth, and to consider how the institution has been applied. The Latin-America environment is very different, in matters of asylum, from the European environment."[130]

126 Manuel R. García-Mora, "The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights", 37 *Virginia Law Review* (1952), 928.

127 *Asylum (Colombia/Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 266, at p. 269.

128 Ibid, at p. 279.

129 Ibid, (Dissenting Opinion, Judge Azevedo), at p. 353.

130 Ibid, (Dissenting Opinion, Judge Álvarez), at p. 292. Judge *ad hoc* Caicedo Castilla made a somewhat similar claim in his opinion, when noting that "in studying the problems of diplomatic asylum and in reaching a decision, account must be taken of the Latin-American spirit and environment, as well as of the special interpretation of American international law regarding asylum, which is very different from the European interpretation." *Cf.* Ibid, (Dissenting Opinion, Judge *ad hoc* Caicedo Castilla), at p. 359.

Based on the nature and practice of the institution of asylum in Latin America, a party to the Convention on Asylum has never refused to grant or recognise diplomatic asylum to a political offender, in times of political disturbance, on the ground that he was seeking to escape from arrest, prosecution or imprisonment, for a political offence.[131] The dissenting judges therefore concluded that urgent cases also include cases of revolution.[132]

In this sense, the reason for dissent of these judges was the fact that the approach adopted by the majority in its judgment, clearly disregarded the views of American law on the matter. Consequently, and bearing in mind that the dispute involved two states belonging to this legal system, it has been considered that the dissenting opinions were more useful than the majority judgment, since they gave special weight to the role and history of the institution of asylum in that part of the world.[133] The composition of the ICJ, seem to have an impact on the exercise of the right to append dissenting opinions role from the judges belonging to states from the continent. It shows how the representation of the principal legal systems of the world, influences the exercise of the judicial function of the International Court of Justice.

In line with this example, reference is also to be made of the dissenting opinion appended by judge Sir Percy Spender to the judgment on the merits of the *Temple of Preah Vihear* case. He noted in his opinion that,

> "[i]n determining what inferences may or should be drawn from Thailand's silence and absence of protest regard must, I believe, be had to the period of time when the events we are concerned with took place, to the region of the world to which they related, to the general political conditions existing in Asia at this period, to the political and other activities of Western countries in Asia at the time and to the fact that of the two States concerned one was Asian, the other European. It would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might today be or might there have been applied to highly developed countries."[134]

Another relevant example in line with the above is constituted, by the advisory opinion of the International Court of Justice on *Certain Expenses of the United Nations*. The General Assembly requested from the ICJ an advisory opinion on the question whether the expenditures authorised by the General Assembly in some resolutions, constitute expenses of the United Nations within the meaning of article 17, paragraph 2, of the Charter of the

131 Ibid, (Dissenting Opinion, Judge Read), at p. 325.
132 See, *e.g.* Ibid, (Dissenting Opinion, Judge Badawi Pasha), at p. 309 – 312.
133 L. C. Green, 'Right of Asylum case', (1951) 4 *International Law Quarterly* 229, 239.
134 *Temple of Preah Vihear (Cambodia v. Thailand)*, *supra* note 125, (Dissenting Opinion, Judge Sir Percy Spender), at p. 128.

United Nations.[135] The reason that prompted this request for an opinion from the International Court of Justice was the refusal from some member states, such as the Soviet Union to pay their contributions to cover the expenditures authorised, for peace-keeping operations in the Middle East and in the Congo.[136] For the states who refused to pay they said expenses, both operations were undertaken in violation of the provisions of the Charter of the United Nations; the necessary expenses to cover the function of both operations could not therefore be considered as legitimate expenses that members must pay.[137]

The majority of the International Court of Justice concluded that any expenses authorised with a view to carrying out the purposes of the United Nations, should be considered as expenses that should be paid by its members. The peace-keeping operations and the resolutions authorising its expenditures were approved, in order to carry out a purpose of the United Nations, namely, the maintenance of international peace and security. In consequence, they amount to expenses of the United Nations and should be paid by its members.[138]

Five judges voted against this advisory opinion rendered by the majority. From this minority group, the dissenting opinions appended by judges Winiarski and Koretsky are relevant, since the exercise of their right to append dissenting opinion is associated to the region of the world they belong. In this sense, both judges belonged to socialist states [139] and the views expressed by each of them in their opinions are connected with the principles that constitute the basis of the socialist doctrine.

In this regard, it is to be noted that from the perspective of socialists states, the resolutions from international organizations may amount to norm-creators, when they are taken within the bounds of their competence and do not contradict basic principles of international law.[140] One of these basic principles is the sovereignty of states.[141] This principle constitutes

135 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151, at p. 152.

136 Alphonse D. Pharand, 'Analysis of the Opinion of the International Court of Justice on Certain Expenses of the United Nations', (1963) 1 *Canadian Yearbook of International Law*, 272.

137 James Fergusson Hogg, 'Peace-keeping Costs and Charter Obligations – Implications of the International Court of Justice Decision on *Certain Expenses of the United Nations*', (1962) 62 *Columbia Law Review*, 1230, 1232.

138 *Certain Expenses of the United Nations*, *supra* note 135, p. 179.

139 Thomas R. Hensley, 'Bloc Voting on the International Court of Justice', (1978) 22 *The Journal of Conflict Resolution*, 39.

140 John B. Quigley, 'The New Soviet Approach to International Law', (1965) 1 *Harvard International Law Club* Journal, 1, 19.

141 *Cf*. Zigurds L. Zile, 'A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy', (1964) 58 *American Journal of International Law*, 359, 371 – 379.

the means for a state to isolate itself and prevent any interference from any other states not belonging to the non-communist circle.[142]

This socialist perspective of international law is present at the dissenting opinions of judges Winiarski and Koretsky. For the former, "only lawful expenses can be expenses of the Organization; they must be validly approved and validly apportioned among the Members. The question is therefore one of the interpretation of the Charter."[143] In interpreting the Charter of the United Nations, judge Winiarski considered that,

> "The intention of those who drafted [the Charter] was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully fields of competence (…) it is only by such procedures, which we clearly defined, that the United Nations can seek to achieve its purposes."[144]

In that sense, the General Assembly has no role in the maintenance of international peace and security. Its resolutions are but recommendations, which are only binding for those states that have accepted them. Consequently,

> "It is difficult to see by what process of reasoning recommendations could be held to be binding on States which have not accepted them. It is difficult to see how it can be conceived that a recommendation is partially binding, and that on what is perhaps the most vital point, the financial contribution levied by the General Assembly under the conditions of paragraph 2 of Article 17. It is no less difficult to see at what point in the transformation of a non-binding recommendation into a partially binding recommendation is supposed to take place, at what point in time a legal obligation is supposed to come into being for a Member State which has not accepted it."[145]

A similar position is adopted by judge Koretsky, for whom the resolutions adopted by the General Assembly were not in conformity with the Charter of the United Nations.[146] In his view, "[t]he Court (…) should have in mind the strict observation of the Charter (…) rules, without limiting itself by reference to the purposes of the Organization; otherwise one would have to come to the long ago condemned formula: the ends justify the means."[147]

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142 Hideaki Shinoda, Re-examining Sovereignty: From Classical Theory to the Global Age (MacMillan Palgrave 2000), 114 – 129; Eugene Korovin, 'Respect for Sovereignty: An Unchanging Principle of Soviet Foreign Policy', (1956) 11 *International* Affairs, 32; Mintauts Chakste, 'Soviet Concepts of the State, International Law and Sovereignty', (1949) 43 *American Journal of International* Law, 21, 30 – 36.

143 *Certain Expenses of the United Nations*, *supra* note 135, (Dissenting Opinion, Judge Winiarski), p. 228.

144 Ibid, p. 233.

145 Ibid, p. 234.

146 *Cf*. Kazimierz Grzybowski, 'Socialist Judges in the International Court of Justice', (1964) 3 *Duke Law* Journal, 536, 543

147 *Certain Expenses of the United Nations*, *supra* note 135, (Dissenting Opinion, Judge Koretsky), p. 268, para. 27.

Moreover, the resolutions from the General Assembly amount to mere recommendations. Transforming them into binding commitments is contrary to the Charter of the United Nations, international law in general and even common sense.[148]

In sum, the references made to the views expressed by judges Winiarski and Koretsky, constitute a clear indication that the exercise of their right to append dissenting opinions was connected to the idea of international law in socialist states.[149]

Further, an additional aspect in the composition of the bench of the International Court of Justice is the manifestation of power politics through the allocation of the seats. In this context, two additional factors informing the exercise of the right to append dissenting opinions are (i) the position adopted by the state of nationality of the judge, with regard to the aspects that constitute the subject-matter of a case before the ICJ; and, (ii) the fact that the a national from each of the five permanent members of the Security Council (with the exception of the China, between 1967 and 1985, and currently the United Kingdom), is always in the bench. Both are important factors considering, as it has been noted elsewhere, that judges are partially elected because of their nationality. Consequently, nationality plays a role when specific certain cases entre the docket of the ICJ despite once a person has been elected to be part of the bench this link should disappear.[150]

In the case of the factor concerning the position adopted by the state of nationality of a judge, with regard to the aspects that constitute the subject-matter of a case brought before the ICJ, an interesting and significant example in this regard is constituted by the recent judgments on preliminary objections rendered in the cases concerning *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament*. The composition of the bench of the International Court of Justice included, by the time that the case was discussed, some judges belonging to states possessing nuclear weapons. Interestingly, only the members of the ICJ from these states voted in favour of rejecting the applications filed by the Marshall Islands;[151] the rest of the members of the ICJ voted against this decision. The opinions appended by the dissenting judges clearly refer

148 Ibid, p. 287, para. 48.

149 Henri Isaïa, 'Les Opinions Dissidentes des Juges Socialistes dans la Jurisprudence de la Cour Internationale de Justice', (1975) 79 *Revue General de Droit International* Public, 657; Also relevant in this regard is (i) the advisory opinion of 30 March 1950 on the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, where judges Winiarski (Poland), Zoričić (Yugoslavia) and Krylov (Union of Soviet Socialist Republics) voted against the majority advisory opinion; and, (ii) the case concerning *United States Diplomatic and Consular Staff in Tehran*, where judges Morozov (Union of Soviet Socialist Republics) and Tarazi (Syria) voted against the majority judgment

150 Chiara Giorgetti, 'The Challenge and Recusal of Judges of the International Court of Justice', in Chiara Giorgetti (ed.) *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Martinus Nijhoff Publishers 2015), 3, 13.

151 Judges Abraham (France), Owada (Japan), Greenwood (United Kingdom), Xue (China), Donoghue (United States), Gaja (Italy), Bhandari (India) and Gevorgian (Russia).

to a manifestation of power politics in the decision adopted by the majority. Judge Robinson for instance noted that,

> "[i]nternational law, like any other branch of law, is not static and some of the greatest developments in history would not have taken place but for the dynamism of law. But where current law can be applied to serve the interests of the international community as a whole, such a dramatic change is only warranted if there is a compelling consideration in favour of doing so (…) The majority has not advanced such reasons (…) This conclusion is rendered even more telling by the subject-matter of the dispute before us today."[152]

In this same line, judge Cançado Trindade noted in his dissenting opinion that,

> "[a] small group of States – such as the NWS – cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained (…) The present case stresses the utmost importance of fundamental principles, such as that of juridical equality of States, following the principle of humanity, and of the idea of an objective justice (…) Factual inequalities and the strategy of 'deterrence' cannot be made to prevail over the juridical equality of States."[153]

On the other hand, the position from members of the ICJ belonging to states possessing nuclear weapons is to be found in the context of the advisory opinion rendered in the *Legality of the Threat or Use of Nuclear Weapons*. All the judges belonging to this group of states appended opinions, with a view to explain their vote with regard to operative subparagraph E, where the majority noted that

> "the threat of use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of international law; however, the International Court, cannot conclude, in view of the current state of international law, whether the threat or use of nuclear weapons would be unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[154]

With regard to this operative subparagraph, judge Guillaume for instance noted that,

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152 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, supra note 1, (Dissenting Opinion, Judge Robinson) p. 1091, paras. 68 – 69.

153 Ibid, (Dissenting Opinion, Judge Cançado Trindade), pp. 1022, 1025 – 1026, paras. 307, 320.

154 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 41.

> "this wording is not entirely satisfactory, and I therefore believe that it needs some clarification (…) The right of self-defence proclaimed by the Charter of the United Nations is characterized by the Charter as natural law (…) Accordingly, international law cannot deprive a State of the right to resort to nuclear weapons if such action constitutes the ultimate means by which it can guarantee its survival (…) In such a case the State enjoys a kind of 'absolute defence' (…) In these circumstances, the Court, in my view, ought to have carried its reasoning to its conclusions and explicitly recognized the legality of deterrence for defence of the vital interest of States."[155]

For its part, Judge Schwebel noted in this same vein that the possession of nuclear weapons and the policy of deterrence,

> "is not a practice of a lone and secondary persistent objector. This is not a practice of a pariah Government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas."[156]

To conclude, a last instance to be mentioned is some of the dissenting opinions appended in the *Fisheries* case between the United Kingdom and Norway. Interestingly, the two dissenting judges in this case, Read and McNair, belong to countries that consider that their coasts are similar to the Norwegian coast (*i.e.* Canada and the United Kingdom). Consequently, both judges referred in their dissents to the Norwegian argument regarding the uniqueness or exceptionality of its coast. They therefore noted in their opinions that the countries they belong to, also have long and indented coasts. Judge McNair for instance noted that,

> "Norway has no monopoly of indentations or even skerries. A glance at an atlas will shew that, although Norway has a very long and heavily indented coastline, there are many countries in the world possessing areas of heavily indented coast-line. It is not necessary to go beyond the British Commonwealth."[157]

Similarly, judge Read noted in his dissent that,

> "It is unrealistic to suggest that the northern coast of Norway is unique or exceptional in that it has a broken coast line in East Finnmark, or because West Finnmark, Troms and Nordland are bordered by a coastal archipelago, deeply indented by fjords and sunds. In other parts of the world, different names are used, but there are many other instances of broken coast lines and archipelagoes

155 Ibid, (Separate Opinion, Judge Guillaume), pp. 290 – 291, paras. 8 – 9.
156 Ibid, (Dissenting Opinion, Judge Schwebel), p. 312.
157 *Fisheries Case (United Kingdom v. Norway)*, supra note 73, (Dissenting Opinion, Judge McNair), p. 169.

(…) There are coastal archipelagoes, deeply indented bays and broken coast lines on the north, south, east and west coasts of Canada."[158]

In striking contrast, all these kinds of differences in the composition of the bench of the International Court of Justice, can hardly be found in the case of the Inter-American Court of Human Rights. This diversity in the composition of the bench is not present in the IACtHR. As noted above, it is not a statutory requirement. In addition, despite states from the Americas belong to either the continental or the common law systems, [159] all of its current judges come from states pertaining to the former.[160] Consequently, no heterogeneity exists in the composition of the Inter-American Court of Human Rights. All the judges, along with coming from states that belong to the same legal system, are experts on human rights, as well as are part of the same region. Hence one might expect a greater common denominator of agreement between its members.[161] These three factors have an important impact on the exercise of the right to append dissenting opinions. The first of these factors, in the sense that the source for dissent, is not to be found in a difference related in the manner how the aspect under consideration, is approached in the legal system of the state of the nationality of a judge.[162] With regard to the second aspect, the source of the dissent is homogeneous since all the members of the IACtHR share in broad terms the same expertise (*i.e.* the protection of human rights). In that sense, whenever a judge dissents from a majority judgment, the main reason may be found in the fact that he disagrees with the (existence or lack of a) violation of a human right, in the case at hand. As for the last factor, the fact that all judges come from the same region avoids the existence of ideological factions and

158 Ibid, (Dissenting Opinion, Judge Read), p. 193.

159 It should be recalled, as already noted above (fn. 585), that only during the first twelve years of its existence, the bench of the Inter-American Court always included at least one judge from a country belonging, to the common law system. This has, however, changed and all of the members of the current bench, come from countries that belong to the continental system.

160 This fact has moreover led some people to argue that the system is more Latin American than Inter-American. *Cf*. Christina M. Cerna, 'The Inter-American Court of Human Rights', in Chiara Giorgetti (ed.) *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff 2012), 368.

161 Forest L. Grieves, 'Reform of the Method of Rendering Decisions in the International Court of Justice', (1970) 64 *American Journal of International Law* 144, 150.

162 As a former member of the International Court has put it, "la question de la diversité des systèmes juridiques mérite trop d'attention pour la traiter ici ; pour répondre à l'argument dans le sujet étudié il suffira sans doute de remarquer que cette diversité ne doit être que dans la manière d'envisager un problème et qu'il ne peut être dans les intentions de personne de souhaiter que la diversité des systèmes juridiques constitue un obstacle au rapprochement des raisonements juridiques afin d'obtenir la plus large majorité possible sur la décision de la Cour." *Cf*. André Gros, '*Observations sur le mode de Délibération de la Cour Internationale de Justice*', in Roberto Ago et al (eds.) Il Processo Internazionale: Studi in Onore di Gaetano Moreli (Pedone 1975), 377, 380.

regional seats.[163] Nevertheless, one must not lose sight that the members of the Inter-American Court of Human Rights have each of them moral convictions, which cannot be disregarded when deciding a case.[164] As judge Vio Grossi recently noted in the dissenting opinion he appended to the advisory opinion on *Gender identity, and equality and non-discrimination with regard to same sex couples*, "the views [expressed in a dissenting opinion] are formulated (…) as an evident demonstration of the dialogue and diversity of thoughts within the [the Inter-American Court]."[165]

These factors, when taken together, explain why the exercise of the right to append dissenting opinions is not informed by factors related to the composition of the bench of the Inter-American Court of Human Rights. The homogeneity in its composition makes the disagreement within this court, to find its basis in the IACtHR's decision to either consider a certain situation as a human rights violation, or the decision as to what are the adequate measures of reparation. Moreover, this homogeneity is also relevant in explaining why (as already noted in the main introduction to this dissertation), there is a significant difference in the number of judgments to which dissenting opinions have been appended in both courts. It is to be recalled that, in the case of the International Court of Justice, in only 11 of its judgments no dissenting opinions have been appended (and furthermore there has only been one judgment without a single individual opinion),[166] whereas from the 403 judgments rendered by the Inter-American Court of Human Rights, in 332 occasions these decisions have been taken by the unanimous vote of its members.

Further, it should also be considered that every judge comes to the bench with all his cultural, social and intellectual baggage.[167] Part of this baggage is the legal system in which he was educated. In this regard, the two predominant legal systems are the common and continental law systems.[168] Undoubtedly, more legal systems exist around the world. Nonetheless, if a classification in large groups is followed the other legal systems

163 *Cf*. Debra P. Steger, 'Improvements and Reform of the WTO Appellate Body', in Federico Ortino and Ernst-Ulrich Petersmann (eds.) *The WTO Dispute Settlement System* (Kluwer 2004), 41, 45.

164 See, *e.g.*, Jonathan Crowe, 'Dworkin on the Value of Integrity', (2007) 12 *Deakin Law Review*, 167.

165 *Gender identity, and equality and non-discrimination with regard to same sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples.* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, (Separate Opinion, Judge Vio Grossi) at para. 2. See also, *Amrhein et al v. Costa Rica*, *supra* note 75, (Partial Dissenting Opinion, Judge Vio Grossi), p. 2.

166 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 February 2009, [2009] ICJ Rep. 61

167 Mandfred Lachs, 'A Few Thoughts on the Independence of Judges of the International Court of Justice', (1987) 25 *Columbia Journal of Transnational Law*, 593, 594.

168 René David, *Les Grands Systèmes de Droit Contemporains* (Dalloz 1964), 14.

can be allocated in one of the two main legal systems;[169] The other existing legal systems finds some of their roots either in the common or continental law systems, particularly with respect to aspects such as the precedential value of judicial decisions and the permissibility of individual opinions.[170] In this context, 77 of the judges of the International Court of Justice belong to countries that their legal system is based in the continental system; 31 judges belong to countries that their legal system is based in the common law system. It has been noted that the ICJ judges that belong to the continental system have traditionally tended to make use of the exercise of the right to append dissenting opinions sparingly.[171] The number of dissenting opinions appended, however, by judges belonging to countries that their legal system is based in the continental system, seems to run counter to this assertion. Thus, 241 of the 349 dissenting opinions appended to judgments of the International Court of Justice, were appended by judges belonging to countries that their legal system is based in the continental system. Consequently, only 31% of the dissenting opinions at the International Court of Justice (*i.e.* 108 dissents) were appended by judges belonging to the common law system. As for the Inter-American Court of Human Rights, only 4 of its judges belong to countries in the Americas that their legal system is based in the common law. These judges have appended a number of 5 dissenting opinions. In contrast, 37 are the judges belonging to states that their legal system is based in the continental system and have appended 81 dissenting opinions.

4.2.2 The exercise of the right to append dissenting opinions from national and ad hoc judges

In the case of the participation from national and *ad hoc* judges in contentious proceedings, it was already noted above (section 3.2.1) that in the case of the Inter-American Court of Human Rights, the possibility for states to appoint *ad hoc* judges, as well as for judges of the nationality of the respondent state, to be part of the proceedings, is currently forbidden.

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169 Jaakko Husa, 'Classification of Legal Families Today, Is it Time for a Memorial Hymn?', (2004) 56 *Revue Internationale de Droit Comparé*, 11.

170 Kwai Hang & Brynna Jacobson, 'How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore', (2017) 12 *Asian Journal of Comparative Law*, 209; Mahdi Zahraa, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions', (2000) 15 *Arab Law Quarterly*, 168; Chenguang Wang & Guobin Zhu, 'A Tale of Two Legal Systems: The Interaction of Common Law and Civil Law in Hong Kong', (1999) 51 *Revue Internationale de Droit Comparé*, 917; Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems', (1978) 26 *The American Journal of Comparative Law*, 187; Paolo Contini, 'Integration of Legal Systems in the Somali Republic', (1967) 16 *The International and Comparative Law Quarterly*, 1088.

171 Philippe Couvreur, 'Charles de Visscher and International Justice', (2000) 11 *European Journal of International Law*, 905, 906.

Nevertheless, one should also bear in mind that in the initial anatomy of the IACtHR, as it was envisaged by the drafters of the American Convention, *ad hoc* judges and national judges were allowed. This difference in the anatomy of both courts is therefore a recent one. In view of this fact, it is not only important to address the relevance of this current difference; it is also important to address if differences existed as to whether and how *ad hoc* and national judges dissented, when they were still allowed at the Inter-American Court of Human Rights.

In this regard, as it was also noted above (section 3.2.1 above), *ad hoc* judges have been frequently criticised for voting in favour of the appointing state. In fact, an analysis of the number of instances at both courts, in which their decisions have been taken by majority shows, that an important number of these decisions were not unanimous because the *ad hoc* judge voted against the decision. To put it other way, without *ad hoc* judges more judgments could have been unanimous. In fact, during the time that these judges were allowed at the Inter-American Court of Human Rights, they were the sole dissenter in 19 instances.[172] Similarly, in the case of the International Court of Justice, in 10 instances the *ad hoc* judge was the sole

172 *Neira-Alegría et al v. Peru*, Preliminary Objections. Judgment of December 11, 1991. Series C No. 13; *Caballero Delgado y Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C, No. 22; *"White Van" (Paniagua Morales et al) v. Guatemala*, Preliminary Objections. Judgment of January 25, 1996. Series C No. 23; *Neira-Alegría et al v. Peru*. Reparations and Costs. Judgment of September 19, 1996. Series C No. 26; *Cantoral Benavides v. Peru*. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40; *Durand & Ugarte v. Peru*. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50; *Castillo Petruzzi and others v. Peru*. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52; *Cantoral Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79; *Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101; *Maritza Urrutia v. Guatemala*. Merits, Reparations and Costs. Judgment of November 27, 2003. Series C No. 103; *Serrano Cruz Sisters v. El Salvador.* Preliminary Objections. Judgment of November 23, 2004. Series C No. 118; *Serrano Cruz Sisters v. El Salvador*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120; *Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125; *Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127; *Rios et al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194; *Perozo et al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195; *Reverón Trujillo v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 30, 2009. Series C No. 197; *Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214.

dissenter.[173] The most recent example of this fact, in the case of the ICJ, is the judgment on the merits of the *Jadhav* case between India and Pakistan.

These numbers are important, if one takes account of the fact (as previously noted), that one of the objections as to the permissibility of *ad hoc* judges is based on the fact that its use has turned into an abuse, since some states have sought to appoint as judges, people who dissented from otherwise unanimous decisions.[174]

There is no doubt that the presence of *ad hoc* judges influences the number of unanimous decisions. Nonetheless, the fact that the person appointed as *ad hoc* judge is the sole dissenter does not necessarily mean that her or his appointment is to be considered as an abuse. First of all, as it was already also noted (section 1.4 above), even though unanimity is always preferred, when it is merely formal (*i.e.* recorded as such in the judgment despite conflicting views among judges), it is not desirable; whatever may be the effect upon public opinion.[175] In this sense, the dissenting opinion is the instrument that allows an *ad hoc* judge to show to the parties to the dispute and the public in general, that she or he was not basically appointed for the purposes of impeding the ICJ or the IACtHR from rendering a unanimous decision. Secondly, in order to speak of an abuse in the exercise of the right for states to appoint an *ad hoc* judge, it would be necessary for *ad hoc* judges to dissent in all cases with a view of breaking unanimity. Instances, however, exist in which the *ad hoc* judges agree with the majority and the sole dissenter that impedes unanimity is another member of the court.[176] Thirdly, a claim as to the existence of an abuse regarding *ad hoc* judges is ill-informed of the role of these judges within the court.

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173 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Preliminary Objections, Judgment of 25 March 1948, [1948] ICJ Rep. 15; *Request for Interpretation of the Judgment of November 20th, 1950, in the* Asylum Case (Colombia/Peru), Judgment of 27 November 1950, [1950] ICJ Rep. 395; *Haya de la Torre (Colombia/Peru)*, Judgment of 13 June 1951, [1951] ICJ Rep. 71; *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment of 18 November 1960, [160] ICJ Rep. 192; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3; *Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, [1993] ICJ Rep. 38; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Merits, Judgment of 17 December 2002, [2002] ICJ Rep. 625; *Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005, [2005] ICJ Rep. 90; *Application of the Interim Accord of 13 September 1995,* (Former Yugoslav Republic of Macedonia v. Greece), Merits, Judgment of 5 December 2011, [2011] ICJ Rep. 644; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment of 24 September 2015, [2015] ICJ Rep. 592; *Jadhav (India v. Pakistan)*, Merits, Judgment of 17 July 2019, [not yet published in the ICJ Reports].

174 Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Human Rights Protection?', (2010) 9 Washington University Global Studies Law Review, 639, 645.

175 Kurt H. Nadelmann, 'The Judicial Dissent: Publication v. Secrecy', (1959) 8 *American Journal of Comparative Law*, 415, 431.

176 See, e.g., *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment of 19 September 2012, [2012] ICJ Rep. 624.

Reference has already been made of the views expressed by *ad hoc* judge Lauterpacht in the separate opinion appended to the second request for the indication of provisional measures, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where he noted that,

> "[the judge *ad hoc*] has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write."[177]

This view has been shared by other persons appointed as *ad hoc* judges at the International Court of Justice,[178] as well as by persons appointed at the Inter-American Court of Human Rights.[179]

A recent example that makes visible this role can be found in the most recent judgment rendered by the International Court of Justice in the case concerning *Obligation to Negotiate Access to the Pacific Ocean*. One of the arguments advanced by Bolivia concerned the existence of an obligation from Chile to negotiate, if all the instruments, acts and conduct presented to show the existence of such an obligation are taken cumulatively. With regard to this argument, the majority of the ICJ concluded that since no obligation to negotiate sovereign access has arisen from any of the documents taken individually, a cumulative analysis cannot change the previous conclusion. Similarly, it also noted that it did not deem necessary to consider whether continuity existed in the exchanges between Bolivia and Chile, since even if continuity existed it would not establish the existence of the obligation to negotiate the sovereign access.[180]

Judge *ad hoc* Daudet referred in his dissenting opinion to this argument and the way the majority addressed it. He emphasised and explained the argument advanced by Bolivia. He therefore,

> "regret[ted] that the Court (…) rejected Bolivia's argument on the ground that the obligation arising from any of the grounds that it has invoked in isolation, 'a cumulative consideration of the various bases cannot add to the overall result', following Chile's position summed up by one of its counsels by the pictorial formula 0 + 0 + 0 = 0. (…) There is indeed no reason to analyse the acts that constitute the sequence individually, because they all relate to the same object

177 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further Request for the Indication of Provisional Measures, Order of 13 September 1993, [1993] ICJ Rep. 325, (Separate Opinion, Judge *ad hoc* Lauterpacht), p. 409, para. 6.

178 See, e.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 173, (Dissenting Opinion, Judge *ad hoc* Franck), at pp. 693 – 695, paras. 10 – 12.

179 *Trujillo Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, (Separate Opinion, Judge *ad hoc* Brower).

180 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, Judgment of 1 October 2018 [2018] ICJ rep. 507, para. 174.

> and share the same claim. Certainly, there were interruptions in this claim but it must be admitted that an aspect as crucial as the access to the sea for Bolivia should only have a recurring character. (…) The same claim from Bolivia has been repeated for more than a century. In the hope of a positive result, the claim was formulated in diverse manners, diverse conditions and in acts and behaviour of diverse nature (…) Such a position must be considered in its entirety and may not be subjected to the same regime of a single and isolated act, which may be examined out of its context."[181]

In line with the above, persons who have been appointed at the Inter-American Court of Human Rights have clearly noted that, their role should be focused in for instance assisting the court with the necessary knowledge of the laws within the respondent state. As *ad hoc* judge Santistevan de Noriega noted in his partial dissenting opinion in the case of *Garcia Asto and Ramirez Rojas*,

> "In exercising international judicial functions, as an *ad hoc* judge of this Court, I have endeavoured to bring intimate knowledge to the distinguished who are members of the Court on the law in force on the country whose State is on trial, and on the practice that within its framework are being developed in order to make them compatible with the provisions of the American Convention and the Peruvian Constitution itself. Therefore, in the short but fruitful time that I have had the privilege to exercise such duty, I have set myself to share with the members of the Court the characteristics of the legal system that, amidst the democratic transition, governs the delicate situation of those persons who are on trial for crimes related to terrorist activities under similar circumstances to the two cases giving rise to this judgment."[182]

This fact, in no way means that the *ad hoc* judge believes he is acting as a representative of the appointing state. Judge Vidal Ramirez, appointed by Peru for some of its early cases at the Inter-American Court of Human Rights, noted that

> "the designation of the judge *ad hoc* by the State, notified with the application does not imply that he assumes his representation because he becomes member of the Court in an individual capacity after previous oath. To become member of the Court as judge *ad hoc* I have met same qualifications as the incumbent judges and, thus, I have been empowered with the same rights, duties, and responsibilities."[183]

In this order of ideas, *ad hoc* judges at both courts clearly know what their role is. It is moreover this role which informs the exercise their right to

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181 Ibid, (Dissenting Opinion, Judge *ad hoc* Daudet), paras. 42 – 43.

182 *García Asto and Ramírez Rojas v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, (Partial Dissenting Opinion, Judge *ad hoc* Santistevan de Noriega), para. 1.

183 *Durand and Ugarte v. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68, (Reasoned Opinion, Judge Vidal Ramirez).

append a dissenting opinion. This does not, however, mean that because of the role and intellectual affinity of the *ad hoc* judge with the position of the appointing state, she or he should always exercise his right to append a dissenting opinion and moreover address all the aspects of the majority decision.[184] *Ad hoc* judge Berman noted in the opinion appended to the judgment of the ICJ in the case concerning *Certain Property* that, while

> "[he] find [him]self in substantial disagreement over certain issues. That would not in itself be grounds for a dissenting opinion, since I do not take the view that it is virtually incumbent on a judge *ad hoc* to tell the waiting world where and how his conclusions differ from those of the majority on the Court. Since, however (or therefore), I believe that the Court has seriously gone astray in deciding how this case should be handled at this preliminary objections phase, I must explain why."[185] (…)

In sum, the *raison d'être* of *ad hoc* judges and the practice as to the exercise of their function shows that they are, in principle, expected to ensure that the arguments advanced by their appointing state have been fully appreciated. This does not, however, mean that their function within the court is limited to these aspects.

In fact, the only difference between an *ad hoc* judge and other members of an international court or tribunal, is basically found in the manner in which they are appointed.[186] The provisions that indicate the requirements for the election of the members of the court or tribunal (*i.e.* independence, impartiality and professional qualifications) are also applicable to an *ad hoc* judge.[187] She or he is therefore called to exercise the same role and function of any other member of the court or tribunal.[188]

It is in view of the above, that *ad hoc* judges from both courts have not limited themselves to ensure that the arguments advanced by their appointing state have been fully appreciated. The following individual opinions that some of them have appended are relevant for exemplifying

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184 *Ad hoc* judge Mahiou for instance noted in his dissenting opinion in the case concerning *Application of the genocide Convention* between Bosnia and Herzegovina and Serbia and Montenegro, "that the purpose of a judge's separate opinion, even a dissenting one, is not to engage in excessively lengthy considerations of substance, to undertake a re-examination and re-appraisal of each of the points addressed by the Court and to put together, as it were, another Judgment." *Cf. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43, (Dissenting Opinion, Judge *ad hoc* Mahiou) p. 383, para. 2.

185 *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment of 10 February 2005, [2005] ICJ Rep. 6, (Dissenting Opinion, Judge ad hoc Berman) pp. 70 – 71, para. 1.

186 Andrés Sarmiento Lamus & Walter Arévalo Ramírez, 'Non-appearance before the International Court of Justice and the Role and Function of Judges *ad hoc*', (2017) 16 *The Law and Practice of International Courts and Tribunals*, 398, 411.

187 Chiara Giorgetti, *supra* note 150.

188 Andrés Sarmiento Lamus & Walter Arévalo Ramírez, *supra* note 186.

this point. In the case of the International Court of Justice, reference will be made of the dissenting opinions appended by the *ad hoc* judges in *Nottebohm* and *Question relating to the Obligation to Prosecute or Extradite*.

In the *Nottebohm* case, *ad hoc* judge Guggenheim referred in his opinion to some of the consequences that the decision from the majority may entail for international law in general. He explicitly noted that the decision would involve important consequences, namely, that

> "even if it be admitted that nationality can be dissociated from diplomatic protection in the present case, there remains the question as to what are the consequences of the total or partial invalidity under international law of a nationality validly acquired under municipal law. Is the invalidity confined to the sphere of diplomatic protection, or does it extend to the other effects of nationality on the international level, for example, treaty rights enjoyed by the nationals of a particular State in regard to monetary exchange, establishment and access to the municipal courts of a third State, etc.? [In addition] A refusal to recognize nationality and therefore the right to exercise diplomatic protection, would render the application of the latter – the only protection available to States under general international law enabling them to put forward the claims of individuals against third States – even more difficult then (*sic*) it is already is. If the right of protection is abolished (…) if no other State is in a position to exercise diplomatic protection, as in the present case, claims put forward on behalf of an individual, whose nationality is disputed or held to be inoperative on the international level and who enjoys no other nationality, would have to be abandoned."[189]

Similarly, *ad hoc* judge Sur focused in the dissenting opinion that he appended in *Questions relating to the Obligation to Prosecute or Extradite*, on general aspects not related to the position asserted by his appointing state. He focused on the International Court's failure to settle the dispute submitted to it. He questioned if,

> "the way in which the Court has conceived of its task, which is to settle a legal dispute between States in accordance with international law. I wonder if the Court has not in fact set about responding to a request for an advisory opinion on the nature and authority of the Convention against Torture, rather than examining in a fair and balance way the arguments and conduct of the Parties (…) a judicial settlement is only a substitute for a diplomatic one, and in my view it must offer a full, balanced and clear response to all of the parties' arguments and claims (…) By way of example, let us take the reference to *jus cogens* which appears in the reasoning, a reference which is entirely superfluous and does not contribute to the settlement of the dispute."[190]

189 *Nottebohm (Liechtenstein v. Guatemala)*, *supra* note 1, (Dissenting Opinion, Judge *ad hoc* Guggenheim), at p. 63.

190 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 1, (Dissenting Opinion, Judge *ad hoc* Sur) pp. 605 – 606, paras. 2- 4.

This situation is not exclusive of the opinions appended by *ad hoc* judges from the International Court of Justice. Examples can also be found in the case of the Inter-American Court of Human Rights. The most relevant are the opinions appended by *ad hoc* judges Caldas, Ferrer MacGregor and Rodriguez-Pinzon.

With respect to *ad hoc* judge Caldas, he appended an opinion in the case of *Garibaldi v. Brazil* in an attempt to prevent excessive delays in the judicial system of states that could eventually lead to situations of impunity. As he expressly noted,

> "I submit this opinion with my own reasoning in the hope that it will contribute to a profound reflection by Brazil and other jurisdictional countries; (…) [hence] in this opinion, I wish to outline a simple model capable, if duly followed by the States, of creating the conditions to resolve judicial delays definitely, easily, promptly and inexpensively."[191]

In the case of *ad hoc* judge Ferrer MacGregor, he sought in his opinion to highlight "the new considerations and clarifications rendered on this doctrine [of the conventionality control] in this Judgment, as well as to emphasize its importance for the Mexican judicial system, and in general, for the future of the Inter-American System."[192] Lastly, in the case of *ad hoc* judge Rodriguez-Pinzon, he noted the reason for exercising his right to append a dissenting opinion "is the result of a debate that, in my opinion, is of great importance as to the protection of human rights in America and to which several well-known jurists of this part of the world has referred by adopting different positions regarding the scope of Article 8 and Article 25."[193]

On the other hand, in the case of national judges fewer instances exist in which a decision could not be unanimous (in whole or in part) because the judge of the nationality of one of the parties to the dispute has voted against the decision of the majority. In fact, in only two cases decided by the International Court of Justice the national judge was the sole dissenter,[194] whereas in the Inter-American Court of Human Rights only one instance exists.[195] This fact does not, however, mean that national judges usually

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191 *Garibaldi v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203 (Opinion of Judge *ad hoc* Caldas), paras. 1 – 8.

192 *Cabrera García and Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, (Concurring Opinion, Judge *ad hoc* Ferrer MacGregor), para. 1.

193 *Salvador Chiriboga v. Ecuador.* Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179, (Partial Dissenting Opinion, Judge *ad hoc* Rodriguez-Pinzon), para. 1.

194 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *supra* note 88; *Request of Interpretation of the Judgment of 31 March 2004 in the Case Concerning* Avena and Other Mexican Nationals, (Mexico v. United States) (Mexico v. United States), Judgment of 19 January 2009, [2009] ICJ Rep. 3.

195 *Caballero Delgado y Santana v. Colombia*, *supra* note 172.

vote with the majority of the court and therefore against their state of nationality. In the case of the International Court of Justice, an analysis of its docket from 1978 onwards[196] shows that in the 17 decisions in which a judge of the nationality of one the parties to the dispute was part of the bench,[197] no instance exists in which the national judge has voted with the majority and, as a consequence, against all the submissions of the state of his nationality. As for the Inter-American Court of Human Rights, the analysis of its docket shows, in clear contrast with the International Court of Justice, that from the 19 where a judge of the nationality of the respondent

196 On 14 April, 1978, the International Court adopted revised Rules of Court. One of the amendments made (when compared to its previous Rules of Court of 1946), was to add that the judgment to be given by the full court or a chamber, should contain the number and names of the judges constituting the majority. In this sense, it was therefore problematic regarding decisions rendered before 1978, to know if a national judge had voted in favour of his government, unless an individual opinion was appended. Consequently, it is better to only consider those decisions in which the voting behaviour is known.

197 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *supra* note 88; *Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, [1989] ICJ Rep. 15; *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 109; *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 88; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, [1993] ICJ Rep. 38; *Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *case*, Order of 22 September 1995, [1995] ICJ Rep. 288; *LaGrand (Germany v. United States of America)*, *supra* note 700; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment of 27 February 1998, [1998] ICJ Rep. 115; *Oil Platforms (Iran v. United States)*, Preliminary Objections, Judgment of 12 December 1996, [1996] ICJ Rep. 803; *Oil Platforms (Iran v. United States)*, *supra* note 64; *Avena and other Mexican Nationals (Mexico v. United States of America)*, *supra* note 435; *Request of Interpretation of the Judgment of 31 March 2004 in the Case Concerning* Avena and Other Mexican Nationals, *supra* note 194; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 88; *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 1; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Merits, Judgment of 31 March 2014, [2014] ICJ Rep. 226; *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1; *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep 255.

state was part of the bench,[198] in only 2 of these the national judge voted in favour of the state's submissions.[199]

4.2.3 The active and passive participation in the drafting of judgments as a source for the exercise of the right to append dissenting opinions and its relation with the majority judgment

The second difference in the anatomy of both courts is to be found on how its judgments are drafted. This is an interesting aspect that is not moreover limited to these two courts. As has been indicated elsewhere, an examination of the working methods of several international courts and tribunals (the International Court of Justice and Inter-American Court of Human Rights included) shows that they are noted for their diversity.[200] The differences between the ICJ and the IACtHR are but a reflection of those that exist, between all the existing international courts and tribunals in this regard.

In the case of the International Court of Justice and the Inter-American Court of Human Rights the differences in the drafting of their judgments is based on the fact that, since in the composition of the former the representation of the main forms of civilization and of the principal legal systems

198 *Caballero Delgado and Santana v. Colombia*. Preliminary Objections. Judgment of January 21, 1994. Series C No. 17; *Caballero Delgado and Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C No. 22; *El Amparo v. Venezuela*. Reparations and Costs. Judgment of September 14, 1998. Series C No. 28; *Suarez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35; *Benavides Cevallos v. Ecuador*. Merits, Reparations and Costs. Judgment of June 10, 1998. Series C No. 38; *Suarez Rosero v. Ecuador*. Reparations and Costs. Judgment of January 20, 1999. Series C No. 44; *"The Last Temptation of Christ" (Olmedo Bustos et al) v. Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73; *Case of the Caracazo*. Reparations and Costa. Judgment of August 29, 2002. Series C No. 95; *Alfonso Martin del Campo-Dood v. Mexico*. Preliminary Objections. Judgment of September 3, 2004. Series C No. 113; *Huilca-Tecse v. Peru*. Merits, Reparations and Costa. Judgment of March 3, 2005. Series C No. 121; *Gomez-Palomino v. Peru*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136; *Blanco Romero et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of November 28, 2005. Series C No. 138; *Ximenes-Lopez v. Brazil*. Preliminary Objection. Judgment of November 30, 2005. Series C No. 139; *Baldeon-Garcia v. Peru*. Merits, Reparations and Costa. Judgment of April 6, 2006. Series C No. 147; *Ximenes-Lopez v. Brazil*. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149; *Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Preliminary Objecitons, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150; *Claude Reyes at al v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151; *Case of the Dismissed Congressional Employees v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158; *Nogueira de Carvalho et al v. Brazil.* Preliminary Objections. Judgment of 28 November, 2006. Series C No. 161.

199 In consequence, there are only two instances in which a judge of the nationality of the state has voted in favour of its submissions. *Cf. Caballero Delgado and Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C No. 22; *Claude Reyes at al v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151

200 David H. Anderson, 'The Internal Judicial Practice of the International Tribunal for the Law of the Sea', in Patibandla Chandrasekhara Rao & Rahmatullah Khan (eds.) The International Tribunal for the Law of the Sea: Law and Practice (Martinus Nijhoff Publishers 2001), 199, 200.

of the world should be assured,[201] participation should be given to all of its members. In other words, the diversity in the composition should be meaningful. In that sense, it was necessary for the International Court of Justice to implement a method for the drafting of its judgments in which all its members, as representatives of a region of the world and a legal system, should have the possibility to contribute in the decision to be adopted.

In clear contrast, as noted above (section 4.2.1) the majority of member states of the Organization of American States belong to the continental law system. They have therefore adopted a method for the drafting of its judgments (*i.e.* through a judge rapporteur) that is known for all the judges of the Inter-American Court of Human Rights. These aspects explain why, whereas the International Court of Justice has opted for a system in which all judges should circulate a written note, expressing their views on the submission of the parties (before the drafting committee is chosen), in the Inter-American Court of Human Rights there is only one judge writing the opinion in its behalf.

These differences seems to be an important factor for explaining the disparity in the number of occasions in which dissenting opinions, have been appended to judgments of both courts. In other words, these differences are not a mere internal aspect devoid of any relevance whatsoever, with regard to the role and function of dissenting opinions. Certainly, it may also be argued that the method for deliberation and drafting of judgments at the International Court of Justice, instead of contributing to a major number of dissenting opinions, is in fact designed to avoiding individual opinions, considering that it seeks to integrate the views from all the members of the ICJ.[202] In principle, an assertion of this kind holds true. Nonetheless, there is one aspect in the deliberation process of the International Court that explains why, despite it is aimed to obtain unanimous decisions, the number of judgments without dissenting opinions appended shows otherwise.

As explained in detail above (section 3.2.3) after the closure of the oral proceedings, and once the President of the International Court has circulated the list of issues that will be discussed, time is given to each of the judges, for the preparation of a written note in which the judge will be presenting his colleagues the solution to each of the points that will be addressed in the judgment. This is an important aspect since the writing of the note requires of all the information advanced by the parties, in support of their position. The note is therefore a well-reasoned document constituting the product of a conscious and judicial analysis, in which the judge attempts to convince his colleagues that his position should be adopted. The former president of the International Court, Mohammed Bedjaoui, has refer to the process of writing the note, in the following terms,

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201 Statute of the International Court of Justice, (adopted 26 June 1945, entered into force 24 October 1945) 1 U.N.T.S. 993, article 9.

202 *Cf.* Nina H. Jørgensen & Alexander Zahar, 'Deliberation, Dissent, Judgment', in Göran Sluiter *et al* (eds.) *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013), 1151, 1200.

> "This is the moment of truth, a moment spread over several weeks. No stage in a case is so revealing for a Judge as when he finds himself committing to paper the substance of his thought on the opposing contentions, and his proposed solution. I have said that one is never *unus judex* at the Court; but what a Judge is called upon to pen in his 'written note' is, in final analysis, a personal mini-Judgment. Hence, there are notes which, for that very reason, take on maxi-dimensions."[203]

Against this background, the importance attached to the process of writing the note, coupled with the time invested naturally endangers a desire from the judge, to see his thoughts in print.[204] In addition, the fact that all the issues must be addressed by each judge entrenches the position or closes the mind to new thinking, ahead of the oral debate.[205] It is therefore more difficult for a judge to change his position. Consequently, more dissenting opinions are to be expected.

On the other hand, in the case of the Inter-American Court of Human Rights, it is only the judge rapporteur who has the duty to make and in-depth analysis of the submissions, arguments and evidence advanced by each of the parties. No such duty exists for the rest of the members of the Inter-American Court of Human Rights. Moreover, the fact that in practice it cannot be considered as a permanent court is relevant in this regard.[206] In that sense, no much time for deliberations (compared to the International Court of Justice) is available. It is only possible for the members of the Inter-American Court of Human Rights to deliberate, during the regular and special or extraordinary periods of sessions, which is limited to about 14 weeks a year.[207] During these sessions, judges should hold public hearings on on-going cases, decide on requests for provisional measures, hold private hearings for monitoring compliance with judgments and deliberate. In that sense, there is not sometimes enough time for judges to deliberate. This makes that only the most salient aspects of the draft judgment are discussed during deliberations. No reading of the judgment, paragraph by paragraph is possible and in consequence a judge is less likely to dissent.

In addition, it should also be noted that this difference in the in the manner that both courts deliberate and draft their judgments, is not only

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203 Mohammed Bedjaoui, 'The "Manufacture" of Judgments at the International Court of Justice", (1991) 3 *Pace Yearbook of International Law*, 29, 47.

204 Richard B. Lillich & Edward White, 'The Deliberation Process of the International Court of Justice: A Preliminary Critique and some Possible Reforms', (1976) 70 American Journal of International Law, 29, 36 – 37.

205 David H. Anderson, 'Deliberations, Judgments and Separate Opinions in the practice of the International Tribunal for the Law of the Sea', in Myron H. Nordquist et al (eds.) Current Marine Environmental Issues and the International Tribunal for the Law of the Sea (Martinus Nijhoff Publishers 2001), 63, 65.

206 *Cf*. Manuel Ventura Robles, 'La Corte Interamericana de Derechos Humanos: La necesidad inmediata de convertirse en un tribunal permanente', (2005) 6 *Revista do Instituto Brasileiro de Direitos Humanos*, 141.

207 Alexandra Huneeus & Mikael Rask Madsen, 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European and African Human Rights Systems', (2017) *iCourts Working Paper Series No. 96* 1, 23.

relevant for the purposes of explaining why more dissenting opinions are appended in the International Court of Justice. The difference also informs the exercise of the right to append dissenting opinions.

At the ICJ, in order to achieve unanimity or the amplest majority of judges in favour of the judgment, judges (especially the drafting committee and other judges in agreement with its position) have to bargain hard over its discursive normative component,[208] in view of the different judicial views expressed by each of the judges. The judgment therefore constitutes the lowest common denominator;[209] consequently, the reasoning is less candid and sometimes lacks candour and transparency.[210] In this kind of situations, the critic contained in the dissenting opinion refers to the fact that the majority has either omitted or not clearly explained why a certain aspect should not be analysed. A clear example of this aspect is for instance to be found, in one of the most recent judgments rendered by the International Court, namely, the preliminary objections decision in *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*.

In this case, one of the arguments advanced by Colombia to demonstrate that the International Court had already decided Nicaragua's claim to a continental shelf beyond 200 nautical miles, on its merits, was the fact that in the 2012 judgment in the *Territorial and Maritime Dispute*, the International Court concluded that since Nicaragua did not establish that it has a continental margin that extends far enough to overlap with Colombia's continental shelf;[211] in consequence, Nicaragua's submission could not be upheld.[212] In fact, Colombia built an argument in order to show how, in its case-law the International Court has always used the term "uphold", when deciding on the merits of a claim.[213]

With regard to this argument, as well as to Nicaragua's reply to it, the majority of the International Court limited itself to indicate in the judgment that, "is not, however, persuaded that the use of that formula [cannot uphold] leads to the conclusion suggested by Nicaragua. Nor is the Court convinced by Colombia's argument that "cannot uphold" automatically equates to a rejection by the Court of the merits of a claim."[214]

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208 Ian Scobbie, 'Smoke, Mirrors and Killer Whales: The International Court's Opinion in the Israeli Barrier Wall', (2004) 9 *German Law Journal*, 1107.

209 Manfred Lachs, 'Le juge international à visage découvert (Les opinions et le vote)', in 2 *Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muela* (Tecnos 1979), 939, 949; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, [2008] ICJ Rep. 12, (Dissenting Opinion, Judge *ad hoc* Dugard), p. 133, para. 2.

210 Ian Scobbie, *supra* note 208, 1113.

211 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 176, p. 669, para. 129.

212 Ibid, at p. 670, para. 131.

213 *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Public sitting held on Wednesday 7 October, 2015, pp. 18 – 20.

214 *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *supra* note 88, p. 129, para. 74.

The majority of the dissenting judges, who moreover appended a joint dissenting opinion, referred to this part of the majority decision and noted that,

> "[t]he consistent use of the phrase 'cannot uphold' demonstrates that the Court rejected Nicaragua's request to delimit purportedly overlapping extended continental shelf entitlements in the 2012 Judgment. The majority states in the present Judgment that, as it was not persuaded by Nicaragua's and Colombia's interpretation of the phrase 'cannot uphold', it will not 'linger over the meaning of the phrase 'cannot uphold'' (Judgment, para. 74). Yet the majority gives no clear indication as to why it rejects the Parties' interpretations; moreover, it does not examine the meaning and scope of the phrase. Since, according the Court's jurisprudence, *res judicata* attaches to the *dispositiff*, it is beyond comprehension why the majority chooses not to 'linger' over the meaning of 'cannot uphold'".[215]

On the other hand, there is no doubt that in the case of the IACtHR, dissenting opinions may also amount to a direct critic of the majority reasoning. Nonetheless, the manner in which the said critic is couched differs, since in the case of the Inter-American Court of Human Rights the content of majority judgment does not constitute the lowest common denominator of agreement between its members. Compared to the International Court of Justice, judges do not have to bargain hard over the discursive normative component of the judgment. The common denominator of agreement is to be found in the human rights that the IACtHR will declare as being violated in the case at hand and the reasons that sustain the said violations. Hence, the dissenting opinion is not drafted as a critic of the majority reasoning, in the sense of criticising the majority for either omitting or not clearly explaining why a certain aspect should not be analysed. The critic contained in the dissenting opinion relates to the merits of the majority reasoning as a whole. Two recent dissenting opinions appended by judge Sierra Porto are relevant in exemplifying this aspect.

In the case of *Galindo Cárdenas et al v. Peru*, judge Sierra Porto disagreed from the majority in concluding that the state was responsible for the violation of the rights to personal integrity, fair trial and judicial protection. For this judge, the way in which the majority judgment assessed the evidence was insufficient to conclude as to the violation of the above mentioned rights. The Inter-American Court of Human Rights argued that in view of the nature of the facts and the context in which they took place (*i.e.* the fight against terrorism) evidence was limited. Based on the said circumstances, the majority concluded that an affectation to the physic and moral integrity

215 Ibid, (Joint Dissenting Opinion, Judges Yusuf, Cançado Trindade, Xue, Gaja, Bhandari, Robinson and judge *ad hoc* Brower), pp. 146 – 147, para. 16.

of the victim took place.[216] Judge Sierra Porto therefore explained why the reasons contained in the majority judgment could not sustain the use of the available evidence, in order to conclude that the rights to personal integrity, fair trial and judicial protection were violated. [217] Further, in the also recent case of *Lagos del Campo v. Peru*, judge Sierra Porto appended a dissenting opinion to express his disagreement, with regard to the majority decision to declare a violation of article 26 of the American Convention.[218] Concretely, in his opinion he addresses the general arguments against the justiciability of economic, social and cultural rights based on article 26 of the ACHR, the impertinence of a reference to the said article in the context of the case at hand and the flaws in the reasons provided by the majority in its judgment.[219]

In sum, the examples provided above it can be appreciated that, the method for the drafting of a judgment informs the exercise of the right to append dissenting opinions, with respect to its content.

4.2.4 The scope and publicity of individual opinions in relation to the exercise of the right to append dissents

The governing instruments of the International Court of Justice and the Inter-American Court of Human Rights are both, similar and different in some aspects regarding the question of the publicity and scope of dissenting opinions.

With respect to the aspect of publicity, the governing instruments stipulate that the possibility for judges to append a dissenting opinion is a right. Consequently, it is not mandatory for a judge voting against the majority decision, to append a dissenting opinion. The practice from both courts shows that despite this similarity, whereas the judges from the Inter-American Court of Human Rights always exercise their right to append a dissenting opinion, the judges of the International Court of Justice do not always exercise this right. Two instances are worth mentioning to exemplify this point. The first one concerns judge Simma, who according to the *dispositif* voted against the majority judgment that rejected the application from Costa Rica for permission to intervene (as non-party) in the *Territorial*

216 *Galindo Cardenas and others v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 2, 2015. Series C No. 30, paras. 244 – 246.

217 See, *e.g.*, Ibid, (Dissenting Opinion, Judge Sierra Porto).

218 *Lagos del Campo v. Peru.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340, paras. 141 – 154.

219 Ibid, (Dissenting Opinion, Judge Sierra Porto).

and Maritime Dispute (Nicaragua v. Colombia).[220] From the seven judges who voted against this decision, Simma was the only judge who did not append any individual opinion expressing his views as to why he could not agree with the majority of the International Court of Justice.[221] Similarly, in the most recent judgment of the ICJ, the decision on preliminary objections in the case concerning *Certain Iranian Assets* between Iran and the United States, four judges voted against the decision to uphold the second preliminary objection to the ICJ's jurisdiction raised by the United States. From these judges, judge Bhandari was the only one who did not append any individual opinion in order to explain why he voted against this operative subparagraph.[222]

On the other hand, the aspect of the scope of the dissenting opinion is different at the International Court of Justice and the Inter-American Court of Human Rights. As already noted (section 3.2.4 above), whereas the governing instruments of the International Court of Justice are silent on this aspect, since 2000 the Rules of the Inter-American Court of Human Rights are clear in indicating that any individual opinion to be appended to a judgment, shall only refer to the issues covered in the majority judgment.

This difference is important as it has led the judges of the International Court of Justice to address the aspect of the scope of their opinions in the dissenting opinions themselves. In this regard, reference is to be made of the individual opinions appended by some members of the ICJ in the controversial decision of the *South-West Africa* cases, as well as to the declarations that the former president Zafrulla Kahn and judge Gros appended to the

220 Andrés Sarmiento Lamus, 'La Corte Internacional de Justicia y la intervención de terceros en cuestiones marítimas: a propósito de la decisión en las solicitudes de intervención de Costa Rica y Honduras en la Controversia Territorial y Marítima (Nicaragua vs. Colombia)', (2012) 5 *Colombian Yearbook of International Law*, 123.

221 In this specific case, one may argue that judge Simma's decision is related to the fact that the International Court of Justice was also seised of a request for permission to intervene from Greece, in the case concerning *Jurisdictional Immunities of the State*. The ICJ's decision in the said case was rendered two months after its decision concerning the request from Costa Rica. Since the applicant state in the proceedings was Germany (the state of his nationality), it is possible to infer that, he did not seem appropriate to express his views as to his disagreement in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.

222 In this specific case, one may argue that judge Bhandari's decision is related to the fact that he voted in favour of some operative subparagraphs that run counter to the position argued by the state of his nationality in the case at hand (India). In consequence, should judge Bhandari had decided to append an individual opinion, he would have been forced to also explain why he agreed with the majority of the International Court of Justice.

preliminary objections decision in *Fisheries Jurisdiction*[223] and *Aegean Sea Continental Shelf*, respectively.

In the *South-West Africa* cases, the president of the International Court of Justice, Sir Percy Spender, appended a declaration in which he sought to indicate the scope of the right vested upon the judges to deliver an individual opinion, as consecrated in article 57 of the Statute of the ICJ. The reason for addressing this issue was based on the fact that some of the judges voting with the minority attempted (and ultimately did so), to refer to the submissions of the applicant states on the merits, whereas the majority limited the analysis of its judgment to the answer the question whether the applicants have any legal right or interest in the subject-matter of the claims.[224] Accordingly, and after referring to the history of the right to append dissenting opinions in international adjudication, Sir Percy Spender concluded that,

> "The contemplated purpose of the publication of the dissent, certainly its main purpose, was to enable the view of the dissenting judge or judges on particular questions of law dealt with in the Court's judgment to be seen side by side with the views of the Court on these questions."[225]

In consequence, for Sir Percy Spender the dissenting opinions should be connected and is therefore dependent of the majority judgment; a dissent should not therefore deal with issues that were not addressed by the International Court of Justice.[226] Hence, the dissenting judges in the decision of the second phase of the *South-West Africa* cases were only allowed to refer to the questions on the merits addressed by the ICJ, *i.e.* those that have and antecedent and more fundamental character and that moreover render a decision on the ultimate merits unnecessary.[227]

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223 *Fisheries Jurisdiction (Germany v. Iceland)*, *supra* note 1. An additional instance that can be mentioned in this regard is the *Nuclear Tests* cases. All the dissenting judges in these cases (i.e. Onyeama, Dillard, Jiménez de Arechaga, Waldock, de Castro and judge *ad hoc* Barwick) analysed the aspects on jurisdiction and admissibility of the applications, although the Court's judgment focused on the question whether the object of the applicants' claim is devoid of any purpose. In that regard, judge de Castro, by referring to the declaration of Percy Spender in *South-West Africa* cases noted that, even though this judge "endeavoured to narrow the scope of the questions with which the judges might deal in their opinions... in the present case, it does not seem to me that the question of jurisdiction and admissibility fall outside the range of the Court's decision." *Cf. Nuclear Tests case (Australia v. France)*, *supra* note 1, (Dissenting Opinion, Judge de Castro), pp. 375 – 376, fn. 1. Nonetheless, this is an instance that can be distinguished from the *South-West Africa* and *Fisheries Jurisdiction*, since no judge opposed to the decision from the dissenting judges to deal with issues not addressed by the International Court of Justice in its majority decision.

224 *South-West Africa Cases*, (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, (Declaration, President Spender), pp. 50 – 51, paras. 1 – 2.

225 Ibid, (Declaration, President Spender), p. 53, para. 12.

226 Ibid, (Declaration, President Spender), p. 55, para. 22.

227 Ibid, (Declaration, President Spender), p. 56, para. 30.

On the other hand, judge Tanaka presented a different position in the dissenting opinion that he appended to the same judgment. For him the opinion from the dissenting judges should not be limited to the aspects addressed in the majority opinion judgment. Dissenting judges are therefore allowed to express their views on the rest of the submissions on the merits advanced by the applicant states, based on the hypothesis that their contention (on what the majority decided) is well-founded.[228]

As for the *Fisheries Jurisdiction* cases, the sole dissenting judge in both judgments, Padilla Nervo, focuses on demonstrating the existence of a right for states to extent their fisheries zone over waters covering their continental shelves. Based on this fact, he believes (contrary to the majority reasoning) that the exchange of notes allowing states to have recourse to the International Court of Justice has elapsed by means of a fundamental change of circumstances. Since the issue that judge Padilla Nervo addressed in his opinion, concerning the existence of a fisheries zone beyond 12 nautical miles could be considered as belonging to the merits phase, President Zafrulla Kahn indicated in his declaration that,

> "[t]he sole question before the Court in this phase of this proceedings is whether, in view of the compromisory clause in the Exchange of Notes of 11 March 1961 between the Government of the United Kingdom and the Government of Iceland, read with Article 36(1) of its Statute, the Court is competent to pronounce upon the validity of the unilateral extension by Iceland of its exclusive fisheries jurisdiction from 12 to 50 nautical milles... All considerations tending to support or to discount the validity of Iceland's actions are, at this stage, utterly irrelevant. To call any such consideration into aid for the purpose of determining the scope of the Court's jurisdiction, would not only beg the question but would put the proverbial cart before the horse with a vengeance and is to be strongly deprecated."[229]

Lastly, in the case concerning *Aegean Sea Continental Shelf*, the International Court based its decision to decline jurisdiction, on two grounds. On the one hand, that the Brussels Communiqué of 1975 required the joint submission of the dispute. On the other hand, that the reservation made by Greece on acceding to the General Act for the Pacific Settlement of International Disputes, would impede it for establishing the ICJ's jurisdiction. In that sense, the International Court omitted referring to the argument advanced by Turkey, and according to which the General Act for the Pacific Settlement of Disputes. In this regard, judge Gros explained that he agreed with the conclusion but based on a different ground, namely, that the General Act for the Pacific Settlement of Disputes is not a convention in force. However,

228 Ibid, (Dissenting Opinion, Judge Tanaka), p. 262.

229 *Fisheries Jurisdiction (Germany v. Iceland)*, *supra* note 1, (Declaration, President Zafrulla Kahn), pp. 22 – 23.

> "by the effect of Article 57 of the Statute I could, in principle, make known my own reasons, but the particular character of the present Judgment appears to forbid this in my view. It is generally recognized that judges' individual opinions, whether separate or dissenting, should be written in correlation to the actual contents of the Judgment, and not deal with any topics extraneous to the decision and its reasoning. It so happens that, whereas my opinion is based on another reasoning, explaining it would involve reference to instruments and grounds not dealt with in the Judgment; this would be doubly unfortunate inasmuch as the Court seems to view the resumption of the case through fresh proceedings as a possibility (para. 108). Any comment on my part, then, would be deprived of judicial character, since it would touch upon matters with which the Court has decided not to deal."[230]

All these instances are relevant to prove that in the case of International Court of Justice, the scope of a dissenting opinion is not settled. In consequence, it is at the discretion of the judge to decided what aspects she or he will address in the dissenting opinion. This aspect can be explained in the light of three dissenting opinions appended in the *South-West Africa*, *East Timor* and *Certain Property* cases. In the first two cases, the International Court of Justice rendered its judgment on the merits but decided to be without jurisdiction to adjudicate on the dispute submitted to it. In the *South West-Africa* cases, judge Tanaka examined *in extenso* the merits of the dispute, after considering that the application involved a legal interest from the applicant states.[231] Similarly, in the *East Timor* case judge Weeramantry addressed in his dissenting opinion aspects related to the merits of the dispute such as, the obligations of Australia in relation of the rights of East Timor, the general duties of all states regarding the right to self-determination, Australia's duties regarding the right to self-determination *vis-á-vis* East Timor and whether Australia was in breach of its international obligations contained in the Timor Gap Treaty. Judge Weeramantry addressed these aspects, by taking advantage of the fact that the parties agreed that jurisdiction and admissibility should be joined to the merits.[232] Lastly, in the *Certain Property* case, judge Kooijmans noted in his dissenting opinion that he will

> "try to confine strictly to what [he] consider to be the preliminary issues. Whatever [his] views on the validity of Liechtenstein's claims may be, they are not relevant to the present stage of the proceedings. Since the case will not reach the merits phase, [he] will refrain from any comments in that respect."[233]

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230 *Aegean Sea Continental Shelf (Greece v. Turkey)*, *supra* note 81, (Declaration, Judge Gros), p. 49.

231 *South-West Africa Cases*, *supra* note 224, (Dissenting Opinion, Judge Tanaka), pp. 263 – 324.

232 *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep 90, (Dissenting Opinion, Judge Weeramantry), p. 90.

233 *Certain Property (Liechtenstein v. Germany)*, *supra* note 185, (Dissenting Opinion, Judge Kooijmans), p. 29, para. 2.

These three instances demonstrate that it is the dissenting judge who decides on the scope of her or his opinion. Nonetheless, these instances also prove that the judge is not at complete liberty to address any aspect whatsoever. One limit exists in this regard, namely, the phase of the proceedings that the International Court of Justice is studying. Whereas in the *Certain Property* case the ICJ was only examining the preliminary objections advanced by the respondent state, in the *South-West Africa* and the *East Timor* cases the ICJ was already examining the merits of the dispute.

Further, despite the fact that since 2000 the rules of procedure the Inter-American of Human Rights clearly settle the aspect of the scope of dissents, it is worth nothing that before the said amendment of the rule, judges were also at liberty to refer to aspects not address in the majority judgment. Two individual opinions appended by judge Cançado Trindade in the cases of *Caballero Delgado and Santana*[234] and *Blake*,[235] where the IACtHR was exclusively addressing the reparations and costs to be awarded to the victims (as the merits were already decided in a separate judgment), are useful in exemplifying this aspect. Moreover, they can possibly constitute the reason behind the decision from the Inter-American Court of Human Rights to amendment article 55 of its rules of procedure.

In the *Caballero Delgado and Santana* case, judge Cançado Trindade dissented from the majority decision that declare non-pecuniary reparations inadmissible, which concerned a reform to Colombia's legislation on the remedy of *habeas corpus* and the codification of the crime of forced disappearance of persons. The Inter-American Court of Human Rights declared the request inadmissible since in its previous judgment on the merits of the case, it did not find a violation of article 2 of the American Convention. In his dissenting opinion, judge Cançado Trindade analysed two aspects, namely, the content of article 1 of the ACHR and the relationship between the obligations contained in the said provision and the obligation of article 2 concerning the adoption of the legislative and other measures necessary to give effect, to the rights contained in the American Convention. He sought to demonstrate that even when the latter provision has not been violated a state has a duty to amend its internal laws.

As for the *Blake* judgment, judge Cançado Trindade addressed in his separate opinion the reservations made to the acceptance of the IACtHR's contentious jurisdiction, in relation to its jurisdiction *ratione temporis*. His purpose in the said opinion (as it can be deduced from its content) was to draw attention to the existing tension between the law of treaties and international human rights law on the subject of reservations. He therefore sought to advocate for the impermissibility of these reservations in the light

234 *Caballero Delgado y Santana v. Colombia*, *supra* note 172, (Dissenting Opinion, Judge Cançado Trindade).

235 *Blake v. Guatemala*. Reparations and Costs. Judgment of January 22, 1999. Series C, No. 48, (Separate Opinion, Judge Cançado Trindade).

of the object and purpose of human rights treaties,[236] as well as he proposed a system of objective determination of compatibility of reservations for human rights treaties, in order to regulate adequately the legal relations, not only at the inter-state level.[237]

As noted above, in *Caballero Delgado and Santana* and *Blake* the Inter-American Court of Human Rights was only addressing the reparations and costs to be determined, based on the violations of the ACHR that it found in its decisions on the merits of both cases. Hence, it was expected that any judge appending an individual opinion should limit the views contained therein to aspects related to the reparations and costs phase. In his dissenting and separate opinions in *Caballero Delgado and Santana* and *Blake*, respectively, judge Cançado Trindade seemed to have referred to aspects that the IACtHR did not addressed in this stage of the proceedings. In addition, he also addressed aspects already decided by the Inter-American Court of Human Rights in its judgments on the preliminary objections and merits.

In view of all the above, it can be concluded that no difference arises in the exercise of the right to append dissenting opinions, despite the scope of dissents is not regulated at the International Court of Justice and it is regulated in the case of the Inter-American Court of Human Rights. In that sense, the instances from the latter where a judge has referred to aspects that did not correspond to the phase of the proceedings under analysis, constitute an exception. This situation has moreover not taken place since year 2000, as the IACtHR amended in the rules of procedure adopted that year, the provision concerning preliminary objections in order to indicate that the preliminary objections, merits and reparations and costs of a case, may be decided in a single judgment.

236 Ibid, paras. 12 – 19.
237 Ibid, para. 28.

Conclusions

This dissertation has addressed the right for judges to append dissenting opinions, in the light of the phenomenon of the judicialization of international relations and the subsequent proliferation of international courts and tribunals. This phenomenon has turned the plurality of judicial bodies into a constant feature of the international legal order,[1] in which each of the international courts and tribunals has been created for specific purposes. Consequently, the mandate, jurisdictional and institutional design of each of them is different, even when some similarities may exist. [2] In the light of these differences, this dissertation sought to analyse whether these differences can and do influence the exercise of the right to append dissenting opinions to the judgments of the International Court of Justice and the Inter-American Court of Human Rights.

This conclusion offers some concrete answers to the research questions that have guided the research aim of this dissertation. It will also offer some broader reflections as to the place of dissenting opinions in the international legal order.

– The difference in mandate, jurisdictional and institutional design of the ICJ and the IACtHR and its relation with the exercise of the right to append dissenting opinions

The exercise of the right for judges to append dissenting opinions, as well as its roles and functions find its roots in municipal law. In that sense, municipal law amounts to an indication of policy and principles that inform the determination of the roles and functions of dissenting opinions in international adjudication in general. In view of the differences between municipal and international law, however, the former constitutes a relevant

1 Laurence Boisson de Chazournes, 'Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach', (2017) 28 *European Journal of International Law*, 1, 13.

2 It is noted for instance, that in the case of the International Court and the International Tribunal for the Law of the Sea and despite their similarities, important differences exist between both judicial institutions. *Cf.* Carl-August Fleischhauer, 'The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg', (1997) 1 *Max Planck Yearbook of United Nations Law*, 327. See also, Thomas A. Mensah, 'Provisional Measures in the International Tribunal for the Law of the Sea', (2002) 62 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*, 44.

indication of policy and principles, to the extent that it does not contradict the structure of international law. In municipal law, dissenting opinions are important in several respects. They are one of the means for judges to manifest their impartiality and independence. Moreover, it is in the light of the views express in a dissent, that the authority of a judgment can be determined. Finally, it constitutes the voice of the future. Hence, it contributes to the development of the law by means of either constituting the basis for a subsequent change in the law or limiting the applicability of the judgment to the specific facts of the case at hand.

Secondly, from a historical perspective, the introduction of the right for judges to append dissenting opinions in international adjudication, as well as its roles and functions was envisaged, in the light of the experience and importance of dissenting opinions in municipal law. In addition, all the international courts and tribunals that were created after the International Court of Justice introduced the right for judges to append dissenting opinions, through emulation, *i.e.* by considering the experience and reasons for allowing dissenting opinions at the ICJ and its predecessor. Nonetheless, the said emulation does not mean that the right to append dissenting opinions is exactly the same in all international courts and tribunals; differences exist in the exercise of this right. One of the reason that explain the existence of these differences, is the fact that one of the aspects that states take into account on the creation of an international court or tribunal is the core value that they seek to maximise[3]. Dissenting opinions should not contradict the said core value and must therefore be adjusted (in their design and structure) to what is required by the value to be protected. This aspect explains why at some international courts and tribunals their members are for instance allowed to append anonymous dissenting opinions, while in others their scope limited, through its rules of procedure, to the aspects addressed in the majority judgment.

Thirdly, the mandate, jurisdictional and institutional design of an international court or tribunal is also important for explaining why differences exist in the exercise of the right to append dissenting opinions. In the case of the two courts that constituted the cases of study of this dissertation, the first and perhaps most important of these aspects is their judicial function. The judge is but a part of a multi-member institution, whose decisions are taken in a collegial basis.[4] Hence, her or his duty is to contribute to the collective work of the international court or tribunal he belongs to; in consequence, her or his work should be directed to contribute to the response to the judicial matters under analysis in the case at hand.[5] It is in view of the

3 Jeffrey L. Dunoff & Mark A. Pollack, *'The Judicial Trilemma'*, (2017) 111 American Journal of International Law, 225..

4 *Cf*. Hemi Mistri, 'The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals', in Joanna Nicholson (ed.) *Strengthening the Validity of International Criminal Tribunals* (Martinus Nijhoff Publishers 2017), 201, 202 – 209.

5 Rosalyn Higgins, 2 Themes & Theories: Selected Essays, Speeches, and Writings in International Law (Oxford University Press 2009), 1039.

said collegial responsibility, that dissenting (and other individual) opinions in general are a by-product of the judgment or advisory opinion, adopted by majority or the unanimous[6] decision of the court. In that sense, any disagreement expressed by a judge in his opinion should (in principle) be related to the exercise of mandate, jurisdictional and institutional design of the international court or tribunal in the case at hand. The function of a dissenting opinion is therefore dependent on the mandate, jurisdictional and institutional design of the specific court.

In this regard, the International Court of Justice was created for the settlement of disputes[7] and to provide assistance to the organ or specialised agency requesting an advisory opinion. For its part, the Inter-American Court of Human Rights was created (even in the case of its advisory jurisdiction) for the purpose of contributing to the protection of human rights in the Americas. In this order of ideas, the function of the dissenting opinions at the ICJ is connected to the settlement of disputes or the assistance to the organ or specialised agency in the fulfilment of its functions, whereas in the case of the IACtHR it is related to the protection of human rights in the Americas. This difference is interesting considering that the settlement of disputes is nowadays at the core of the mandate of just a minority of the current adjudicative bodies.[8] It can therefore even be concluded that the settlement of disputes, as a function that informs the exercise of the right to append dissenting opinions, is present at a minority of international courts and tribunals.

In the case of the differences on the function of dissenting opinions concerning the development of the law, the position of the International Court of Justice and the Inter-American Court of Human Rights, as well as the jurisdiction *ratione materiae*, are relevant to explain why and how this function is different. The International Court of Justice is open to all states and nearly any kind of disputes can be submitted to it. This fact, coupled with others such as being the principal judicial organ of the United Nations and the oldest permanent judicial institution, turns it into the guardian of general international law. [9] These facts give the International Court of Justice and its dissenting opinions a special and more recurrent place with regard to the development of the law. In contrast, the Inter-American Court

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6 As explained in the main introduction to this dissertation, the concept of dissenting opinions is based on its content and not how the judge has designated it. In consequence, dissenting opinions are not only to be found in majority judgments. Even in unanimous decisions it is possible to speak of dissenting opinions, depending on its content and notwithstanding the judge's vote in the operative part of the judgment.

7 Pierre-Marie Dupuy, 'Recourse to the International Court of Justice for the purpose of Settling a Dispute', in Laurence Boisson de Chazournes *et al* (eds.) *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers 2013) 59, 64.

8 Cesare Romano *et al*, 'Mapping International Adjudicative Bodies', in Cesare Romano *et al* (eds.) *The Oxford Handbook of International Adjudication* (Oxford University Press 2014), 1, 6.

9 Jorge E. Viñuales, 'The Contribution of the International Court of Justice to the Development of International Environmental Law: A Contemporary Assessment', 32 *Fordham International Law Journal* (2008), 232, 258.

of Human Rights is regional judicial institution, entrusted with a specific mandate in relation to a specific parcel of international law.

Further, the composition and the drafting of judgments are relevant in informing the exercise of the right to append dissenting opinions. In other words, the place or part that dissenting opinions play in relation with the composition and drafting of judgments of the International Court of Justice and the Inter-American Court of Human Rights, is different. In fact, it is in view of the heterogeneity in the composition of the bench and the active participation from all members of the ICJ in the drafting of judgments, that dissenting opinions are but a natural consequence of the active participation from all judges in the drafting of the judgment, as well as they are the result of the diversity in the backgrounds and legal education from the members of the International Court. For its part, the homogeneity in the bench of the IACtHR and its method for the drafting of judgments, place its dissenting opinions in a different level. Their role is not related to the fact that different legal systems are represented in the court.

Fourthly, it is interesting to note that, the differences in mandate, jurisdictional and institutional design, do not have an incidence in the role and function of the dissenting opinions from *ad hoc* judges. Even when the differences between other members of an international court or tribunal and a judge *ad hoc* are more formal than material,[10] it is in fact a formal difference (*i.e.* the source of their appointment) which determines the role and function of their dissents.

– The proliferation of dissenting opinions as a phenomenon for subsequent analysis

The existing analyses on the exercise of the right to append dissenting opinions have mainly been limited to four aspects.[11] Looking to new aspects to be analysed, the phenomenon on the proliferation of dissenting opinions opens up the possibility to new aspects for analysis concerning the exercise of the right to append dissenting opinions.

The analysis made in this dissertation with regard the proliferation of dissenting opinions, based on the two international courts and tribunals that constituted the case study, leads to the conclusion that the mandate, jurisdictional and institutional design among international courts and tribunals, are important in explaining the differences in the exercise of the right to append dissenting opinions. Based on this conclusion, a new aspect for analysis emerges from the proliferation of dissenting opinions, namely, the differences in the exercise of the right to append dissenting opinions in international courts and tribunals. This aspect allows for an

10 Andrés Sarmiento Lamus & Walter Arévalo Ramírez, 'Non-appearance before the International Court of Justice and the Role and Function of Judges ad hoc', (2017) 16 The Law and Practice of International Courts and Tribunals, 398..

11 See, pp. 15 – 16.

analysis from various angles and levels. These angles are the mandate, jurisdictional and institutional design of international courts and tribunals. For its part, the levels refer to the position of the international courts and tribunals that may be the subject of analysis. Taking account of these angles and levels, an analysis as to the differences in the exercise of the right to append dissenting opinions can even be made among international courts and tribunals pertaining to the same family and genus[12] (*e.g.* regional international human rights courts), with a view for instance to trying to explain why judges (and their dissents) are considered as belonging to different planets despite adjudicating on the same (or connected) issues.[13]

– The place of dissenting opinions in the international legal order

Morgan-Foster *et al* have recently noted with regard to ICJ decisions, that "it is the attention that scholars give to a particular decision that makes it a 'landmark' from a doctrinal point of view".[14] In the case of the exercise of the right to append dissenting opinions, a somewhat similar situation occurs. The place of dissenting opinions in the international legal order has been limited to the attention that particular judges and their dissenting opinions have attracted from a practical or doctrinal point of view.

In consequence, the place of the exercise of the right to append dissenting opinions in the international legal order has been limited to two aspects. First, they are considered as mere personal choice, in which the personality, background and beliefs of the judge plays a central role in her or his decision to exercise such right.[15] Hence, dissenting opinions are considered as mere personal statements constituting a "safety-valve" that allows a judge to freely express her or his views on the case submitted to the court or tribunal.[16] Consequently, the name of "heroic" or "great" dissenter has been reserved to judges that are recurrent in voicing her or his

12 *Cf.* Cesare Romano, 'A Taxonomy of International Rule of Law Institutions', (2012) 2 Journal of International Dispute Settlement, 241, 244.

13 Joost Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators are from Venus' (2015) 109 *American Journal of International Law*, 761.

14 Jason Morgan-Foster *et al*, 'The International Court of Justice in the *Leiden* Journal: A Retrospective', (2017,) 30 *Leiden Journal of International Law*, 571,574.

15 *Cf.* John Dugard, 'The Nuclear Tests Cases and South West Africa Cases: Some Realism about the International Judicial Decision', (1976) 16 *Virginia Journal of International Law*, 463, 492; John G. Merrills, 'Images and Models in the World Court: The Individual Opinions in the North Sea Continental Shelf Cases', (1978) 41 *Modern Law Review*, 638.

16 Judge Weeramantry for instance noted in his dissenting opinion appended to the advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* that "[i]f this dissent sets out my views in some depth and detail, it is because no less is necessary on an issue of this magnitude. An important feature of the tradition of judicial responsibility is that the judge 'will not hesitate to speak frankly and plainly on the great issues coming before them'". *Cf. Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 66, (Dissenting Opinion, Judge Weeramantry), p. 170.

disagreement, based on her or his understanding of the law, and their views moreover attract the support of others.[17] Second, references to dissenting opinions are limited to those appended in cases considered as important.[18]

The phenomenon regarding the proliferation of dissenting opinions,[19] as well as the answers to the research questions that have guided the research aim of this dissertation, are an important indication that the place of the right to append dissenting opinions in the international legal order is not limited to considering them a mere individual statements that are occasionally relevant. In this sense, dissenting opinions are also important for the parties to the dispute brought before the international court or tribunal, since they sometimes refer to aspects not addressed in the majority judgment and which the parties may consider as relevant in order to settle their dispute. Similarly, they amount to a driving force that strongly influences the majority to draft a sounder and stronger judgment; in that sense both, the drafting process and its final result (*i.e.* the majority judgment) are enhanced by the views expressed by the dissenting judges. In addition, the dissenting opinion, as well as any other individual opinion, is important for understanding and analysing the majority judgment. Consequently, the majority decision cannot be analysed in its full juridical perspective, unless, considered in the context of the individual opinions appended to it.[20]

In sum, in order to ascertain the current and real place of the right to append dissenting opinions in the international legal order, account should also be taken of the fact that they contribute to furthering the institutional goals of the judiciary.[21] They are important from the institutional level and not only for the case at hand. Ultimately, the utility of dissenting opinions is not to be exclusively found in the development of the law and their importance should not be limited to some dissents.

17 See, *e.g.*, Duncan French, 'The Heroic Undertaking? The Separate and Dissenting Opinions of Judge Weeramantry during his time on the bench of the International Court of Justice', (2004) 11 *Asian Yearbook of International Law*, 35; Andrew Lynch, 'The Intelligence of a Future Day: The Vindication of Constitutional Dissent in the High Court Australia – 1981-2003', (2007) 29 Sydney Law Review, 195; Liliana Obregon, 'Noted for Dissent: The International Life of Alejandro Alvarez', (2006) 19 Leiden Journal of International Law, 983.

18 Walter Stager, 'Dissenting Opinions. Their Purpose and Results', (1925) 11 *The Virginia Law Register*, 395, 397.

19 See, introduction.

20 Robert Y. Jennings, 'The Collegiate Responsibility and Authority of the International Court of Justice', in Yoram Dinstein (ed.) *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Leiden: Martinus Nijhoff 1989), 343, 351.

21 Hunter Smith, *'Personal and Offi cial Authority: Turn-ofthe- Century Lawyers and the Dissenting Opinion'*, (2012) 24 Yale Journal of Law & the Humanities, 507, 531.

Annex 1: List of Judges of the International Court of Justice

Judge	Nationality	Term	Dissents
Rony Abraham	France	2005 – xxxx	4
Roberto Ago	Italy	1979 – 1995	2
Andres Aguilar	Venezuela	1991 – 1995	
Prince A. Ajibola	Nigeria	1959 – 1964	
Ricardo Alfaro	Panama	1959 – 1964	
Awn Al-Khasawneh	Jordan	2000 – 2011	7
Alejandro Álvarez	Chile	1946 – 1959	6
Fouad Ammoun	Lebanon	1965 – 1976	2
Enrique Armand-Ugon	Uruguay	1952 – 1961	5
Jose Philadelpho de Barros e Azevedo	Brazil	1946 – 1951	5
Abdel Badawi P.	Egypt	1946 – 1965	9
Jules Basdevant	France	1946 – 1964	7
Richard Baxter	United States	1979 – 1980	
Mohamed Bedjaoui	Algeria	1982 – 2001	2
Cesar Bengzon	Philippines	1967 – 1976	
Mohamed Bennouna	Morocco	2006 – xxxx	10
Davel Bhandari	India	2012 – xxxx	2
Thomas Buergenthal	United States	2000 – 2010	3
Jose Bustamante	Peru	1961 – 1970	3
Antonio A. Cançado Trindade	Brazil	2009 – xxxx	7
Levi F. Carneiro	Brazil	1951 – 1955	4
Federico de Castro	Spain	1970 – 1979	5
James Richard Crawford	Australia	2015 – xxxx	4
Roberto Cordova	Mexican	1955 – 1964	2
Charles de Visscher	Belgium	1949 – 1952	1
Hardy C. Dillard	United States	1970 – 1979	2
Joan Donoghue	United States	2010 – xxxx	4
Nabil Elaraby	Egypt	2001 – 2006	2
Abdullah El-Erian	Egypt	1979 – 1981	
Taslim O. Elias	Nigeria	1976 – 1991	

Judge	Nationality	Term	Dissents
Abdallah F. El-Khani	Syria	1981 – 1985	1
Jens Evensen	Norway	1985 – 1994	1
Isidro Fabela	Mexico	1946 – 1952	
Luigi Ferrari Bravo	Italy	1995 – 1997	
Sir Gerald Fitzmaurice	England	1960 – 1973	2
Carl-August Fleischhauer	Germany	1994 – 2003	2
Isaac Forster	Senegal	1964 – 1982	1
Giorgio Gaja	Italy	2012 – xxxx	3
Kirill Gevorgian	Russia	2015 – xxxx	2
Sergei A. Golunski	Russia	1952 – 1953	
Christopher Greenwood	England	2009 – 2018	1
Andre Grós	France	1964 – 1984	6
Jose A. Guerrero	Salvador	1946 – 1958	2
Gilbert Guillaume	France	1987 – 2005	
Green H. Hackworth	United States	1946 – 1961	5
Géza Herczegh	Hungary	1993 – 2003	1
Rosalyn Higgins	England	1995 – 2009	2
Yuji Iwasawa	Japan	2018 – xxxx	
Hsu Mo	China	1949 – 1956	4
Louis Ignacio-Pinto	Benin	1970 – 1979	
Sir Robert Y. Jennings	England	1982 – 1995	4
Philip C. Jessup	United States	1961 – 1970	1
Eduardo Jimenez de Arechaga	Uruguay	1970 – 1979	2
Kenneth Keith	New Zealand	2006 – 2015	2
Heige Klaestad	Norway	1946 – 1961	6
Feodor I. Kojevnikov	Russia	1953 – 1961	
Pieter H. Kooijmans	The Netherlands	1997 – 2006	2
Vladimir M. Koretsky	Russia	1961 – 1970	3
Abdul G. Koroma	Sierra Leone	1994 – 2012	10
Sergei B. Krylov	Russia	1946 – 1952	6
Mandfred Lachs	Poland	1967 – 1993	2
Guy L. de Lacharrière	France	1982 – 1987	
Sir Hersch Lauterpacht	England	1955 – 1960	3
Sir Arnold McNair	England	1946 – 1955	6
Kéba Mbaye	Senegal	1982 – 1991	
Gaetano Morelli	Italy	1961 – 1970	3

Judge	Nationality	Term	Dissents
Lucio M. Moreno Quintana	Argentina	1955 – 1964	6
Platon D. Morozov	Russia	1970 – 1985	5
Hermann Mosler	Germany	1976 – 1985	2
Nagendra Singh	India	1973 – 1988	1
Ni Zhengyu	China	1985 – 1994	1
Shigeru Oda	Japan	1976 – 2003	14
Charles D. Onyeama	Nigeria	1967 – 1976	4
Hisashi Owada	Japan	2003 – 2019	7
Luis Padilla Nervo	Mexico	1964 – 1973	3
Gonzalo Parra-Aranguren	Venezuela	1996 – 2009	3
Raghunandan S. Pathak	India	1989 – 1991	
Sture Petrén	Sweden	1967 – 1976	2
Raymond Ranjeva	Madagascar	1991 – 2009	5
Sir Benegal Rau	India	1952 – 1953	1
John Erskine Read	Canada	1946 – 1958	11
Francisco Rezek	Brazil	1996 – 2006	1
Patrick Lipton Robinson	Jamaica	2015 – xxxx	7
Jose Maria Ruda	Argentina	1973 – 1991	1
Nawaf Salam	Lebanon	2018 – xxxx	1
Stephen Schwebel	United States	1981 – 2000	11
Julia Sebutinde	Uganda	2009 – xxxx	6
Bernardo Sepulveda-Amor	Mexico	2006 – 2015	2
José Sette-Camara	Brazil	1979 – 1988	2
Mohamed Shahabuddeen	Guyana	1988 – 1997	3
Shi Jiuyong	China	1994 – 2010	1
Bruno Simma	Germany	2003 – 2012	4
Leonid Skotnikov	Russia	2006 – 2015	7
Sir Percy C. Spender	Australia	1958 – 1967	4
Jean Spiropoulos	Greece	1958 – 1967	1
Kotaro Tanaka	Japan	1961 – 1970	2
Nikolai K. Tarassov	Russia	1985 – 1995	
Salah Tarazi	Syria	1976 – 1980	1
Peter Tomka	Slovakia	2003 – xxxx	10
Vladlen S. Vereshchetin	Russia	1995 – 2006	3
Sir Humprey Waldock	England	1973 – 1991	2
Christopher G.Weeramantry	Sri Lanka	1991 – 2000	8

Judge	Nationality	Term	Dissents
Vi K. Wellington Koo	China	1957 – 1967	4
Bodan Winiarski	Poland	1946 – 1967	8
Xue Hanquin	China	2010 – xxxx	6
Abdulqawi A. Yusuf	Somalia	2009 – xxxx	6
M. Zafrulla Khan	Pakistan	1964 – 1951 / 1954 – 1963	1
Milovan Zorićić	Yugoslavia	1946 – 1958	3

Annex 2: List of Judges of the Inter-American Court of Human Rights

Judge	Nationality	Term	Dissents
Rhadys Abreu Blondet	Domican Republic	2007 – 2012	
Alirio Abreu Burelli	Venezuela	1995 – 2006	2
Asdrubal Aguilar Aranguren	Venezuela	1991 – 1994	1
Julio A. Barberis	Argentina	1990 – 1993	
Thomas Buergenthal	United States	1979 – 1991	2
Roberto F. Caldas	Brazil	2013 – 2018	4
Antonio A. Cançado Trindade	Brazil	1995 – 2006	9
Policarpo Callejas	Honduras	1989 – 1991	
Maximo Cisneros Sanchez	Peru	1979 – 1985	
Carlos Vicente de Roux	Colombia	1998 – 2003	5
Eduardo Ferrer-MacGregor	Mexico	2013 – xxxx	7
Sergio Garcia Ramírez	Mexico	1998 – 2009	1
Cecilia Medina Quiroga	Chile	2004 – 2009	
Leonardo A. Franco	Argentina	2007 – 2012	1
Hector Fix-Zamudio	Mexico	1985 – 1997	
Diego Garcia-Sayan	Peru	2004 – 2015	1
Ricardo Gil Lavedra	Argentina	2001 – 2003	
Hector Gros Espiell	Uruguay	1985 – 1990	
Jorge Hernandez Alcerro	Honduras	1985 – 1989	
Oliver H. Jackman	Barbados	1995 – 2006	3
Margarette May Macaulay	Jamaica	2007 – 2012	
Cecilia Medina Quiroga	Chile	2002 – 2009	7
Alejandro Montiel Arguello	Nicaragua	1991 – 1997	2
Huntley Eugene Munroe	Jamaica	1979 – 1985	
Rafael Nieto Navia	Colombia	1981 – 1994	2
Pedro Nikken	Venezuela	1979 – 1989	1
Elizabeth Odio Benito	Costa Rica	2016 – xxxx	
Cesar Ordoñez Quintero	Colombia	1979 – 1981	
Maximo Pacheco Gomez	Chile	1991 – 2003	1
Patricio Pazmiño Freire	Ecuador	2016 – xxxx	

Judge	Nationality	Term	Dissents
Alberto Perez Perez	Uruguay	2010 – 2015	8
Ricardo Perez Manrique	Uruguay	2019 – xxxx	
Sonia Picado Sotela	Costa Rica	1989 – 1994	1
Rodolfo Piza Escalante	Costa Rica	1979 – 1989	1
Carlos Roberto Reina	Guatemala	1979 – 1985	
Hernan Salgado Pesantes	Ecuador	1991 – 2003	
Humberto A. Sierra Porto	Colombia	2013 – xxxx	7
Orlando Tovar Tamayo	Venezuela	1989 – 1991	
Manuel Ventura Robles	Costa Rica	2004 – 2015	7
Eduardo Vio Grossi	Chile	2010 – xxxx	13
Eugenio Raúl Zaffaroni	Argentina	2016 – xxxx	

Summary

International law and international relations have experienced in the last decades, the phenomenon on the judicialization of international relations and the subsequent proliferation of international courts and tribunals. One of the most significant aspects of this phenomenon, is the diversity in the institutional settings of each of the international courts and tribunals. These differences in the mandate, jurisdictional and institutional design make each of these judicial institutions unique. Despite these differences, there is one aspect that is common to nearly all the existing international courts and tribunals: the right for judges and arbitrators to append dissenting opinions.

Differences exists, however, in how this right is regulated, designed and exercised across international courts and tribunals. While at some courts and tribunals dissenting opinions should be anonymous, at others their content should be strictly limited to the aspects addressed in the majority judgment. Likewise, judges do not always exercise their right to append dissenting opinions for the same reasons. Based on these differences, the dissertation sets out to investigate whether there are differences in the exercise of the right to append dissenting opinions that can be traced back to differences in the mandate, jurisdictional and institutional design of the international court or tribunal in which they were rendered. This research aim is made through a focus on two courts that are notable for their differences, namely, the International Court of Justice and the Inter-American Court of Human Rights.

In order to contextualise the topic of dissenting opinions, the dissertation analyses in the first place the discussion in domestic law. The purpose is to enquire whether and to what extent the discussion on dissenting opinions at the domestic level is relevant at the international level and can therefore inform the research aim. The enquire took account of the fact that the use of analogies to domestic law should consider the differences in the structure between domestic law and international law. Consequently, the use of the discussion on dissenting opinions at the domestic level is relevant at the international level, to the extent that it amounts to an important indication of policy and principles and as far it does not contradict the structure of international law. Based on this approach, the discussion at domestic law on dissenting opinions is relevant as an indication of policy and principle concerning their roles and functions of dissents at the international level.

Against this background, the dissertation addresses the exercise of the right to append dissenting opinions at the international level, focusing in its origins and the arguments in favour and against them that had had an effect

their design at various international courts and tribunals. In this regard, since the creation of the first permanent international court, the right for judges to append dissenting opinions was, save for two exceptions, not put into question. A close look at the debates during the drafting of the Statute of the Permanent Court, show that in the case of dissenting opinions most of the discussions on their permissibility centred on the convenience of the exercise of this right for judges *ad hoc.* In addition, the drafting of the Statute of the Permanent Court was the only instance where the admissibility of dissenting opinion was amply discussed. Upon the subsequent creation of international courts and tribunals, no discussion at all took place on the matter; dissenting opinions have multiplied in international adjudication through emulation. In the case of the arguments in favour and against dissents, the discussion as to their permissibility mainly centered on the tension between judicial authority and judicial independence. This tension played an important role in the design of the exercise of the right to append dissenting opinions at some international courts and tribunals.

Part II discusses to what extent, if at all, do differences in mandate, jurisdictional and institutional design of the International Court of Justice and the Inter-American Court of Human Rights result in differences in the exercise of the right to append dissenting opinions. In the first place, a reference to the mandate, jurisdictional and institutional design of both courts is conducted, with a view to identifying the most relevant differences and present some questions that will inform the subsequent analysis as to whether the said differences inform the exercise of the right append dissenting opinions. Relevant differences were identified regarding the mandate, composition of the bench, permissibility of judges *ad hoc* and national judges, deliberations and the moment to disclose the content of a dissenting opinion and their scope and publicity. These differences guided the analysis in the second chapter of Part II, as to whether they influence the exercise of the right to append dissenting opinions.

In the light of the findings of the first chapter of Part II, the dissertation follows to an analysis as to how the differences and similarities between the International Court of Justice and the Inter-American Court of Human Rights may result in differences and similarities in the exercise of the right to append dissenting opinions in their judgments and advisory opinions. With regard to the mandate in contentious and advisory proceedings of both courts, the content of some dissenting opinions reveal that they are informed by this principal mandate and therefore the judge sometimes exercises her or his right to append a dissenting opinion regrets that the approach taken by the majority in the judgment, is not in keeping with the mandate vested to the ICJ or the IACtHR. In contrast, the development of the law is not a recurrent reason for judges to append dissenting opinions; moreover, there is only one instance from each court in which it can be said that a dissenting opinion has actually contributed to the development of international law. In addition, the exercise of this mandate is also informed by the universal and regional character of these courts. Further,

in the case of the composition of the bench, this aspect also informs the exercise of the right to append dissenting opinions, especially with regard to the reasons for a judge to dissent and the number of dissenting opinions so far appended to judgments and orders, since the bench of the ICJ is heterogenous while the bench of the IACtHR is homogenous. A similar situation occurs in the case of the format of deliberations; the more active participation of ICJ judges in the drafting of judgments and advisory opinions informs the exercise of the right to dissent, when compared to the more passive role that all the judges of the IACtHR play in the drafting of judgments and advisory opinions. Lastly, the differences in mandate, jurisdictional and institutional setting between both courts do not reveal any influence in the exercise of the right to append dissenting opinions from judges *ad hoc* and national judges. Their opinions are connected to their role within the court, rather than the settings of the court.

In conclusion, the exercise of the right to append dissenting opinions at international courts and tribunals, is informed by the mandate, jurisdictional and institutional setting. The analysis performed in the dissertation opens up the possibility to new aspects for analysis concerning the exercise of the right to append dissenting opinions. Likewise, it constitutes a contribution to introduce the phenomenon on the proliferation of dissenting opinions, in an attempt to illustrate that the place of dissenting opinions in the international legal order is not limited to the aspects that have classically been mentioned, *i.e.* the development of the law. Dissents also contribute to furthering the institutional goals of the judiciary. They are therefore important from the institutional level and not only for the case at hand.

Samenvatting (Summary in Dutch)

Internationaal recht en internationale betrekkingen hebben de afgelopen decennia het fenomeen op het gebied van de rechtvaardiging van internationale betrekkingen en de daaruit voortvloeiende verspreiding van internationale rechtbanken en tribunalen meegemaakt. Een van de belangrijkste aspecten van dit fenomeen is de diversiteit in de institutionele instellingen van elk van de internationale rechtbanken en tribunalen. Deze verschillen in mandaat, jurisdictie en institutioneel ontwerp maken elk van deze gerechtelijke instellingen uniek. Ondanks deze verschillen is er één aspect dat bijna alle bestaande internationale rechtbanken en tribunalen gemeen hebben: het recht van rechters en arbiters om afwijkende meningen bij te voegen.

Er bestaan echter verschillen in de manier waarop dit recht wordt gereguleerd, ontworpen en uitgeoefend door internationale rechtbanken en tribunalen. Terwijl bij sommige rechtbanken en tribunalen afwijkende meningen anoniem moeten zijn, moet bij andere de inhoud strikt beperkt zijn tot de aspecten die in het meerderheidsoordeel aan de orde komen. Evenzo oefenen rechters om dezelfde redenen niet altijd hun recht uit om afwijkende meningen bij te voegen. Op basis van deze verschillen wordt in het proefschrift onderzocht of er verschillen zijn in de uitoefening van het recht om afwijkende meningen bij te voegen die kunnen worden herleid tot verschillen in het mandaat, de jurisdictie en de institutionele opzet van het internationale gerecht of tribunaal waarin ze waren weergegeven. Dit onderzoeksdoel is gericht op twee rechtbanken die opvallen door hun verschillen, namelijk het Internationaal Gerechtshof en het Inter-Amerikaans Hof voor de Rechten van de Mens.

Om het onderwerp van afwijkende meningen in een context te plaatsen, analyseert het proefschrift in de eerste plaats de discussie in het nationale recht. Het doel is te onderzoeken of en in hoeverre de discussie over afwijkende meningen op binnenlands niveau relevant is op internationaal niveau en daarmee het onderzoeksdoel kan informeren. Bij het onderzoek is rekening gehouden met het feit dat bij het gebruik van analogieën met het nationale recht rekening moet worden gehouden met de verschillen in de structuur tussen het nationale recht en het internationale recht. Bijgevolg is het gebruik van de discussie over afwijkende meningen op nationaal niveau relevant op internationaal niveau, voor zover het een belangrijke indicatie van beleid en beginselen vormt en niet in tegenspraak is met de structuur van het internationaal recht. Op basis van deze benadering is de discussie in de nationale wetgeving over afwijkende meningen relevant als een indicatie van beleid en principes met betrekking tot hun rol en functies van afwijkende meningen op internationaal niveau.

Tegen deze achtergrond behandelt het proefschrift de uitoefening van het recht om afwijkende meningen op internationaal niveau toe te voegen, waarbij de oorsprong en de voor- en tegenargumenten die hun ontwerp bij verschillende internationale rechtbanken en tribunalen hadden beïnvloed, werden geconcentreerd. In dit verband werd sinds de oprichting van de eerste permanente internationale rechtbank het recht van rechters om afwijkende meningen bij te voegen, op twee uitzonderingen na, niet ter discussie gesteld. Als we de debatten tijdens de opstelling van het Statuut van het Permanent Hof van dichtbij bekijken, blijkt dat in het geval van afwijkende meningen de meeste discussies over hun toelaatbaarheid gericht waren op het gemak van de uitoefening van dit recht voor rechters ad hoc. Bovendien was de redactie van het Statuut van het Permanent Hof de enige instantie waar uitgebreid werd gesproken over de ontvankelijkheid van afwijkende meningen. Bij de latere oprichting van internationale rechtbanken en tribunalen vond hierover helemaal geen discussie plaats; afwijkende meningen zijn vermenigvuldigd in internationale jurering door emulatie. Bij de argumenten voor en tegen dissidenten ging de discussie over hun toelaatbaarheid vooral over de spanning tussen gerechtelijke autoriteit en rechterlijke onafhankelijkheid. Deze spanning speelde een belangrijke rol bij de opzet van de uitoefening van het recht om afwijkende meningen bij sommige internationale rechtbanken en tribunalen bij te voegen.

Deel II bespreekt in hoeverre verschillen in mandaat, jurisdictie en institutionele vormgeving van het Internationaal Gerechtshof en het Inter-Amerikaans Hof voor de Rechten van de Mens, al dan niet leiden tot verschillen in de uitoefening van het recht om afwijkende meningen bij te voegen. In de eerste plaats wordt verwezen naar het mandaat, de jurisdictie en de institutionele opzet van beide rechtbanken, met het oog op het identificeren van de meest relevante verschillen en het stellen van enkele vragen die de latere analyse zullen informeren of de genoemde verschillen de uitoefening van de juiste aanhangende afwijkende meningen. Relevante verschillen werden geïdentificeerd met betrekking tot het mandaat, de samenstelling van de bank, de toelaatbaarheid van ad hoc rechters en nationale rechters, beraadslagingen en het moment om de inhoud van een afwijkende mening en hun reikwijdte en publiciteit openbaar te maken. Deze verschillen leidden de analyse in het tweede hoofdstuk van deel II over de vraag of ze de uitoefening van het recht om afwijkende meningen bij te voegen beïnvloeden.

In het licht van de bevindingen van het eerste hoofdstuk van deel II volgt het proefschrift op een analyse van hoe de verschillen en overeenkomsten tussen het Internationaal Gerechtshof en het Inter-Amerikaans Hof voor de Rechten van de Mens kunnen leiden tot verschillen en overeenkomsten in de uitoefening van het recht om afwijkende meningen bij te voegen in hun beoordelingen en adviezen. Wat betreft het mandaat in een contentieuze en adviserende procedure van beide rechtbanken, blijkt uit de inhoud van sommige afwijkende meningen dat ze worden geïnformeerd door dit hoofdmandaat en daarom oefent de rechter soms haar of zijn recht

uit om een afwijkende mening bij te voegen, betreurt het dat de benadering van de meerderheid in het arrest past niet in het mandaat van het ICJ of het IACtHR. Daarentegen is de ontwikkeling van de wet geen terugkerende reden voor rechters om afwijkende meningen bij te voegen; bovendien is er van elke rechtbank slechts één instantie waarin kan worden gesteld dat een afwijkende mening daadwerkelijk heeft bijgedragen tot de ontwikkeling van het internationaal recht. Daarnaast wordt de uitoefening van dit mandaat ook bepaald door het universele en regionale karakter van deze rechtbanken. Verder, in het geval van de samenstelling van de bank, informeert dit aspect ook de uitoefening van het recht om afwijkende meningen bij te voegen, vooral met betrekking tot de redenen voor een rechter om afwijkende meningen te geven en het aantal afwijkende meningen dat tot nu toe is toegevoegd aan uitspraken en bevelen , aangezien de bank van de ICJ heterogeen is, terwijl de bank van de IACtHR homogeen is. Een soortgelijke situatie doet zich voor bij de vorm van beraadslagingen; de actievere deelname van ICJ-rechters aan het opstellen van uitspraken en adviezen geeft aan dat het recht op afwijkende meningen wordt uitgeoefend, in vergelijking met de meer passieve rol die alle rechters van het IACtHR spelen bij het opstellen van uitspraken en adviezen. Ten slotte laten de verschillen in mandaat, jurisdictie en institutionele setting tussen beide rechtbanken geen invloed zien bij de uitoefening van het recht om afwijkende meningen van ad hoc en nationale rechters bij te voegen. Hun mening houdt meer verband met hun rol binnen de rechtbank dan met de instellingen van de rechtbank.

Concluderend wordt de uitoefening van het recht om afwijkende meningen bij internationale rechtbanken en tribunalen bij te voegen, geïnformeerd door het mandaat, de rechtsmacht en de institutionele setting. De analyse die in het proefschrift is uitgevoerd, opent de mogelijkheid voor nieuwe aspecten voor analyse met betrekking tot de uitoefening van het recht om afwijkende meningen bij te voegen. Evenzo vormt het een bijdrage om het fenomeen over de verspreiding van afwijkende meningen te introduceren, in een poging te illustreren dat de plaats van afwijkende meningen in de internationale rechtsorde niet beperkt is tot de aspecten die klassiek zijn genoemd, namelijk de ontwikkeling van de wet. Dissents dragen ook bij aan het bevorderen van de institutionele doelstellingen van de rechterlijke macht. Ze zijn daarom belangrijk vanuit institutioneel niveau en niet alleen voor het geval.

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