Judicial Authority, Dissent and the Project of International Justice

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Abstract

Dissenting opinions, separate opinions and declarations are a familiar aspect of the international jurisprudential landscape. Despite this, in comparison to domestic judicial systems, there has been comparatively little by way of attempts to rationalise the institutional and systemic implications of this practice. While there is widespread agreement that the impact of additional opinions lies in their effect upon the authority of the court or tribunal and its decisions ('institutional judicial authority'), the nature of that impact is open to greater contestation. How should additional opinions be viewed? An unnecessary and counterproductive distraction or an important mechanism of accountability for the exercise of judicial power?

By conceiving additional opinions as the expression of *individual* judicial authority, this thesis examines the interplay between individual judicial authority and institutional judicial authority within two paradigms of international justice. The first – comprising the ICJ and PCIJ – represents the traditional paradigm of international justice wherein the culture of expressing individual judicial authority in international law was born. The second paradigm is international criminal justice as pursued by two institutions in particular, the ICTY and the ICC. By comparing these two paradigms, and the nature and purposes of judicial authority therein, this thesis considers how individual judges through their additional opinions have contributed to the evolving international judicial culture, and how that practice affects the manner in which the institutions in question advance the project of international justice.

Drawing upon Mirjan Damaška's work demonstrating how procedural choices and practices have implications upon authority, and the relationship between procedure and the purposes for which authority is claimed, this thesis demonstrates that not only is the expression of individual judicial authority consistent with institutional authority but it is constitutive of it. The final section of the thesis turns to consider a form of judicial expression – defined as judicial dissent – that places institutional and individual authority in conflict with one another. Despite the negative implications of judicial dissent upon judicial authority (both institutional and individual) and judicial collegiality, the final section considers whether such practice can play a legitimate systemic function.

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List of Abbreviations

ABAJ	American Bar Association Journal
ACHR	American Convention on Human Rights
AfCPHR	African Charter on Peoples and Human Rights
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
AJPS	American Journal of Political Science
AJS	American Judicature Society
ALR	Albany Law Review
AULR	American University Law Review
AuYIL	Australian Yearbook of International Law
AYIL	Asian Yearbook of International Law
BIICL	British Institute of International and Comparative Law
BUP	Brandeis University Press
BYIB	British Yearbook of International Law
CaLR	California Law Review
ChJIL	Chicago Journal of International Law
CJIL	Chinese Journal of International Law
CKLR	Chicago-Kent Law Review
CLF	Criminal Law Forum
CLR	Columbia Law Review
CnYIL	Canadian Yearbook of International Law
CUP	Cambridge University Press
CYIL	Chinese Yearbook of International Law
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
EJCL	Electronic Journal of Comparative Law
EJIL	European Journal of International Law
ELR	European Law Review
FLR	Florida Law Review
GaJIL	Georgia Journal of International Law
GJIL	Goettingen Journal of International Law
HJIL	Heidelberg Journal of International Law
HLJ	Hastings Law Journal
HLR	Harvard Law Review
HoLJ	Howard Law Journal
HRLJ	Human Rights Law Journal
HUP	Harvard University Press
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILM	International Legal Materials

ILSAJICL	ILSA Journal of International and Comparative Law
JAJC	Journal of the American Judicature Society
JCL	Journal of Comparative Law
JHR	Journal of Human Rights
JI	Juridica International
JICJ	Journal of International Criminal Justice
JLA	Journal of Legal Analysis
JLP	Journal of Legal Professionals
JLS	Journal of Law and Society
JP	Justice of the Peace
JSCH	Journal of Supreme Court History
LJIL	Leiden Journal of International Law
LTICT	The Law and Practice of International Courts and Tribunals
MaLr	Maine Law Review
MJ	Martinus Nijhoff
MLR	Modern Law Review
MUP	Manchester University Press
NEJICL	New England Journal of International and Comparative Law
NJIHR	Northwestern Journal of International Human Rights
NYIL	Netherlands Yearbook of International Law
NYUJILP	New York University Journal of International Law and Politics
NYUP	New York University Press
OHLJ	Osgoode Hall Law Journal
OJLS	Oxford Journal of Legal Studies
OTP	Office of the Prosecutor (ICC)
OUP	Oxford University Press
PCIJ	Permanent Court of International Justice
PL	Public Law
PS	Political Science and Politics
PSPR	Personality and Social Psychology Review
PUP	Princeton University Press
PYIL	Pace Yearbook of International Law
SCJIL	Santa Clara Journal of International Law
SCSL	Special Court for Sierra Leone
SLR	Sydney Law Review
STL	Special Tribunal for Lebanon
SUP	Stanford University Press
TLCP	Transnational Law and Contemporary Problems
UCLR	University of Chicago Law Review
UCP	University of California Press
UILR	University of Illinois Law Review
ULR	Utrecht Law Review
UMP	University of Michigan Press
UNUP	United Nations University Press
UPLR	University of Pennsylvania Law Review
UPP	University of Pennsylvania Press

VJIL	Virginia Journal of International Law
WLR	Washington Law Review
YJIL	Yale Journal of International Law
YJLH	Yale Journal of Law and the Humanities
YLJ	Yale Law Journal
YUP	Yale University Press

List of Decisions,[1] Orders, Submissions by Parties, Hearings

Permanent Court of International Justice

Advisory Proceedings

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Designation of the Workers' Delegation for the Netherlands at the Third Session of the International Labour Conference (Advisory Opinion) [1922] PCU Series B.01

Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production (Advisory Opinion) [1922] PCU Series B.03

Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion) [1923] PCU Series B.04

Jaworzina (Advisory Opinion) [1923] PCU Series B.08

German Settlers in Poland (Advisory Opinion) [1923] PCU Series B.06

Monastery of Saint-Naoum (Advisory Opinion) [1924] PCU Series B.09

Exchange of Greek and Turkish Populations (Advisory Opinion) [1925] PCU Series B.10

Polish Postal Service in Danzig (Advisory Opinion) [1925] PCU Series B.11

Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne (Advisory Opinion) [1925] PCU Series B.12

Competence of the ILO to Regulate Incidentally the Personal Work of the Employer (Advisory Opinion) [1926] PCU Series B.13

The Jurisdiction of the Courts of Danzig (Advisory Opinion) [1928] PCIJ Series B.15

Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV) (Advisory Opinion) [1928] Series B.16

Greco-Bulgarian "Communities" (Advisory Opinion) [1930] Series B.17

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Railway Traffic Between Lithuania and Poland (Advisory Opinion) [1931] Series A/B. 42

Contentious Proceedings

The Mavrommatis Palestine Concessions (Jurisdiction) (Greece v UK) [1924] PCIJ Series A.02

Treaty of Neuilly, Article 179, Annex, Paragraph 4 (Interpretation) [1924] Series A.03

Interpretation of Judgment No.3 (Chamber of Summary Procedure) [1925] PCIJ Series A.04

[1] 'Decisions' denotes judgments, decisions or advisory opinions issued by international courts and tribunals.

Legal Status of Eastern Greenland (Norway v Denmark) [1933] PCIJ Series A/B.53

International Court of Justice

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Conditions of Admission into the United Nations (Advisory Opinion) [1948] ICJ Rep 57

Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174

Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] ICJ Rep 15

Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa (Advisory Opinion) [1955] ICJ Rep 67

Admissibility of Hearings of Petitioners by the Committee on South West Africa (Advisory Opinion) [1956] ICJ Rep 23

Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO (Advisory Opinion) [1956] ICJ Rep 77

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1971] ICJ Rep 16

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Legality of the Use of Force (Serbia and Montenegro v Belgium) [2004] ICJ Rep 279

Certain Property (Preliminary Objections) (Liechtentstein v Germany) [2005] ICJ Rep 6

Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections) (Croatia v Serbia) [2008] ICJ Rep 412

Maritime Delimitation in the Black Sea (Romania v Ukraine) Merits [2009] ICJ Rep 61.

Jurisdictional Immunities of the State (Germany v Italy) [2012] ICJ Rep 99

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) [2012] ICJ Rep 422

Whaling in the Antarctic (Declaration of Intervention by New Zealand) (Australia v Japan; New Zealand Intervening) [2013] ICJ Rep 3

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2015.

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Prosecutor v Perišić, 'Judgement' (Trial Chamber) 06/09/2011 (IT-04-81-T)

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Situation in Central African Republic

Prosecutor v Bemba, 'Decision on the Admission into Evidence of Material

Contained in the Prosecution's List of Evidence' (Trial Chamber III) 10/11/2010 (ICC-01/05-01/08-1022)

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the Legal Representative for Victims for the Disqualification of Judge Christine van den Wyngaert from the Case The Prosecutor v Germain Katanga' (Decision of the Plenary) 22/07/2014 (ICC-01/04-01/07-3504-Anx)

Prosecutor v Lubanga, 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction' (Appeals Chamber) 01/12/2014 (ICC-01/04-01/06-3121-Red)

Prosecutor v Ngudjolo Chui, 'Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II Entitled "Judgment Pursuant to Article 74 of the Statute"' (Appeals Chamber) 27/02/2015 (ICC-01/04-02/12-271)

Situation in Kenya

Situation in the Republic of Kenya, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' (Pre-Trial Chamber II) 31/03/2010 (ICC-01/09-11-Corr)

Prosecutor v Ruto, 'Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30/05/2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissability of the Case Pursuant to Article 19(2)(b) of the Statute"' (Appeals Chamber) 30/08/2011 (ICC-01/09-01/11-307)

Prosecutor v Kenyatta, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (Pre-Trial Chamber II) 23/01/2012 (ICC-01/09-01/11-373)

Prosecutor v Kenyatta, 'Decision on the Defence Request for Conditional Excusal From Continuous Presence at Trial' (Trial Chamber Vb) 18/10/2013 (ICC-01/09-02/11-830)

Prosecutor v Ruto, 'Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber V(a) of 18 June 2013 Entitled "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"' (Appeals Chamber) 25/10/2013) ICC-01/09-01/11-1066

Prosecutor v Kenyatta, 'Decision on the Victims' Request to Participate in the Appeal Proceedings' (24/04/2015) ICC-01/90-02/11-1015

Situation in Libya

Prosecutor v Al Senussi, 'Decision on the Admissibility of the Case against Abdullah Al-Senussi' (Pre-Trial Chamber I) 11/10/2013 (ICC-01/11-01/11-466-Red)

Others

Domestic Courts

Canada

R v RDS [1997] 3 SCR 484

UK

Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377

Inter-American Court of Human Rights

Ximenes-Lopes v Brasil (Merits, Reparations and Costs) Judgment of 4th July 2006

Special Court for Sierra Leone

Trial-Chamber

Prosecutor v Taylor 'Transcript of Sentencing Hearing' (Trial Chamber II) 16/05/2012 (SCSL-2003-01-T)

Appeals-Chamber

Prosecutor v Taylor 'Decision on Charles Ghankey Taylor's Motion for Partial

Voluntary Withdrawal or Disqualification of Appeals Chamber Judges' (Appeals Chamber) 13/09/2012 (SCSL-03-01-A-1323)
Prosecutor v Norman, 'Decision on Preliminary Motion Based on Lack of Jurisdiction' (Judicial Independence)' (Appeals Chamber) 13/03/2004 (SCSL-2004-14-AR72(E))
Prosecutor v Sesay, 'Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber' (Appeals Chamber) 13 March 2004 (SCSL-04-15-AR15)

1. Introduction

Sir Hersch Lauterpacht once observed that regardless of the legal system or tradition in question 'judicial decisions, particularly when published, become part and parcel of the legal sense of the community'.[1] This thesis considers the place within that community of one form of judicial text that, if not a judicial decision, exists in close symbiosis with the judicial decision. Those judicial texts are additional opinions: dissenting opinions, separate opinions, declarations and permutations thereof,[2] whether authored individually or jointly and appended to the judgment, decision or advisory opinion of an international court or tribunal.

The object of this thesis is to develop an understanding of how, through the vehicle of the additional opinion, judges – as individuals – have shaped and can shape the 'project of international justice'.[3] Put differently, the purpose of this thesis is to consider how the interplay between the individual authority of international judges, as expressed through additional opinions, and the institutional authority of the international court or tribunal (as expressed through the court or tribunal's decision, judgment or advisory opinion) affects the manner in which international courts and tribunals discharge their functions.[4]

International judges occupy a historically unique position in international law.[5] Modern international law has long been defined by its State centrism,[6] where individuals were traditionally seen as objects not subjects of the system.[7] Over time,

[1] H. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht Systematically Arranged and Edited by Elihu Lauterpacht* Volume 2 (CUP 1975) at 473-4.

[2] As Section 4.2.1 of Chapter 4 explains, some judges of the international criminal courts and tribunals have developed the practice of issuing additional opinions labelled as 'dissenting and separate', or 'partially dissenting' or 'separate and partially dissenting'.

[3] Chapter 2 will elaborate more upon what the project of international justice denotes, however, for now it suffices to state that at its essence it refers to the normative enterprise embodied by the course to – and the activities of – international courts and tribunals.

[4] Unless otherwise specified, 'decision' will be used to refer to 'decisions', 'judgments' or 'advisory opinions'. See. Chapter 2, Section 4.1.

[5] A. Clapham, 'The Role of the Individual in International Law' (2010) 21 *EJIL* 21 at 26-27; S. Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) at 153.

[6] Eg. L. Oppenheim, *International Law* Volume 1 (Longmans 1905) at 341, describing the how '[s]ince the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations'.

[7] On the evolution of the understanding of the individual in international law, see K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP 2013).

individuals have gained increasing personality in international law,[8] as the holders of (enforceable) rights and responsibilities and thus being recognised as subjects of (or participants in)[9] international law.[10] Despite this, the making and determination of international law – whether as treaty or custom – remained the preserve of States, and latterly international organisations.[11] Against this backdrop, the formal recognition of 'the teachings of the most highly qualified publicists' as subsidiary means for the determination of rules of international law under the Statute of the International Court of Justice (ICJ), might be considered a curiosity.[12] Still, while scholars do play an important role in international legal discourse, as a matter of general principle *individually* their authority is marginal.[13]

Whereas international judges may also be the 'most highly qualified publicists', something distinguishes the authority of their writings written in the capacity of a scholar from their writing in the form of an additional opinions issued as an individual judge, irrespective of the similarity in the substantive views expressed. Consequently, the individuals who formed and form the international judiciary have occupied a privileged platform from which they can – acting collectively in the name of the institution – proclaim and apply international law.[14] But what about when they act individually, when issuing additional opinions? This thesis focuses upon the expression of individual judicial authority within two paradigms of international justice – the Peace Palace paradigm of international justice,[15] and international

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[8] *The Jurisdiction of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ Series B.15 at 17-18. Generally, see R. McCorquodale, 'The Individual and the International Legal System' in M. Shaw (Ed) *International Law* (2nd Ed OUP 2006) at 307-332; R. Portmann, *Legal Personality in International Law* (CUP 2010).

[9] McCorquodale (1994) n.8 at 311.

[10] *Reparations for Injuries Suffered in the Service of the UN* (Advisory Opinion) [1949] ICJ Rep 174 at 178-9.

[11] A. Boyle and C. Chinkin, *The Making of International Law* (OUP 2007) at Chapter 3; J. Alvarez, *International Organizations as Law-Makers* (OUP 2007).

[12] Article 38(1)(d) ICJ Statute. I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) at 65. Though at the same time, it might be argued that this is unsurprising given how the history of international law is replete with names of various 'fathers' of international law – Grotius, Vattel, Calvo, Lauterpacht, to name a few. I. Brownlie, *Principles of Public International Law* (7th Ed OUP 2008) at 24-25. See B. Fassbender and A. Peters (Eds) *The Oxford Handbook of the History of International Law* (OUP 2012) which dedicates a whole section to 'People in Portrait', comprising of 20 chapters each providing a portrait of 20 key individuals in international law. As Robert McCorquodale observes, it has been these individual jurists, and their writings, that have shaped basic understanding of the international legal system, and the role of individuals therein. McCorquodale (1994) n.8 at 311.

[13] Venzke (2012) n.12 at 65.

[14] O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP 2005); R. Mackenzie, C. Romano and P. Sands, *Selecting International Judges: Principle, Process, and Politics* (OUP 2010).

[15] Comprised of the ICJ and its predecessor the PCIJ.

criminal justice[16] – and to what effect. By doing so, this thesis considers the possible contribution that the individual judge makes to the operation of international justice by the international courts and tribunals of which they are a member.

Existing literature focuses upon the manner in which additional opinions contribute to discharging one of the functions of international adjudication, namely the clarification and development of international law.[17] In some ways, the focus of this thesis is broader, and in others much narrower. In the narrower sense, its focus is specifically upon how additional opinions, and in Chapter 5 'judicial dissent', affects the *authority* of international courts and tribunals. However, the ability of international courts and tribunals to discharge their functions within society (whether that be, for example, dispute resolution or law clarification and development) is contingent upon the degree of authority that the institution commands through its decisions. As a consequence, this thesis reaches beyond the contribution of additional opinions to the development of international law. Rather, it touches upon how they shape the manner in which international courts and tribunals discharge the *range* of functions that they are claimed to pursue, and for the pursuit of which they claim authority.

1 Research Significance

Additional opinions are an established and familiar aspect of the international jurisprudential landscape, an aspect of the judicial culture – to the extent that one exists – within international adjudication. Despite disagreement as to the effect of additional opinions upon the authority and prestige of the ICJ,[18] the judges of the international criminal courts and tribunals inherited this practice or habit, embracing their entitlement to write separately.[19] At the ICJ, few of its decisions are published unaccompanied by any additional opinions,[20] while at the International Criminal Court (ICC) and the International Criminal Tribunal for the former Yugoslavia (ICTY)

[16] As pursued by the ICC and ICTY.

[17] For references to the relevant literature, see below, Section 3.

[18] See Chapter 3.

[19] See Chapter 4.

[20] The *only* judgment or advisory opinion of the ICJ to be delivered without a single additional opinion attached is *Maritime Delimitation in the Black Sea* (Merits) (Romania v Ukraine) [2009] ICJ Rep 61. For further discussion, see Chapter 3, Section 3.2.

the practice is familiar, if not as common.[21] Today, there is a wealth of scholarly literature upon the functions served by the administration of justice by international courts and tribunals and the role of the international judge to those ends.[22] Much of this contemporary literature is a response to the increasing judicialisation of international affairs, with a wider range of disputes being submitted to a proliferating range of increasingly specialised international courts and tribunals.[23] Against this backdrop, how should additional opinions be viewed? An unnecessary and counterproductive distraction or an important mechanism of accountability for the exercise of judicial power?

In the context of the Peace Palace paradigm of international justice, the focus will be upon the ICJ, considering its predecessor the Permanent Court of International Justice (PCIJ), where appropriate. Since the earliest jurisprudence of the PCIJ, additional opinions published alongside the decision of the Court have been a defining characteristic of that institution. Yet, while there has been extensive judicial practice at both the PCIJ and ICJ,[24] it is more difficult to pinpoint the purpose that this practice serves. By developing an understanding of the relationship between additional opinions and the authority of the ICJ, this thesis offers one conceptualisation of the functions served by writing separately.

Whereas the judicial culture within the Peace Palace institutions is one that, over the course of its 90-year history, has become defined by the plurality of legal cultures and traditions represented in its jurisprudence, the judicial culture within international criminal justice is still in formation. The nascency of the judicial culture within international criminal justice is a recurring theme throughout this thesis, with additional opinions being the instruments through which the fight for influence over that emerging culture is being fought.[25] Yet, it is clear from the practice of the judges of the international criminal tribunals that they have, notwithstanding the significant

[21] See Chapter 4, Section 4.2.

[22] C. Romano, K. Alter and Y. Shany (Eds) *The Oxford Handbook of International Adjudication* (OUP 2014); Mackenzie, Romano and Sands (2010) n.14; A. Bogdandy and I. Venzke, *In Whose Name: A Public Law Theory of International Adjudication* (OUP 2014); G. Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014); Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 *EJIL* 73.

[23] See Chapter 5, Section 4.1. G. Ulfstein, 'International Courts and Judges: Independence, Interaction and Legitimacy' (2014) 46 *NYUJILP* 849 at 849.

[24] See Chapter 3, Section 3.

[25] See Chapter 5, Section 4.3.

difference between the nature and purposes of judicial authority in the civil inter-state sphere and criminal sphere,[26] embraced the entitlement to write separately.

By comparing these two paradigms, and the nature and purposes of judicial authority therein, this thesis will consider how individual judges through their additional opinions have contributed to, and in the context of the ICC are contributing to, the evolving international judicial culture. As Chapters 3 and 4 will explain, there are differences in the nature and structure of authority between the *ad hoc* Tribunals and the ICC.[27] However, the continuity in personnel and judicial practice between the *ad hoc* Tribunals and the ICC and the similarities in the purposes for which those institutions claim authority mean that they provide a useful comparator to the ICC. The ICC is in the process of entrenching its status as *the* permanent international criminal court in practice; by contrast, as their mandates draw to a close, the *ad hoc* Tribunals are subject to the assessment of their legacy from both within and beyond.[28] In view of the symmetry between the ICTY and ICTR from the perspective of institutional organisation, this thesis will focus upon the substantive practice of judges within just one *ad hoc* Tribunal by way of example, that being the ICTY. Reflecting upon judicial practice at the ICTY provides an opportunity to consider retrospectively how individual judges contributed to defining the manner in which the ICTY discharged its functions.

The ICJ is the 'principal judicial organ of the United Nations',[29] the ICC is the first permanent international criminal court, and the *ad hoc* Tribunals are subsidiary judicial organs of the UN and the first in the contemporary era of international criminal justice. Therefore, the judges of each of these international courts and

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[26] See Chapter 4, Section 2.

[27] For an explanation of those differences, and their significance for the appraisal of additional opinions in each institutional context, see Chapter 4, Section 2.

[28] In the broadest sense, the ICTY has defined its legacy as 'that which the Tribunal will hand to its successors and others'.'Assessing the Legacy of the ICTY – Background Paper' *A Conference of the International Criminal Tribunal for the former Yugoslavia* 23-24 February 2010, The Hague at http://www.icty.org/sid/10292. F. Pocar, 'Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY' (2008) 6 *JICJ* 655; B. Swart, A. Zahar and G. Sluiter (Eds) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011); M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (OUP 2012); F. Mégret, 'The Legacy of the ICTY as Seen Through Some Eyes of its Actors and Observers' (2011) 3 *GJIL* 1011; R. Steinberg (Ed) *Assessing the Legacy of the ICTY* (MN 2011); L. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (MN 2005); T. Gallimore, 'The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda' (2008) 14 *New England Journal of International and Comparative Law* 239; A. Dieng, 'Capacity-Building Efforts of the ICTR: A Different Kind of Legacy' (2011) 9 *Northwestern Journal of International Human Rights* 403.

[29] Article 1 ICJ Statute, Article 92 UN Charter.

tribunals bear responsibility for the determination of how international justice as pursued by their institutions is perceived. Their jurisprudential output forms the public face of international adjudication upon which those institutions are judged.[30] To this effect, this thesis asks how the tradition of writing separately within these two paradigms of international justice defines or contributes to what international justice actually is.

2 Existing Literature

There is a wealth of existing scholarship upon the theory and practice of writing separately within domestic legal systems, particularly concerning the English and US legal systems.[31] In the context of international law, additional opinions and judicial dissent are controversial due to the differences in approach towards them within national legal systems. However, despite this, there is a surprising gap in contemporary scholarship theorising additional opinions and judicial dissent and considering its effects in practice. Where that scholarship does exist, it is largely in the context of the ICJ.

The three principal studies that address the subject of dissenting and separate opinions in international law were published in 1977,[32] 1984[33] and 2004.[34] All three

[30] J. Resnik and D. Curtis, *Representing Justice: Invention, Controversy and Rights in City States and Democratic Courtrooms* (YUP 2011).

[31] T. Henderson, 'From *Seriatim* to Consensus and Back Again: A Theory of Dissent' (2008) *Chic. John M. Ohlin Law and Economics Working Paper* 1; M. Kirby, 'Dissent and the Importance of Judicial Diversity' (18-19 August 2005) Institute of Judicial Studies of New Zealand, Conference, Rotorua, New Zealand, at http://bit.ly/14B5bve ; L. Guinier, 'Demosprudence Through Dissent' (2008) 122 *HLR* 4; D. Rousseau, 'La Transposition des Opinions Dissidentes en France est-elle Souhaitable? - "Pour": Une Opinion Dissidente en Faveur des Opinions Dissidentes' (July 2000) *Cahiers du Conseil Constitutionnel n° 8*, at http://bit.ly/17KFJSZ ; S. Fuld, 'The Voices of Dissent' (1962) 62 *CLR* 923; R. Ginsburg, 'Remarks on Writing Separately' (1990) *WLR* 133; W. Brennan, 'In Defense of Dissents' (1985) 37 *HLJ* 427; M. Arden, 'A Matter of Style? The Form of Judgments in Common Law Jurisdictions: A Comparison' (20 June 2008) Conference in Honour of Lord Bingham, Oxford, UK, at http://bit.ly/ZDmFOS ; K. Lipez, 'Some Reflections on Dissenting' (2005) 57 *MaLR* 313; R. Raffaelli, 'Dissenting Opinions in the Supreme Courts of the Member States' (2012) European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs – Legal Affairs, PE 462.470, at http://www.europarl.europa.eu/studies ; C. L'Heureux-Dubé, 'The Dissenting Opinion: Voice of the Future?' (2000) 38 *OHLJ* 495; K. Nadelman, 'The Judicial Dissent: Publication v. Secrecy' (1959) 8 *AJCL* 415; F. Luchaire and G. Vedel, 'La Transposition des Opinions Dissidentes en France est-elle Souhaitable? "Contre": le Point de Vue de Deux Anciens Membres du Conseil Constitutionnel' (July 2000) *Nouveaux Cahiers du Conseil Constitutionnel n° 8* at http://bit.ly/ZwxLcF ; B. Kerr, 'Dissenting Judgments – Self Indulgence or Self Sacrifice?' (8 October 2012) The Birkenhead Lecture, at http://bit.ly/T7P02u ; M. Kirby, 'Judicial Dissent' (26/02/2005) James Cook University, at http://bit.ly/10mBxs8 ; B. Nelissen, 'Judicial Loyalty Through Dissent or Why the Timing is Perfect for Belgium to Embrace Separate Opinions' (2011) 15 *EJCL*1; J. Alder, 'Dissent in Courts of Last Resort: Tragic Choices?' (2000) 20 *OJLS* 221; R. Munday, 'Suppressing Dissent' (2008) 172 *JP* 830; J. Laffranque, 'Dissenting Opinion in the European Court of Justice – Estonia's Possible Contribution to the Democratisation of the European Union Judicial System' (2004) XI *JI* 14; W. Douglas, 'The Dissent: A Safeguard of Democracy' (1948) 32 *JAJC* 104; J. Lee, 'In defence of Concurring Speeches' (2009) *PL* 305; L. Epstein, W. Landes, R. Posner, 'Why (and When) do Judges Dissent?: A Theoretical and Empirical Analysis' (2011) 3 *JLA* 101; T. Poole and S. Shah, 'The Law Lords and Human Rights' (2011) 74 *MLR* 79.

[32] F. Jhabvala, *The Development and Scope of Individual Opinions in the International Court of Justice* (University Microfilms International 1977).

focus on the ICJ, and the former two address a period when division within the ICJ was at its most apparent.[35] The first study, *The Development and Scope of Individual Opinions in the International Court of Justice,* by Farokh Jhabvala, provides a historical account of the development of attitudes towards additional opinions in international justice. This account comprises of a close reading of the negotiation documents of The Hague Peace Conferences of 1899 and 1907 on the Statute of the Permanent Court of Arbitration, the records of the negotiations of the Statute of PCIJ, and, subsequently, the ICJ Statute.[36] Jhabvala's review of the historical origins of additional opinions in turn constitutes the basis for a critique of the judicial practice at the ICJ in the 1960s and 1970s that had generated disquiet.[37] Accordingly, the reference point for the analysis of the propriety of judicial practice in this study was the fidelity of that practice to the intentions of the drafters of the Courts' Statutes, evidenced by the text of the Statute and the drafting history.

By contrast, Ijaz Hussain's 1984 monograph *Dissenting and Separate Opinions at the World Court* offers an account of the role that additional opinions play in the progressive development of international law by the ICJ.[38] Hussain suggested how certain individual judges,[39] by using the platform of additional opinions, engaged in an ongoing dialectic with the rest of the Court throughout their time on the bench. Their objective, he explained, was to challenge the positivist orientation of the Court's jurisprudence and case law in favour of a greater inclination toward natural law-inspired theories of jurisprudence.[40] Thus, for Hussain, who focused less on the propriety of what at the time was controversial judicial practice, the significance of that practice lay in its contribution to the reformation of the 'juridical vision' of the Court.[41] Mita Manouvel's thesis, in a similar vein to Hussain's, addresses additional

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[33] I. Hussain, *Dissenting and Separate Opinions at the World Court* (MN 1984).

[34] M. Manouvel, *Les Opinions Séparées à la Cour Internationale: Un instrument de contrôle du droit international prétorien par les états* (L'Harmattan 2004).

[35] See Chapter 3, at 4.2.2.

[36] Jhabvala (1977) n.32. See also, F. Jhabvala, 'Declarations by Judges of the International Court of Justice' (1978) 72 *AJIL* 830, and F. Jhabvala, 'The Scope of Individual Opinions in the World Court' (1982) 13 *NYIL* 33.

[37] On this, see Chapter 3, at Section 4.2.2.

[38] Hussain (1984) n.33.

[39] Judges Alejandro Alvarez, Sir Hersch Lauterpacht, and Kotaro Tanaka.

[40] Hussain (1984) n.33 at 265-6. For a persuasive critique of Hussain's thesis, see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (rev. ed. CUP 2006) at 68 (footnote 159).

[41] Ibid.

opinions through the lens of law development by the ICJ.[42] However, rather than viewing additional opinions as a means by which to *expand* the law-development potential of the ICJ and its judges, Manouvel concentrated upon the function of additional opinions as a mechanism of *constraint* upon the legislative potential of the Court.[43] Beyond these three extended studies, the practice of publishing additional opinions has received limited attention in the literature.[44] Typically this is by former judges on the ICJ writing upon aspects of judicial procedure within the Court,[45] and more recently by Gleider Hernández and Robert Kolb.[46] Significant for the purposes of this thesis, these writings together build a picture of the institutional function and system value of additional opinions, or at least how that is perceived by judges with experience within ICJ, or by scholars in the field.

There is comparatively little consideration of the institutional function of additional opinions in the context of international criminal justice. There have been some important contributions to the field by Goran Sluiter,[47] Christoph Safferling,[48] Nina Jørgensen and Alexander Zahar.[49] However, despite the controversy that this practice elicits, there has been no comprehensive consideration of how the practice of writing separately affects international criminal justice.

Differences in the attitudes towards additional opinions (both in the context of the ICJ and international criminal justice) are commonly located in the different

[42] Manouvel (2004) n.34.

[43] Ibid.

[44] M. Hudson, 'The Twenty-Eighth Year of the World Court' (1950) 44 *AJIL* 1 at 20; E. Hambro, 'Dissenting and Individual Opinion in the International Court of Justice' (1956-7) 17 *HJIL* 230; E. Dumbauld, 'Dissenting Opinions in International Adjudication' (1942) 90 *UPLR* 929; R. Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 14 *ICLQ* 788.

[45] For example, G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: General Principles and Substantive Law' (1950) 27 *BYIL* 1, at 1-2; R. Jennings, 'The Collegiate Responsibility and the Authority of the International Court of Justice' in Y. Dinstein (Ed) *International Law at a Time of Perplexity* (MN 1989) at 348; R. Jennings, The Internal Judicial Practice of the International Court of Justice (1988) 59 *BYIL* 32; M. Shahabuddeen, *Precedent in the World Court* (CUP 1996) at 177 *et seq*; M. Bedjaoui (translation by B. Noble), 'The Manufacture of Judgments of the International Court of Justice'(1991) 3 *PYIL* 29, G. Guillaume, 'Les Declarations Jointes aux Decisions de la Cour Internationale de Justice' in J. Ruda and C, Armas Barea (Eds), *Liber Amicorum 'In Memoriam of Judge José Maríe Ruda* (Kluwer Press 2000); G. Guillaume, 'Cultures Juridiques et Delibere Judicaire' in Societe Française Pour le Droit International, *Droit International et Diversité des Cultures Juridiques/International Law and Diversity of Legal Cultures* (Pedone 2008); N. Singh, *The Role and Record of the International Court of Justice* (MN 1989); R. Higgins, 'Reflections from the International Court' in Shaw (Ed) n.8 at 4.

[46] Hernández (2014) n.22 at 95 *et seq*; and R. Kolb, *The International Court of Justice* (Hart 2013) at 1011-1018.

[47] G. Sluiter, 'Separate and Dissenting Opinions' in A. Cassese (Ed) *The Oxford Companion to International Criminal Justice* (OUP 2009) at 511; G. Sluiter, 'Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY' in Swart, Zahar and Sluiter (Eds) n.28 at 198.

[48] C. Safferling et al, *International Criminal Procedure* (OUP 2012) at 526.

[49] N. Jørgensen and A. Zahar, 'Deliberation, Dissent, Judgment' in G. Sluiter et al (Eds) *International Criminal Procedure: Principles and Rules* (OUP 2013).

approaches traditionally adopted within the civil law and common law traditions.[50] Few ask specifically *why* those traditions have taken the approach that they do.[51] Even fewer engage in a sustained critique of the extension of those cultural assumptions to the international spheres.[52] Some writers avoid the apparent impasse between the civil law and common law traditions by instead diverting their attention to particular characteristics of international law that may militate in favour of either permitting or prohibiting additional opinions.[53] However, there has been no attempt to break that impasse and, despite observing the criticism that dissent undermines the authority of a given court or tribunal and its decisions, only one writer has considered what that authority is comprised of and how dissent operates to undermine it – both in theory and in practice.[54]

After first determining the nature and structure of international judicial authority – taking in turn each paradigm of justice identified in this chapter – this thesis will then consider the impact of the assertion of individual judicial authority through additional opinions upon the institutional authority of the international courts and tribunals that form the focus of this study. Like the existing studies mentioned, this thesis will also consider the specific traits of international justice as pursued in each of these paradigms that may warrant a particular approach towards additional opinions. Drawing upon the findings of interviews conducted with ICC and ICJ judges and ICC and ICTY legal officers,[55] this thesis is intended to fill some of the gaps observed in the existing literature concerning the theory and practice of writing separately in international criminal law specifically. By doing so, its purpose is to build a more comprehensive understanding of the systemic function of this ever-expanding corpus of jurisprudence. The underlying research is intended to inform ongoing efforts by the institutions, States, policy makers, scholars and civil society to determine *how* international courts and tribunals discharge their functions and fulfil their objectives in regards to the normative project encapsulated by the project of

[50] Hussain (1984) n.33 at 5-7 and 263-4; Kolb (2013) n.46 at 1012; Sluiter (2009) n.47 at 193; Dumbauld (1942) n.44 at 929-934. For a judicial statement to this effect in *Appeal Relating to the Jurisdiction of the ICAO Council* (Judgment) (India v Pakistan) [1972] ICJ Rep 46, Separate Opinion of Judge De Castro at 116.

[51] Briefly considered by Hussain (1984) n.33 at 7 and more so by Kolb (2013) n.46 at 1012.

[52] This point is briefly observed by Jhabvala (1977) n.32 at 129.

[53] Kolb (2013) n.46 at 1012-1013;

[54] Hussain (1984) n.33 at 39 *et seq*.

[55] See Section 3.2.2.2.

international justice, in order to enable them to identify and implement policies and practices to strengthen the efficiency and effectiveness by which they do so.

3 Methodology

In order build a comprehensive and accurate understanding of how and to what effect additional opinions operate upon the administration of international justice by international courts and tribunals, this research synthesises a range of research methods. Before explaining the reasons for the adoption of a mixed methodology, and for the choice of methods adopted, following sub-section will explain the theoretical framework underpinning this research.

3.1 Theoretical Framework

The research questions addressed by this thesis are distinctly socio-legal enquiries. The focus of this thesis is upon how additional opinions as expressions of individual judicial authority influence the capacity of international courts and tribunals to discharge their functions and therefore advance the project of international justice, and the manner in which they do so. Consequently, less emphasis is placed upon the contribution of additional opinions to substantive doctrinal debates as to the content of the law. Nor is the focus upon how particular individual judges have used the platform of additional opinions in order to advance a specific conception of international law or international justice.[56] Consequently, this thesis eschews the adoption of a doctrinal framework based upon normative legal theory such as that of, for example, HLA Hart or Ronald Dworkin.[57] Instead, this thesis might fall squarely within the field of jurisprudence being 'an effort to understand the nature of a social institution and its products'.[58] However, it departs from traditional analytical

[56] L. Obregón, 'Noted for Dissent: The International Life of Alejandro Álvarez' (2006) 19 *LJIL* 893; K. Zobel, 'Judge Alejandro Álvarez at the International Court of Justice (1946-1955): His Theory of a 'New International Law' and Judicial Lawmaking' (2006) 19 *LJIL* 1017; D. French, 'The Heroic Undertaking? The Separate and Dissenting Opinions of Judge Weeramantry During his Time on the Bench of the International Court of Justice' (2006) 11 *AYIL* 35; A. Cançado Trindade*, Judge Antonio A. Cançado Trindade. The Construction of a Humanized International Law: a Collection of Individual Opinions (1991-2013)* (Brill 2015); E. McWhinney and M. Kawano (Eds) *Judge Shigeru Oda and the Path to Judicial Wisdom: Opinions (Declarations, Separate Opinions, Dissenting Opinions) on the International Court of Justice 1992-2003* (Brill 2006); M. Reisman, 'Metamorpheses: Judge Shigeru Oda and the International Court of Justice' (1995) 33 *CnYIL* 185.

[57] R. Cotterrell*, The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (2nd Ed OUP 2003) at 191.

[58] S. Shapiro, *Legality* (HUP 2011) at 7. Contrast this with Peter Goodrich's argument that '[j]urisprudence as philosophy of law is also somewhat resistant to theory. It has tended to operate upon the positivist philosophy of science and to rationalise the products of its science's practice, legal discipline, into a grammar of law or hierarchy of legal validity'. P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (MacMillan Press 1987) at 211.

jurisprudence in its focus upon additional opinions as a form of juridical behaviour within its institutional or organisational setting.[59] Analytical or normative jurisprudential approaches do not take into consideration the institutional or behavioural factors that influence judicial decision-making and reasoning, which in turn affect the law.[60] Rather they focus upon 'presenting law as, in some sense, an integrated or structured doctrinal whole'.[61] In contrast, additional opinions are, by definition, a specific form of institutionalised judicial behaviour. By demonstrating divergence and disagreement between the judges of a collegiate judicial panel, they are a direct challenge to the image of doctrinal unity or systemic coherence presented by analytical legal theoretical approaches.

Accordingly, if the objective of this thesis is to ascertain the institutional functions of additional opinions, then a sociological approach to analysing the phenomenon of additional opinions and judicial dissent is apposite.[62] This thesis is influenced by the work of those such as Karl Llewellyn, who has been described by Roger Cotterrell as embodying 'constructive legal realism'.[63] Although this approach does not deny the importance of doctrine, it emphasises the absolute necessity of taking 'account of behavioural factors determining how and to what extent legal doctrine is significant in the production of judicial and other official decisions'.[64] For example, institutionally-oriented jurisprudential approaches incorporate into their analysis of the law 'steadying factors' that 'promote consistency and predictability in appellate decision making'.[65] Such factors might include the 'common training and experience of judges in a professional legal environment, the constraint of group decision-making and of the professional environment as a whole, shared judicial values, the public character of judicial office, and a range of procedural factors limiting the variables to be considered in the decision making process'.[66] All of these factors have been alluded to by former international judges when writing upon the topic of

[59] Shapiro (2011) n.58 at 6. Moreover, it is possible to identify similarities in the objectives with that of the 'international legal process' method, that is by viewing additional opinions as a mechanism by which individual authority can be expressed, it seeks to understand the 'role that law and lawyers play in international society'. M. O'Connell, 'New International Legal Process' (1999) *AJIL* 334, at 336.

[60] Cotterrell (2003) n.57 at 191-192.

[61] Ibid. at 207.

[62] R. Cotterrell, 'The Sociological Conception of Law' (1983) 10 *JLS* 241 at 242.

[63] Cotterrell (2003) n.57 at 186.

[64] Ibid. at 186.

[65] Ibid. at 192-3, referring to K. Llewellyn, *The Common Law Tradition* (Little Brown 1960) at 19-61.

[66] Cotterrell (2003) n. 57, at 192-3.

additional opinions.[67] As such, any scholarly account of additional opinions that fails to take into account those factors would be an incomplete, if not inaccurate, reflection of the legal and social reality of additional opinions.[68]

Doctrinal approaches towards additional opinions – in their understanding of additional opinions within the system of rules and principles that constitute the law and legal practice – do inform judicial practice and interpretations of judicial practice by some (and perhaps, the main) audiences of international justice. Consequently, this thesis inherently involves an exercise in doctrinal analysis in the critique of both judicial practice and attitudes towards judicial practice. Doctrinal legitimacy (that is, conformity with the legal rules established by the governing statutes of the relevant institutions) is one, if not the main, standard of legitimacy according to which the exercise of individual judicial power is determined by the legal community.[69] However, this thesis argues that the significance of additional opinions reaches beyond pure doctrine. This claim is supported by the existing literature on the topic of additional opinions – both in the context of domestic legal systems and international law. Here, arguments in favour and against permitting judges to issue additional opinions focus upon how such opinions affect the authority of a court, the degree to which that court's decision is 'accepted' and the likelihood of compliance with that court's decision.[70]

This thesis draws upon Weberian approaches to understanding the law, legal process and legal institutions through the lens of the 'historically founded rationalities of the institution[s] in question'.[71] It seeks to understand the relationship between the attitudes toward the expression of individual views of judges and the purposes of international courts and tribunals in society. As such, its purpose is not to describe the law as such, but rather explain legal processes and behaviour.[72] Additional opinions are both a product of social processes and are themselves a social process;

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[67] See Chapters 3 and 4, and specifically, Guillaume (2008) n.45 at 401-402.

[68] A socio-legal rather than purely doctrinal or analytical approach has been described as particularly appropriate to international law in view of the 'peculiarly decentralized structure of international society'. The result, it was explained, 'is that social conditions bear more heavily on legal rules and influence them more in the international sphere than in a municipal law system.' G. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 *HoLJ* 95 at 95.

[69] See Chapter 3 at Section 5.1 and Chapter 4 at Section 6.

[70] See Chapter 2, 3 and 4.

[71] M. Radsen, 'Sociological approaches to international courts' in C. Romano, K. Alter and Y. Shany (Eds) n.22 at 392.

[72] R. Cotterrell, *Law, Culture and Society: Legal Ideas in the Perspective of Social Theory* (Ashgate 2006) at 45.

they are the outcome of deliberations and decision-making by judges. Quite similarly, as the expression of the individual views of the authoring judge(s), additional opinions are themselves a social act, and contribute to ongoing on going deliberations.[73]

3.2 Empirical Research Methods

This theoretical approach is complemented by the utilisation of empirical methods of research in order to obtain an accurate understanding of judicial practice. Some have described this as the 'qualitative stance', where the view is that 'the world – its processes and phenomena – are (or should be) described before they are theorized, understood before they are explained, and seen as concrete qualities rather than abstract quantities'.[74] In order to describe and understand the phenomenon of additional opinions, the following empirical methods will be utilised.

3.2.1 Quantitative Analysis

The conceptual analysis of the kind explained in Section 3.1 is supported by a statistical analysis of judicial practice, designed to identify how frequently additional opinions are used, in what form they are published, and which judges are responsible for them. The significance of this data lies in its descriptive value; it identifies the scale and extent of judicial practice and the frequency by which judges have invoked their right to issue additional opinions and who the authors of such opinions are.[75] The quantitative data provides an overview of judicial practice within the institutions in question over time, from which potential trends or patterns can be identified that warrant further qualitative investigation. Examples include the identification of periods in the institutions' jurisprudence where the publication of additional opinions was particularly prolific or sparse or the identification of outlier decisions in terms of the number of additional opinions attached to it.

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[73] Chapter 2, Section 4.3.

[74] S. Brinkmann et al (Eds) *Qualitative Stance: Essays in Honor of Steinar Kvale* (Aahaus University Press 2008) at 7.

[75] Due to the lack of any qualitative dimension to the data and the fact that it does not reflect any form of content analysis of the substance of additional opinions, there is limited inferential value in the data. The data excludes important qualitative factors such as the type of dispute forming the subject matter of the judgment (including the legal issues and the factual context), the nature and degree of the judge's disagreement or departure from the judgment, or characteristics of the particular judge that would influence if and when a judge would publish an additional opinion.

Having identified possible trends or patterns in the numerical data, it was possible to follow up those leads by way of recourse to qualitative research methods, discussed in Section 3.2.2. For example, quantitative analysis helped to identify which decisions or additional opinions warranted further qualitative investigation, either by way of content analysis or, where appropriate, recourse to existing secondary literature. The quantitative data informed the selection of participants in the research interviews as well as the issues and questions explored in those interviews, in order to help identify the qualitative significance of the numerical findings.

While existing research on additional opinions has drawn upon statistical data on judicial output, it was decided that in order to obtain an up-to-date, comprehensive and accurate breakdown of judicial practice, it would be preferable to collect a complete set of raw data. Not only is it not possible to access the raw data upon which existing statistical analysis has been based, but much of that research was conducted decades ago,[76] such that any data is now incomplete for today's purposes. By collecting a complete and comprehensive data set of judicial practice, it enabled more complex forms of analysis, and created a valuable resource that can be easily updated, developed and utilised in future research. Furthermore, while there is some data (albeit outdated) for judicial practice at the ICJ,[77] there has been little comprehensive data collected on judicial practice at the international criminal courts and tribunals.[78]

The raw data was manually collected by working through the records of each court or tribunals' jurisprudence made available on the websites of the international courts and tribunals.[79] This data was entered into spreadsheets created using Microsoft Excel.[80] The study was structured according to how each judge who participated in each decision behaved in relation to the publication of additional opinions – whether they did not publish or participate in an opinion, or if they did,

[76] Jhabvala (1977) n.32; Anand (1965) n.44.
[77] Ibid.
[78] Sluiter (2011) n.47 at 204-206.
[79] For the PCIJ, see http://www.icj-cij.org/pcij/index.php?p1=9 and for the ICJ see http://www.icj-cij.org/docket/index.php?p1=3&p2=2&sort=2&p3=0. For the ICTY see http://www.icty.org/sections/TheCases/JudgementList and the ICC, see http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx.
[80] See Appendix 1, Figure 1.

then of what kind.[81] Once the complete data set was collected in this format, the data was re-coded into a standardised data matrix,[82] so that it could be inputted and analysed using the statistical software 'Statistical Package for the Social Sciences' ('SPSS'). Each value for each nominal variable was assigned a discrete numerical value, and those nominal variables unnecessary for the numerical analysis were removed from the dataset.[83] The only interval variable – that is the decision date – was retained in its date format. The coded data was imported into SPSS, having created a new SPSS database and defined the variable and values according to the code adopted.[84] Having done so, it was possible to create descriptive charts and custom tables using the various permutations of the variables.[85] Using a combination of the descriptive charts and tables, cross referenced with the original complete Excel dataset, it was possible to arrive at the findings cited in this thesis.

3.2.1.1 Range of Data

3.2.1.1.1 PCIJ and ICJ

The data for the Peace Palace institutions covers all decisions issued by the PCIJ across its lifespan. For the ICJ, it includes all decisions since its inception until 16 June 2015. The consequence of this is that for *current* members of the Court (whether full members or those participating in cases as *ad hoc* judges) the data on the frequency of their participation in additional opinions is not complete. In order to obtain an accurate representation of judicial practice in the publication of additional opinions (both individual and joint) with minimal distortion, the study considered judicial practice in the context of all decisions. It includes all merits judgments and all advisory opinions, as well as interlocutory judgments (preliminary phases, jurisdiction, and compensation) but it does not include orders. Orders have been excluded from this present data set in order to achieve some degree of parity with the data collected for the international criminal justice institutions.[86] Therefore, the data covers judicial practice in all 134 judgments and advisory opinions delivered to 16 June 2015. All forms of additional opinions have been included in this count, to

[81] Ibid.

[82] M. Franklin, 'Quantitative Analysis' in D. Della Porta and M. Keating (Eds) *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (CUP 2008) at p.245. For illustration, see Appendix 1, Figures 2 and 3.

[83] For illustration, see Appendix 1, Figures 2 and 3.

[84] For a screenshot of the SPSS database, see Appendix 1, Figure 4.

[85] For an example, See Appendix 1, Figure 5.

[86] See Section 3.2.1.1.2.

address *all* those situations in which a judge perceives the decisions of the Court not to be a complete or adequate representation of their views on the present case. Additional opinions were classified according to the label prescribed by the author(s) of a given opinion.

Regarding *ad hoc* judges, since it is common for States to appoint *ad hoc* judges that are not their own nationals,[87] the nationality of the judge for the purposes of this data reflects their nationality of origin, not the appointing State. For example, Judge *ad hoc* Cot – a French national – has sat on the Court having been appointed as *ad hoc* judge by Colombia,[88] Romania,[89] Thailand[90] and Timor-Leste.[91]

3.2.1.1.2 ICTY and ICC

Due to the number of interlocutory decisions issued by Chambers of the ICTY and the ICC, it has not been possible within the constraints of this research project to collect a complete set of data for all judicial practice.[92]

As such, the data for the ICTY concerns all trial and appeals judgments upon the verdict of the accused.[93] They do not include sentencing judgments where these are issued as separate decisions from those on the verdict, nor do they include decisions or judgments arising in cases where the accused had entered a plea bargain. The quantitative data here also excludes interlocutory decisions. The data is correct up to 16 June 2015, and comprises of judicial practice in 42 judgments of the ICTY Trial Chambers and 38 judgments of the ICTY Appeals Chamber. As with practice in the Peace Palace, all additional opinions – as defined by the authoring judge – have been recorded.

Regarding the ICC, due to the low number of judgments on the verdict having been issued, in order to obtain a larger sample of judicial practice, the data incorporated some interlocutory decisions. In addition to judgments of the Trial Chamber and

[87] See http://www.icj-cij.org/court/index.php?p1=1&p2=5&p3=2.

[88] *Territorial and Maritime Dispute* (Nicaragua v Colombia) and *Aerial Herbicide Spray* (Ecuador v Colombia).

[89] *Maritime Delimitation in the Black Sea* (Romania v Ukraine).

[90] *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).

[91] *Questions Relation to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v Australia).

[92] However, it is hoped that the work to compile and maintain a complete dataset can be undertaken in future research.

[93] Judgments issued pursuant to Article 23 ICTY Statute (Trial Chamber) and judgments issued pursuant to Article 25(1) ICTY Statute (Appeals Chamber).

Appeals Chamber judgments upon the verdict against the accused,[94] the data includes key decisions of the Pre-Trial Chamber. The decisions included were Decisions on the Authorisation to Open an Investigation,[95] Decisions on Challenges to Admissibility,[96] and Decisions on the Confirmation of Charges.[97] In the Trial Chamber, in addition to the Judgment of the Trial Chamber pursuant to Article 74 of the Statute, the data includes Trial Chamber Decisions on Challenges to Admissibility.[98] In the context of the Appeals Chambers, decisions on the Appeal against decisions of both the Pre-Trial and Trial Chamber on Admissibility are included alongside Appeals against the decision of the Trial Chamber on the judgment against the accused.[99] Consequently, the data for the ICC comprises of a sample consisting of 20 decisions of the Pre-Trial Chamber, 5 of the Trial Chamber and 8 of the Appeals Chamber in the time period commencing from when the Court's Chambers started to first issue decisions in relation to cases up until 16 June 2015. Although the inclusion of interlocutory decisions in the context of the ICC is inconsistent with the sampling methodology used for the ICTY, the alternative – to exclude all interlocutory decisions – would have resulted in a sample size of only 3 Trial Chamber judgments and 3 Appeals Chamber judgments. The interlocutory decisions selected for inclusion were considered the least inconsistent with the sampling methodology, with decisions on admissibility and the confirmation of charges being considered of equivalent significance as the interlocutory judgments of the ICJ on, for example, preliminary objections and jurisdiction.

The inability to collect a full set of data for every single decision issued by Chambers of the ICC and ICTY is regrettable, especially in the context of the ICC. However, although not fully covered by the numerical data, this interlocutory jurisprudence has not been excluded from the analysis undertaken in this research project. Much of the qualitative analysis of the jurisprudence of the international criminal courts and tribunals conducted in this thesis – in the form of the content analysis of additional opinions and the data obtained through interviews with ICC judges –

[94] Article 74 (Trial Chamber decision) and Article 81(1) (Appeals Chamber judgment) ICC Statute.
[95] Article 15 ICC Statute.
[96] Article 17 and Article 19(2) ICC Statute.
[97] Article 61(7) ICC Statute.
[98] Article 19 ICC Statute.
[99] Article 82(1)(a) ICC Statute and Article 81(1) ICC Statute.

addresses more substantively the recurring themes in the additional opinions contained in the expansive body of interlocutory jurisprudence.[100]

3.2.2 Qualitative Analysis

While quantitative data analysis is useful for descriptive purposes, qualitative analysis in the form of content analysis and the analysis of research interviews conducted with judges and other court officials is necessary in order to understand the significance and meaning of judicial practice. The conceptual, quantitative and qualitative findings will together provide the basis upon which to answer the questions that form the subject of this thesis.

Qualitative methods enable investigation into the substantive content of additional opinions and to identify institutional and behavioural factors influencing judicial practice. Two qualitative methods have been used: first, content analysis of additional opinions and, second, interviews with judges and other key actors involved in the production and interpretation of additional opinions. The purpose behind this mixed methodology – in recourse to theoretical analysis, quantitative methods and a number of qualitative methods – is to 'access multiple perspectives and dimensions'.[101] By triangulating the results of each method,[102] it is possible to test the strength and validity of the project's overall findings.[103]

3.2.2.1 Content Analysis

Content analysis, as the name suggests, involves the analysis of the substance of additional opinions. The purpose of content analysis is to find out how international judges use additional opinions, what they are used to communicate, how it is communicated and why they are used. The purpose of additional opinions, taken at its broadest, is to explain the individual views of a judge; they provide an opportunity for that judge to express their motivation for disagreeing with the views and decision of the majority as expressed in a Court's decision. The subjection of additional opinions and their substance to analysis through the prism of the theoretical framework explained, supplemented by the findings of the interviews conducted

[100] See Section 3.2.2.

[101] R. Barbour, *Introducing Qualitative Research* (SAGE 2008) at 155.

[102] O. Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling' (2007) 40 *PS* 765 at 766.

[103] Ibid.

with judges, is thus the principal method by which the research questions underpinning this thesis are answered.

3.2.2.2 Interviews

In order to develop an informed understanding of the practice of issuing additional opinions and their impact upon the administration of justice by the courts and tribunals in question, a number of in-depth interviews were conducted with judges and legal officers. Given the gap in scholarship on the judicial process, including the production and publication of additional opinions, in the context of international criminal justice, the interviews were weighted towards judges and legal officers at the ICC. The purpose of these interviews was twofold. First was to obtain factual information regarding the process of deliberation and the institutional culture within the international courts and tribunals from those with insider knowledge and experience.[104] The second purpose was to find out about the interviewees' own perspectives as 'insiders' within the institution and as actors involved in, and affected by, the practice of issuing additional opinions.[105] Because the interview subjects were elites,[106] leaders and/or experts in the field, in order to mitigate some of the asymmetry in power between interviewer and interviewee,[107] it was decided to conduct the interviews towards the end of the research project. This meant that it was possible for the interviewer (myself) to plan and conduct the interviews with a certain level of knowledge and expertise concerning the interview topic.[108] At the same time, the majority of those interviewed were international judges, who are individuals of a certain authority. As such, the power dynamics within the interviews remained very much with the interviewees, who had the power to decide for themselves the information that they divulged.

Seven interviews – each lasting between 60 and 90 minutes – were conducted. Participants were 1 ICJ judge, 3 ICC judges, 2 ICC legal officers and 1 ICTY legal

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[104] S. Brinkmann and S. Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd Ed SAGE 2015) at 172.

[105] G. Gaskell, 'Individual and Group Interviewing' in M. Bauer and G. Gaskell (Eds), *Qualitative Researching with Text, Image and Sound: A Practical Handbook* (SAGE 2000) at 39.

[106] J. Berry, 'Validity and Reliability in Elite Interviewing' (2002) 35 *PS* 679.

[107] Brinkmann and Kvale (2015) n.104 at 171.

[108] Ibid. and W. Harvey, 'Strategies for Conducting Elite Interviews' (2011) 11 *Qualitative Research* 431 at 434.

officer.[109] A purposive or judgmental method of sampling was adopted when approaching prospective research participants, i.e. based on the researcher's judgment as to who would likely be the most representative or useful.[110] Judicial participants were selected on the basis on a range of factors including: the length of their service at their present institution, the number of cases in which their participated, their own practice in regards to the publication of additional opinions, and any experience they had within other judicial institutions – whether in the international or national – sphere. Legal officers were identified and approached based upon their length of service within the institutions in question, and thus their experience and involvement in the production of additional opinions. Those identified as possessing these attributes were considered to have the greatest ability to reflect upon the impact – as they perceived it – upon the administration of justice by the respective court or tribunal. Other relevant criteria taken into consideration included whether the individual had been involved in the process of negotiating and drafting the Rome Statute and for which judges they served as officer to.

An 'Information for Research Participants' document was provided to all prospective participants prior to receiving their consent to participate.[111] This explained the purpose of the interviews, the expectations of the participants and information regarding the anonymity and confidentiality of the participants' identity and the research data. All who agreed to participate were required to complete a 'Participant Consent Form' prior to commencing the interview having read and understood the information provided.[112] 5 of the 7 participants agreed to have their interview

[109] 9 ICC judges were invited to participate in an interview. 3 accepted that invitation, 3 responded in order to decline the invitation, and 3 did not respond. 6 ICTY/ICTR judges were invited to participate, none of whom responded. In addition to the 3 legal officials interviewed, a further 4 were approached. 1 did not respond and the remaining 3 responded in order to decline. The difficulty in recruiting participants from the ICTY was attributed to a further factor, namely that the period over which the interviews were being conducted coincided with an institutional visit to Arusha, the seat of the ICTR. Consequently many of the ICTY judges and officials approached were out of the country and unavailable for interview. Interview #07, Fieldnotes of Interview with ICTY/ICTR Official, 27/05/2015, The Hague, on file with author.
All 15 current ICJ judges were invited to participate. Although 3 had responded positively, 2 had to withdraw due to changes to their commitments. 3 ICJ judges responded in order to decline the invitation.
Considering the responses of those who replied in order to decline, many gave reasons for the decline, however some did not. While some of the reasons given are worthy of reflection, because they are not covered by consent, their content cannot be used in this thesis.

[110] E. Babbie, *The Practice of Social Research* (12th ed Wandsworth 2010) at 139.

[111] See Appendix 2 for a copy of the document.

[112] See Appendix 3 for a blank copy of the consent form.

recorded,[113] while the remaining 2 consented to my taking of field notes upon our discussion.[114] While there was some concern that participants may speak more freely if unrecorded,[115] all those who agreed to be recorded were surprisingly forthcoming and frank in their responses. As was revealed in the course of the interviews, the issue of additional opinions is a particularly sensitive issue at the ICC and ICTY. While one interviewee suggested that this sensitivity might have deterred some of those judges approached from agreeing to participate,[116] those who did agree had particularly strong views on the matter and were keen to share those views. On the other hand, this is likely to have a negative impact upon the representativeness of the views expressed by those judges. For example, the views held by judges keen to assert their individual authority and express their own views (whether in the form of additional opinions, or whether that be through the participation in research interviews) may not be shared by judges who declined the request for interviews and those less inclined to express their individual views.

All interviews were conducted face-to-face during a research visit to The Hague between 3-31 May 2015. Recording the interviews had two principal benefits. While observational notes were taken where appropriate throughout the interviews, audio recordings allowed the interviewer to focus upon the participants' responses and engage in a more detailed dialogue with the participant.[117] By responding to, following up and seeking clarification upon responses, participants were encouraged to divulge their views more freely. Secondly, given the depth and length of interviews, it was not always immediately possible to appreciate the full meaning and significance of the participant's responses. However, the process of listening to the recording, transcription and analysis of the transcripts ensured the most data was captured, thereby avoiding the inevitable 'information loss' that would have occurred had reliance been placed solely upon handwritten notes made in the

[113] Interview #02, Transcript of Interview with ICC Judge, 11/05/2015, The Hague, on file with author; Interview #03, Transcript of Interview with ICC Official, 25/05/2015, The Hague, on file with author; Interview #04, Transcript of Interview with ICC Official, 25/05/2015, The Hague, on file with author; Interview #05, Transcript of Interview with former ICC Judge, 26/05/2015, The Hague, on file with author; Interview #06, Transcript of Interview with ICC Judge, 27/05/2015, The Hague, on file with author.

[114] Interview #01, Fieldnotes of Interview with ICJ Judge, 06/05/2015, The Hague, on file with author; Interview #07 n.109.

[115] U. Flick, *An Introduction to Qualitative Research* (SAGE 2009) at 168.

[116] Interview #07 n.109.

[117] Brinkmann and Kvale (2015) n.104 at 171.

course of the interviews or after the conclusion of the interview.[118] The ability to listen to the recordings and check the accuracy of original interpretations of the participants' responses reduced the chance of misinterpretation and misrepresentation of their views.

Prior to the interviews, a number of issues and themes for exploration with the interview participants were identified, however for the purposes of conducting the interview a semi-structured interview methodology was adopted. Because interview participants were elites, it was considered most appropriate to grant interviewees greater freedom to interpret and respond to more open-ended questions and address them as they saw fit.[119] This encouraged the dialogue to progress in a more organic way than a more heavily structured 'Q&A' style interview, allowing the interviewer to follow up and seek clarification on the responses provided by the interviewees and to pose questions to address those issues not addressed by the interviewee. This more flexible interview structure enabled the development of a rapport between the interviewer and interviewee and encouraged participants to raise issues that they considered relevant but which may not have been foreseen by a more confined question.[120] From an observational perspective, a more relaxed interview structure facilitated an insight into the character and temperament of the participants, which was particularly important from the perspective of ascertaining the behavioural or institutional implications of additional opinions. Given the highly subjective nature of the enquiry into the motives and purposes of additional opinions and the enquiry into the perceived impact of additional opinions upon the administration of international justice, the interview findings are again primarily of descriptive rather than normative value. However, in view of the objectives of this research project, designed to understand the relationship between additional opinions as the expression of individual judicial authority and institutional authority, rather than to predict future practice, the subjective and descriptive nature of the interview findings was considered unproblematic.

[118] J. Aberbach and B. Rockman, 'Conducting and Coding Elite Interviews' (2002) 35 *PS* 673 at 675.
[119] D. Richards, 'Elite Interviewing: Approaches and Pitfalls' (1996) 16 *Politics* 199 at 202.
[120] Brinkmann and Kvale (2015) n.104 at 172.

4 Outline of Thesis

The thesis is split into four substantive chapters. The first of these, Chapter 2, situates additional opinions within wider normative context of the project of international justice. After expanding upon what the project denotes, it then establishes the link between additional opinions as a specific aspect of judicial procedure and that project. Explaining that additional opinions have implications upon the project of international justice by reason of their consequences for institutional judicial authority, it proceeds to elaborate the analytical framework for ascertaining the impact of additional opinions upon international judicial authority.

Chapter 2 will explain why different legal traditions historically adopted fundamentally different approaches towards the permitting the expression of individual judicial authority in the form of additional opinions. Today, the dichotomy between the Romano-Germanic civil law tradition and the Anglo-American common law tradition is less clearly demarcated, with many jurisdictions of the civil law tradition permitting to varying degrees the publication of additional opinions.[121] Despite this, views as to the impact of additional opinions upon institutional judicial authority are still informed by these ingrained structural or cultural conceptions of judicial authority. Chapter 2 will introduce Mirjan Damaška's framework for appraising the structure of judicial authority within a given justice system, identifying the key elements and explaining how they inform attitudes towards additional opinions. It will explain how the structure of judicial authority within a given justice system determines the degree to which the assertion of individual judicial authority can be consistent with institutional judicial authority.

The purposes of Chapters 3 and 4 are threefold. Taking the ICJ paradigm of international justice and international criminal justice in turn, each chapter will first consider the structure of judicial authority within each paradigm of justice. They will do so in order to determine whether the expression of individual authority is consistent with the institutional authority of the courts and tribunals in question. Having concluded in both cases that additional opinions – as expressions of

[121] Whereas 'Napoleonic' code based jurisdictions such as that of France, Belgium and Italy maintain a strict prohibition of additional opinions, other jurisdictions such as Germany do permit them in some circumstances. For an overview of the variance across continental European civil law jurisdictions, see Raffaelli (2012) n.31.

individual authority – are consistent with the structure of authority, the second purpose of each chapter is to consider the criteria for the legitimate exercise of individual power, and thus when additional opinions are expressions of individual judicial authority. They will consider the arguments expressed within existing doctrine and secondary literature, as well as the findings of interviews conducted as part of this research project, in favour and against permitting additional opinions and upon judicial practice, in order to identify those criteria that imbue the expression of individual power through additional opinions as legitimate. Thirdly, these chapters will consider the relationship between expressions of individual judicial authority (additional opinions) and institutional authority (through decisions of courts and tribunals) and the consequences of this upon the advancement of the project of international justice by those institutions.

Chapter 5, by contrast, will turn to an area of particular sensitivity: when individual judicial authority and additional opinions are used to specifically challenge the authority of the institution, as expressed in the court or tribunal's decision. Whereas the motives behind additional opinions are numerous and varied, and although many of those will have implications for institutional authority, additional opinions are rarely aimed at directly challenging the authority of decision in question. Where this occurs, termed here as 'judicial dissent', at stake is not only the authority of the particular decision in question, but also the authority of the institution itself. It does so by calling into question whether the institution's claim to be a legitimate power holder is valid. This chapter will explain what constitutes judicial dissent, and why, and will consider how the use of individual judicial authority for this purpose should be viewed.

Chapter 6 contains the conclusion of the thesis. It will develop an understanding of how additional opinions have contributed and can contribute to shaping the manner in which international courts and tribunals pursue international justice. Having reflected upon the findings reached throughout this thesis, it will consider their implications for how the practice of issuing additional opinions, and engaging in judicial dissent, should be approached. It will explain that from a systemic perspective, for the potential of additional opinions and judicial dissent to be realised, there is a need for stronger (and more explicit) engagement with that practice by the various actors and audiences whose interpretation and appraisal are determinative of both institutional and individual judicial authority.

2. The Project of International Justice, Judicial Authority, and Additional Opinions

1 Introduction

In Chapter 1, it was explained that the object of this research is to ascertain the implications of the expression of individual judicial authority in the form of additional opinions upon the advancement of the project of international justice ('the project'). First, this chapter elaborates upon what that project is, and second, how a specific form of judicial practice can have implications for the project. It will introduce the work of Mirjan Damaška who has explained the relationship between the macro (the project) and the micro (the practice of issuing additional opinions and judicial dissent). Not only does Damaška's work demonstrate the connection between procedural choices and the overarching normative objectives underpinning a justice system, but it also offers an appropriate framework – one adopted and applied in Chapters 3 and 4 of this thesis – through which international justice can be viewed in order to answer the research question indicated above.

Section 2 will provide a definition of the 'project of international justice' and will explain its significance for the purposes of this research project. It will explain that institutions of international justice that form the subject of this thesis – be it the PCIJ, the ICJ, the ICTY or the ICC – pursue or advance the normative objectives encapsulated by the project by asserting their authority in order to effectively discharge their functions. Consequently, matters that affect the authority of these institutions have implications for the manner and effectiveness by which those functions are pursued, and ultimately the advancement of the project of international justice. When considering the effectiveness by which international courts and tribunals pursue their normative objectives, the focus is often upon external factors that affect their authority. However, drawing upon Damaška's work, Section 3 will explain that institutional legitimacy and authority are also affected by factors internal to those institutions – their procedural design and the practice of both the institution and those of which the institution is comprised. One aspect of procedure with implications upon how institutional legitimacy and authority is

perceived is the expression of individual judicial authority through additional opinions. Section 3 will explain in further detail what additional opinions are. It will clarify the nature of individual judicial authority and will explain how additional opinions are the vehicle for individual judicial authority.

While there is consensus as to the fact that there exists a relationship between additional opinions and institutional judicial authority, there much less agreement as to the nature of that relationship in the context of international justice. Section 4 will open by observing how both advocates and opponents of additional opinions have advanced authority and the related theme of independence as arguments in favour of their respective positions. Section 4 will explain how and why 'authority' and 'independence' can be used to support views both in favour and against admitting additional opinions. Using one dimension of Damaška's matrix for the comparative analysis of judicial procedure across legal systems, it will show how historically rooted conceptions of judicial authority, and the manner in which that authority is structured, informs how those systems view the relationship between individual and institutional judicial authority.

Using examples from domestic legal systems by way of illustration, Section 4 will show how all of these factors together inform the approach towards additional opinions. Consequently, in order to understand the relationship between individual judicial authority and institutional judicial authority in the context of international justice, it is first necessary to determine the nature and structure of judicial authority in the context of international justice. Only having done is it possible to ascertain the impact of additional opinions upon the authority of the institutions and therefore their capacity to advance the project of international justice.

Chapters 3 and 4 will, in turn, take each of the two paradigms of international justice considered in this thesis and consider them through the prism of Damaška's idealtypes for the structure of authority. Before turning to consider how additional opinions affect the advancement of the project of international justice by the Peace Palace institutions in Chapter 3, this chapter will close by drawing out three themes that recur in the discussion concerning the relationship between additional opinions and judicial authority. Those themes are of 'independence', 'transparency' and 'secrecy'. Given prominence of these themes throughout this thesis, Section 5 will clarify what each theme entails.

2 The Project of International Justice

The phrase 'international justice' is an evocative term; like many rhetorically powerful concepts, the notion of (international) justice is both controversial and highly subjective.[1] Despite this, international justice and even the 'project of international justice' are ingrained deep within the vocabulary of international law. The institutions that embody the two paradigms of international justice that form the subject of this thesis place the notion of 'international justice' at the centre of their identity. The Permanent Court of *International Justice* and the International Court of *Justice* invoke 'international justice' in their names, whereas the *raison d'être* of international criminal courts and tribunals is 'justice', however that may be conceived. This sub-section will briefly enunciate what is (and is not) meant by the use of this term in this thesis and will explain how additional opinions and judicial dissent are situated within this context.

When speaking of 'international justice', this thesis is not concerned with 'social justice', that being the moral assessment of given rules or practices.[2] It is concerned with the notion of 'justice' as an institution for organising or structuring the international polity, rather than the specific rules according to which that ordering is attained. 'Institution' refers to the 'rules and practices that structure relationships and interactions between agents'.[3] The objective of this section is therefore not to elaborate a particular new theory of global justice, a theory that articulates what should be the right 'tests' for justice in the international sphere in the sense just described,[4] or indeed to select and adopt an existing theory of global justice as the basis of this study.[5]

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[1] J. Thompson, *Justice and World Order: A Philosophical Enquiry* (Routledge 1992) at 1-23.

[2] T. Pogge and M. Kosch, *John Rawls: His Life and Theory of Justice* (Oxford Scholarship Online 2007) at 28.

[3] Ibid.

[4] R. Dworkin, *Law's Empire* (Hart 1998) at 73. For a recent attempt to articulate the 'right tests' for the substantive justice of international law, see S. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (OUP 2015).

[5] At the same time, an awareness of the ideas conjured by the use of the language of justice is vital to the substantive task of interpreting the practice of judges both as members of the institutions of international justice and as individuals, *in the name of that institution*. As Ronald Dworkin observed:

> [j]ustice is an institution that we interpret…it has a history; we each join that history when we learn to take the interpretive attitude towards the demands, justifications, and excuses we find other people making in the name of justice… we each – some more reflectively than others – form a sense of justice that is an interpretation of justice nonetheless.

Ibid. at 73. Therefore, when international judges discharge their judicial role when hearing and deciding cases both as members of the institutions and as individuals, their interpretations of justice and what that requires of them will find

The project of international justice as used in this thesis encapsulates what Andreas Paulus has described as 'the aspirational aspects of international adjudication, namely the establishment of an international rule of law',[6] the 'proscription of arbitrary action by *any actor* in the international system'.[7] Its values coincide with those manifested in what Martti Koskenniemi has described as the 'culture of formalism' – 'a culture of resistance to power, a social practice of accountability, openness and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it.'[8] It is the process of replacing (or redistributing) the politics of power,[9] of violence,[10] bargaining or compromise with the politics of what Shklar refers to as *legalism*.[11]

Legalism, as Shklar explains, is a self-consciously political outlook or ideology shared by those in the legal profession that 'holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rule'.[12] These include, the 'dislike for vague generalities, the preference for case-by-case treatment of all social issues, [and] the structuring of all possible human relations into the form of claims and counter-claims under established rules'.[13] Within this 'project of legality', the attributes of accountability and predictability are considered necessary 'conditions for the achievement of the most foundational ends

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manifestation in the manner in which they perform their judicial role – including their practice (or none practice, as the case may be) of writing dissenting opinions.

Wider ideas of justice will also inform how the practice of institutions and their judges is interpreted by their various interpretive communities. Stanley Fish proposes that the meaning of a text, whether it be a legal text or non-legal, is determined by the 'assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance' that inform the interpretation of that text by a given reader. Where that same matrix of factors act upon a number of individuals, Fish identifies an 'interpretative community' as existing between those subject to the same interpretative forces. (S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Clarendon 1989) at 141-142). Thus, when the ICJ calls itself the 'International Court of *Justice*' and the international criminal courts and tribunals claim to be pursuing 'justice', irrespective of what those institutions may state their objectives to be and the understanding of 'justice' upon which they and individual judges operate, these ideas of justice depending on the interpretive community in question will inevitably inform how those institutions are perceived in their justice-pursuing roles.

[6] A. Paulus, 'International Adjudication' in S. Besson and J. Tasioulas (Eds) *The Philosophy of International Law* (CUP 2010) at 223.

[7] B. Chimni, 'Legitimating the Rule of Law' in J. Crawford and M. Koskenniemi (Eds) *The Cambridge Companion to International Law* (CUP 2012) at 306 (emphasis added).

[8] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law (1870-1960)* (CUP 2004) at 500 and 502. See also J. Resnik and D. Curtis, *Representing Justice: Invention, Controversy and Rights in City States and Democratic Courtrooms* (YUP 2011) at 255 who state that one of the aspirations for international judicial institutions is that they come 'with no political entanglement'.

[9] Resnik and Curtis (2011) n.8 at xv.

[10] J. Shklar, *Legalism* (Belknap 1964) at 130.

[11] Ibid. at 133.

[12] Ibid. at 1. The term 'ideology' is understood as 'a matter of attitudes common to groups of people. It is the sort of preference that arises in the course of common social experiences'. Ibid. at 5.

[13] Ibid. at 10.

associated with liberal-democratic political traditions'.[14] On this account, justice – the commitment to obeying rules – is conceived as the policy through which the ideology of legalism is advanced.[15] Consequently, when individual judges use their additional opinions to allege that the decision of the court or tribunal from which they dissent has been influenced by considerations of *realpolitik* (on which, see Chapter 5), the assault upon the legitimacy of the exercise of institutional judicial power is particularly strong.

2.1 The Advancement of the Project Through Judicial Institutions

At its broadest, the project of international justice denotes a normative trend within international organisation, that started at the 1899 Hague Peace Conferences,[16] and which continued throughout the twentieth century with the establishment of the PCIJ and later the ICJ,[17] and which continues today with the establishment and operation of first the *ad hoc* Tribunals and now the ICC.[18] Here actors, whether they be States (classically) or individuals (increasingly) are constrained in their actions or held accountable for actions taken within and according to a system of international laws in which there is – *at least an expectation of* – equal application and enforcement.[19]

Chapter 1 referred to the body of growing literature in both international law and international relations that has sought to develop a clearer picture of the functions of international adjudication and its institutions in the contemporary era.[20] By 'functions', what is here being referred to is how international courts and tribunals

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[14] B. Roth, 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism and the Limits of International Criminal Justice' (2010) 8 *SCJIL* 231 at 246.

[15] Shklar (1964) n.10 at 8.

[16] Accounts of the history and chronology of the development of third party dispute settlement in international law, including international adjudication culminating in the establishment of the International Court of Justice are widespread, and include S. Rosenne, *The Law and Practice of the International Court 1920-2005: Volume 1 The Court and the United Nations* (MN 2006); T. Gill, *Rosenne's The World Court: What It is and How It Works* (6th rev. ed. MN 2003) at 1-28; O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP 2005) at Chapter 1; H. Lauterpacht, *The Function of Law in the International Community* (OUP 1933) at Chapter 2.
Accounts that include in that history, the post-WWII courts and tribunals include P. Sands, 'Introduction' in R. Mackenzie et al, *The Manual on International Courts and Tribunals* (OUP 2010) at ix-xvi.

[17] For further discussion of the project of international justice as embodied by the Peace Palace institutions, see Chapter 3.

[18] For further discussion of the international criminal justice paradigm of the project, see Chapter 4.

[19] W. Schabas, 'The Banality of International Justice' (2013) 11 *JICJ* 545 at 550; K. Sikkink, *The Justice Cascade* (W. W. Norton & Co 2011) at 11.

[20] See Chapter 1, n. 22 for references.

'contribute to orderly and peaceful social interaction'.[21] This body of scholarship seeks to understand first, why international adjudication is being increasingly invoked in order to address challenges within the international system, and second, how adjudication does so.[22] Thus, by discharging their functions, international courts and tribunals advance the project of international justice – being the institution according to which orderly and peaceful social interaction is promoted.

These writers observe an expansion in the functions of adjudication beyond the traditional function of dispute settlement to include the development of normative expectations, the stabilisation of normative expectations and law creation, and the controlling and legitimation of authority expressed by others.[23] Many of these functions are discussed throughout this thesis when considering how additional opinions strengthen the decisional and interpretive legitimacy of the exercise of institutional judicial power.[24] The characterisations and classification of the functions additional to dispute settlement may differ,[25] and the categories overlap in part if not entirely. However taken together, these additional functions assumed by (or attributed to) some international courts and tribunals lend support to the argument that international courts and tribunals participate as actors in international/global governance,[26] and even exercise public authority.[27]

3 From Macro to Micro: The Project and Additional Opinions

Having described the project of international justice and how this relates to the functions served by international courts and tribunals pursuant to that project, it is now necessary to locate the relationship and significance of the practice of

[21] A. Von Bogdandy and I. Venzke, 'On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority' (2013) 26 *LJIL* 49 at 52.

[22] C. Romano, K. Alter, and Y. Shany 'Mapping International Adjudicative Bodies, the Issues, the Players' in C. Romano, K. Alter and Y. Shany (Eds) *The Oxford Handbook of International Adjudication* (OUP 2014).

[23] Bogdandy and Venzke (2013) n.21.

[24] Chapter 3, Section 4.3, and Chapter 4, Section 5.2.

[25] For example, Karen Alter identifies 'dispute settlement', 'administrative review', 'enforcement' and 'constitutional review' as the four categories of international judicial function. K. Alter, *The New Terrain of International Law* (PUP 2014) and Benedict Kingsbury's 'ten types of international courts' in B. Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in Crawford and Koskenniemi (Eds) (2012) n.7 at 205-211.

[26] Romano, Alter and Shany (2014) n.22 at 16; J. Alvarez, 'What are International Judges For? The Main Functions of Adjudication' in Romano, Alter and Shany (Eds) (2014) n.22 at 176.

[27] Bogdandy and Venzke (2013) n.21 at 50-61.

international judges in terms of additional opinions. In view of the grandiose nature of the objectives encapsulated by the project, day-to-day judicial practice and procedure such as the practice of issuing additional opinions might seem relatively insignificant. After all, there are far greater geopolitical challenges that dilute the effectiveness by which international courts and tribunals pursue – and are perceived to pursue – the project of international justice.

The ability of international courts and tribunals to effectively discharge their social functions – and in turn advance the project of international justice – depends upon the degree of authority that they command.[28] 'Authority' for the purposes of this thesis is understood in terms of Max Weber's conception of 'authority' or 'domination', understood as the 'legitimate exercise of power'.[29] Power denotes 'the probability that one actor within a social relationship will be in a position to carry out his own will, despite resistance'.[30] 'Legitimacy' here is understood in the sense of political legitimacy, namely 'the process through which both political power and obedience are justified'.[31] On this basis, 'legitimacy' is defined as 'the governed recognizing the right of the governors to lead and, to a certain extent, their entitlement to the perks of power'.[32] According to this view, 'what makes a certain practice of power legitimate is the process through which authority justifies its exercise of power and gains social acceptance'.[33] Here the 'legitimacy of any given institution can be derived from a number of different practices aiming at different audiences'.[34] Ingo Venzke has observed that the 'acceptance' of the legitimacy of an expression of power by an actor is a function of three variables.[35] First, is the content of the expression of power – the substantive nature of an action, the substance of the claim, or in this instance, decision of a court or the additional opinion of an individual judge. Second are the interests of the different actors whose acceptance is under consideration.[36] What counts as valid justification in order to gain that

[28] M. Radsen, 'Sociological approaches to international courts' in Romano, Alter and Shany (Eds) (2014) n.22 at 410.
[29] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* Volume 1 (UCP 1978) at 212 *et seq*.
[30] Ibid. at 53.
[31] J-M Coicaud, 'Legitimacy, Across Borders and Over Time' in H. Charlesworth and J-M Coicard (Eds) *Faultlines of International Legitimacy* (CUP 2010) at 17.
[32] Ibid.
[33] Radsen (2014) n.28 at 392. See also Fish (1989) n.5.
[34] Radsen (2014) n.28 at 409.
[35] Ibid.
[36] Ibid.

acceptance depends upon the criteria of legitimacy upheld by each of these different actors or groups of actors ('audiences').[37] In the preceding sections, the project of international justice was defined by, in essence, its commitment to procedure and process. Consequently, although the criteria for legitimacy upheld by different actors may vary, as a matter of general principle, one – if not the primary – criteria for the legitimacy of the exercise of judicial power is that power is exercised in conformity with the formal prescribed process.[38] The third variable lies with the author of the act or expression of power; their particular attributes or office (that is their individual charismatic authority) and which audience they aim their practice at.[39]

Authority, and particularly its quality of denoting the *acceptance* of the legitimacy of the expression of power by a social actor, is especially important in the context of international justice. Given the geopolitical realities of the international sphere – the primacy of the State as the principal unit of action and the dependence of international courts and tribunals upon the consent and cooperation of States in order to function – international courts and tribunals have weak 'power', that being the ability to enforce their will despite resistance and without consent of the affected parties. Thus, international courts and tribunals rely upon the acceptance of the legitimacy as institutions and the legitimacy of their decisions in order to secure the compliance and cooperation necessary for their operation and the effective discharge of their functions.

In his seminal study, *The Faces of Justice and State Authority*,[40] Damaška offered a heuristic model that illustrates the relationship between the procedural design and practice, official authority, and the purposes for which that authority is exercised. He explained how procedural choices and practices have implications upon authority (ie. the appraisal of the degree to which the exercise of official power is legitimate), and observed that the manner in which process affects authority depends on two variables. The first is the structure and organisation of official authority, and second,

[37] Radsen (2014) n.28 at 409.

[38] T. Franck, *The Power of Legitimacy Among Nations* (OUP 1990) at 19; A. Cassese, 'The Legitimacy of International Criminal Tribunals and Current Prospects of International Criminal Justice' (2012) 25 *LJIL* 491 at 492-493; J. Gibson and G. Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support and the European Court of Justice' (1995) 39 *AJPS* 459 at 460-461.

[39] Venzke (2012) n.35 at 63.

[40] M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (YUP 1986).

is the purposes served by the administration of justice by way of the exercise of that authority.[41]

Damaška provided a matrix along the axes of which it is possible to place legal systems; on one axis is the organisation of official authority, and on the other is the purposes served by the administration of justice. At each end of the axes are two 'idealtypes'; abstract models not designed to reflect individual or particular legal systems but which are rather designed to identify the key features of otherwise complex phenomenon.[42] The concept of the idealtype as developed by Max Weber has been described as

> a conceptual abstraction from reality which is sufficiently general that it cannot capture the whole of any actual phenomenon. Second, it is a stylised construct that represents the perfect, and thus unreal … As a pure case the idealtype is an analytical yardstick against which we might measure actual actions, institutions, or societies.[43]

Accordingly, although every legal system will exhibit traits of both idealtypes on each axis, such that no legal system is a pure example of either of the idealtypes, there is nevertheless likely to be a tendency towards one or the other. In order to understand the relationship between a particular process or practice and the authority of the institution, Damaška's theory suggests that it is necessary to situate that practice within the wider systemic context – considering the range of factors embodied within his matrix of idealtypes and their implications for each other.

Additional opinions – it will be explained in the second half of this chapter – affect the assessment by those actors subject to the exercise of institutional power of the legitimacy of that exercise of power, and thus its authority. How they affect the assessment of the legitimacy of judicial power will depend upon the structure and composition of judicial authority within a particular legal system. Thus – as will be explained in further detail in Section 5 – claims as to the effect of additional opinions

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[41] Ibid. at 4-11.

[42] M. Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1974-1975) 84 *Yale Law Journal* 480 at 482.

[43] R. Lempert and J. Sanders, *An Invitation to Law and Social Science* (UPP 1989) at 3.

upon judicial authority and independence are embedded within particular systems of official authority, wherein such claims and the assumptions underpinning them are valid.

Section 4 will explain in further detail what additional opinions are and the process by which they can affect the appraisal of the legitimacy of the exercise of institutional judicial power and thus the degree of authority wielded by the institution. Section 5 will then explain how the outcome of that process and the consequences for judicial authority depends upon the characteristics of the wider procedural regime.

4 Additional Opinions

4.1 Additional Opinions

At their essence, additional opinions are those written texts appended to the decision of a court or tribunal and which express the individual views of one or more judges that participated in the case. By definition, additional opinions are the views which are subject to publication – that is, they are made public.

Additional opinions are attached to court decisions under a plethora of guises. 'Dissenting opinions', 'separate opinions', 'minority opinions', 'individual opinions', 'declarations' and permutations thereof are all forms in which such opinions are published. However, the usage and significance of these different labels, and the nature of the variance from the court's decision that they are taken to represent, is unclear and may differ across institutions. For example at the ICJ, 'dissenting opinions' have traditionally been understood as denoting those opinions that express disagreement with the Court's disposition of the case whereas 'separate opinions' refer to those that differ or wish to expand upon elements of the Court's motif but which reflect the views of a judge who overall agrees with its dispotif.[44] However, it is difficult to implement this distinction in practice, with the line between the two having been described by those having served as ICJ judges as 'indeterminate'.[45] ICJ

[44] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: General Principles and Substantive Law' (1950) 27 *BYIL* 1 at 1-2. R. Hofmann and T. Laubner, 'Article 57' in A. Zimmermann et al (Eds) *The Statute of the International Court of Justice: A Commentary* (2nd Ed OUP 2012) at 1387-1388.

[45] R. Jennings, 'The Collegiate Responsibility and the Authority of the International Court of Justice' in Y. Dinstein (Ed) *International Law at a Time of Perplexity* (MN 1989) at 348 and G. Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) at 97.

judges have on occasion labelled their opinions as 'dissenting' even when they are in agreement with the vast majority of the Court's dispotive paragraphs.[46] In contrast, some have elected to label their opinion as 'separate' in instances where the substance of their opinion is consistently and highly critical of the ICJ's decision, but in circumstances they find themselves able to vote in favour of the dispositive paragraphs.[47] Similarly, 'declarations', described in the ICJ Rules of Court as a record of a judge's concurrence or dissent without providing a statement for doing so,[48] are used flexibly, and can often contain detailed substantive analysis.[49] Indeed, historically a tendency has been observed whereby ICJ judges have labelled their opinions as 'declarations' rather than 'dissenting' or 'separate' in order to receive priority in the order of publication in the Court records.[50] This led to a clarification made in the 1976 amendments to the Rules of Court that was designed to prevent such abuses of label by clarifying which forms of individual judicial expression were entitled to priority in publication.[51] The subsequent use of the label of 'declaration' has suggested that the guidelines provided in the amended Rules of Court were not followed, with judges continuing to issue lengthy and substantive reasoned opinions under the nominal rubric of the 'declaration'.[52] As discussed below, the justifications offered for this subsequent practice suggest that considerations other than the formal classification can motivate the labelling decision of judges. For this reason, in

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[46] An example that will be drawn upon again throughout this thesis is the additional opinions to the *Nuclear Weapons* Advisory Opinion. Here, Judges Shahabuddeen, Weeramantry and Vice President Schwebel all explained that although in concurrence with the large part of the Court's Opinion, their disagreement with what they perceived to be the fundamental holding of the Court rendered it necessary for them to label their respective opinions as 'dissenting'. See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Dissenting Opinion of Vice President Schwebel at 311; Dissenting Opinion of Judge Shahabuddeen at 376 and Dissenting Opinion of Judge Weeramantry at 433. This approach, whereby a judge determines the label for their Opinion upon their assessment of which dispositive paragraphs they considered 'most important', was also given by a present ICJ judge, interviewed for this research. Interview #01, Fieldnotes of Interview with ICJ Judge, 06/05/2015, The Hague, on file with author.

[47] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at para.163 and Separate Opinion of Judge Higgins. Again, this approach was endorsed by the ICJ judge interviewed for this research, who explained no matter how fundamental their disagreement with the Court's judgment or opinion, if they found themselves able to arrive at the same dispositive conclusion as the Court, then they would label their Opinion as 'Separate'. Interview #01 n.46.

[48] Article 95(2) and Article 107(3), ICJ Rules of Court, adopted on 14/04/1978.

[49] For example, *Wall* n.47, Declaration of Judge Buergenthal. For the purposes of this thesis, one of the most noteworthy is President Spender's use of his right to attach a Declaration in order to set forth his views on the correct limits upon the usage of the Article 57 right in *South West Africa* (Second Phase) (Ethiopia v South Africa; Liberia v South Africa) [1966] ICJ Rep 6, Declaration of President Sir Percy Spender. For discussion, see Chapter 3, Section 5.1.

[50] G. Guyomar, *Commentaire de Réglement de la Cour Internationale de Justice* (Pedone 1983) at 610, cited by G. Guillaume, 'Les Declarations Jointes aux Decisions de la Cour Internationale de Justice' in J. Ruda and C. Armas Barea (Eds), *Liber Amicorum "In Memoriam' of Judge José Maríe Ruda* (Kluwer Press 2000) at 426-7.

[51] Ibid.

[52] See below.

the context of the ICJ at least, the importance of a strict classification has been considered of lesser importance.[53]

In the context of international criminal justice, judicial practice is largely similar; 'dissenting' being used to signify a disagreement with the material outcome of the decision at hand, typically coinciding with a negative vote for one or more of the dispositive paragraphs.[54] 'Separate' is used to signify a lesser departure from a Chamber's decision, in either concurrence and elaboration or disagreement.[55] In contrast to their *formally* designated function at the ICJ, 'declarations' are not provided for in the Statutes of any the international criminal courts or tribunals. However, the judges of the international criminal courts and tribunals have issued declarations and they are typically used to provide reasoned opinions on matters of general concern relating to criminal procedure and the judicial process which – although raised by the case at hand – are not germane to the Chamber's disposition of the case or issue at hand.[56]

Other factors beyond the substance, formal criteria, or the author's position regarding a court's dispositive paragraphs may also inform the decision as to how an opinion should be labelled. One former ICJ judge has explained how judges may avoid using the label 'dissenting' given the connotations associated with the concept of dissent, even if they disagree with the Court's disposition of the case.[57] Another explained that one rationale for an ICJ judge to issue a 'declaration' was to avoid having to ascribe the label 'dissenting' or 'separate' to it,[58] both judges therefore implying that there are (or there are at least perceived to be) consequences of the adoption of such labels that an authoring judge may wish to avoid. In fact, Judge Guillaume went as far as to suggest that the use of 'declaration' by judges to characterise their opinions might have a lesser impact upon the authority of the Court as expressed in its decision that make 'declarations' more amenable to judges from continental civil law jurisdictions than those characterised as 'dissenting' or

[53] Hofmann and Laubner (2006) n.44 at 1205.

[54] G. Sluiter, 'Separate and Dissenting Opinions' in A. Cassese (Ed) *The Oxford Companion to International Criminal Justice* (OUP 2009) at 511.

[55] Ibid.

[56] For detailed discussion of this, see Chapter 4, Section 6.2.

[57] R. Jennings, The Internal Judicial Practice of the International Court of Justice (1988) 59 *BYIL* 32 at 46.

[58] Guillaume (2000) n.50 at para.16 (at 433).

'separate'.[59] The significance of labelling was also highlighted by one ICC judge interviewed for this research. Explaining that they had authored what in their view was a 'separate opinion' to a decision of a Trial Chamber, the judge explained how the judges in the majority insisted that to label it as such would be 'too antagonising' and required the judge to label it 'concurring' instead.[60]

Therefore, while labelling may provide some indication of an individual judge's views in regards to the ultimate disposition of the case by a court, it is not necessarily an accurate reflection of the individual judge's views on the decision as a whole. While the precise qualitative difference between the different forms of additional opinions are unclear, it is undisputed that they are all platforms for the expression of individual judicial authority.[61] Moreover, the issues that they raise in terms of independence and authority are the same in kind, if not in degree. Therefore, and in light of the complex range of factors that may inform the choice of label adopted for an additional opinion, the neutral term of 'additional opinion' has be used throughout this thesis where no distinction is made, and will indicate where discussion relates to a specific form. While some writers adopt the general term 'individual opinion' in reference to the different forms of opinions,[62] 'additional opinion' is preferred as it acknowledges that such opinions may authored individually or jointly, by two or more judges. By using 'additional opinion' rather than 'individual opinion', it is intended to make clear that both individually authored opinions and jointly authored opinions are included in the analysis. This is not to deny the importance of labelling,[63] and this thesis rejects the notion that it is merely a matter of convenience.[64] Rather for the large part, from the perspective of understanding the relationship between individual and institutional judicial authority, the distinction between the labels does not need to be made.

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[59] Ibid.

[60] Interview #06, Transcript of Interview with ICC Judge, 27/05/2015, The Hague, on file with author.

[61] On 'individual judicial authority', see below, Section 4.5.

[62] For example, Hernández (2014) n.45, F. Jhabvala, *The Development and Scope of Individual Opinions in the International Court of Justice* (University Microfilms International 1977) at 3.

[63] P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1986-1987) 38 *HLJ* 814 at 838. Similarly, see M-C Belleau and R. Johnson, 'I Beg to Differ: Interdisciplinary Questions About Law, Language and Dissent' in L. Atkinson and D. Majury (Eds) *Law, Mystery and the Humanities: Collected Essays* (University of Toronto 2008) at 174.

[64] Contrast to F. Jhabvala, 'The Scope of Individual Opinions in the World Court' (1982) 13 *NYIL* 33 at 46.

The following section will explain how – through contributing to deliberations – additional opinions can influence the assessment of the legitimacy of the exercise of institutional judicial power, and thus authority. The objective behind deliberation is to 'arrive at a rationally motivated consensus – to find reasons that are persuasive to all who are committed to acting on the results of a free and reasoned assessment of alternatives by equals.'[65] Thus with consensus being central to the internal logic of deliberative theory,[66] it might lead to the conclusion that additional opinions are the antithesis to the desired outcomes of deliberative processes. However, as Ian Johnstone has explained,

> deliberative democrats acknowledge that consensus is not always possible, which is why votes are held and votes are often traded in a bargaining process; however the bargains struck and the outcome of the votes are (and should be) shaped by engagement in a public debate, argument and reason giving.[67]

Deliberative theory relies upon the equal status of participants in the process of deliberation; the debate must be conducted under 'rules that treat no person as privileged and no answer as presumptively favoured', such that all participants are able to participate fully and freely and on equal terms.[68] This is in pursuit of what Habermas has termed the 'ideal-speech situation', which denotes that situation 'where discourse occurs unaffected by relationships of power and coercion or any other factors extraneous to "the force of the better argument"'.[69] Consequently, for deliberation to be conducted effectively, this requires the full expression – or at least the capacity for full expression – of the different viewpoints to be resolved in the process of deliberation and decision-making.

Additional opinions inform and influence deliberations within two deliberative spheres, each having implications upon the determination of the institutional judicial

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[65] J. Cohen, 'Deliberation and Democratic Legitimacy' in A. Hamlin and P. Pettit (Eds) *The Good Polity: Normative Analysis of the State* (Basil Blackwell 1989) at 23.

[66] For discussion of the consensus based nature of international legal authority, see S. Wheatley, *The Democratic Legitimacy of International Law* (Hart 2010) at 150.

[67] I. Johnstone, 'Legal Deliberation and Argumentation in International Decision Making' in Charlesworth and Coicard (Eds) n.31 at 177. See also Wheatley (2010) n.66 at 103-104.

[68] D. Gauthier, 'Constituting Democracy' in D. Copp, J. Hampton and J. Roemer (Eds) *The Idea of Democracy* (CUP 1993) at 320.

[69] J. Habermas, 'Why Europe Needs a Constitution' (2001) Sept-Oct *New Left Review* at 11.

authority and thus the capacity of the institutions international justice to advance the project of international justice. The spheres in which judges can exercise power can be broadly identified as the 'internal' and 'external' spheres. Power, denoting the capacity of a given actor to carry out their will, or more generally as 'any kind of influence exercised by objects, individuals, or groups upon each other',[70] here concerns the capacity of an individual judge to inform and influence the process and outcome of deliberations within each sphere. In both, judges exercise their individual judicial power through their contribution to deliberation, as evidenced in the existing scholarship on the utility of additional opinions, as the following discussion will illustrate. The following sub-sections, taking each deliberative dimension in turn, will explain how additional opinions, by facilitating individual judicial contribution to deliberation, grants individual judges power. Having done so, this section will then consider the range of factors that determine the extent to which individual judges possess *authority* (ie. that their expression of power is accepted as legitimate) within each sphere.

4.2 Internal Deliberative Context

The internal deliberative context refers to the discussions undertaken by members of a court or chamber responsible for deciding a given decision. Deliberations are the process out of which a decision-making body's decision is reached and its decision drafted. The procedure for deliberation differs from institution to institution.[71] Through the process of deliberation, wherein participants discuss their views upon the decision at hand, the members of the decision-making body determine whether a decision can be reached by consensus, or if not, where the majority lies. By their very nature, deliberations are also instrumental to shaping the views of the individual participants in that process.[72] Because of the importance of deliberations, and the importance attached to the creation of an 'ideal speech situation' wherein participants can participate as fully and freely as possible, this aspect of judicial

[70] J. Scott, *Power: Critical Concepts* (Psychology Press 1994) at 89.
[71] See below, Section 4.5.1.
[72] Ibid.

procedure is subject to the strictest degree of secrecy, provided for by all the governing instruments of the relevant institutions.[73]

4.2.1 Individual Judicial Power

In the internal deliberative context, judges exercise power through their participation in deliberations, by voting on dispositive paragraphs and in drafting a court or chamber's decision. Through participation in each of these processes, the judge can, or at least can attempt to, influence the outcome or substance of each of those enterprises in line with their own views. Few, if any, object to the expression of individual views in the course of internal deliberations; the likelihood of disagreement between judges in the course of deliberations and over the decision might be implicit in the nature of decision-making where the decision-making authority is granted to a body comprised of two or more individuals.[74] Speaking more generally about group decision-making, the expression of disagreement in the course of decision-making is considered to enhance the quality of that decision-making, whether the group be comprised of judges, other group formations – for example juries, corporate bodies, tribunals. The airing of conflicting views is considered to contribute to problem solving, creativity and understanding.[75]

Existing scholarship on additional opinions (that is written opinions)[76] has focused upon how the production of additional opinions (for consumption in the *external* deliberative sphere) enhances the quality of deliberation in the *internal* deliberative sphere, strengthening the rationality of a court's decision and reasoning.[77] The internal circulation of written opinions that disagree with the majority provides the majority or drafter(s) of the court's decision with a counterpoint against which to test the coherence and persuasive rigour of their decision.[78] Being presented with a fully articulated alternative to the decision before it is rendered and made subject to public scrutiny provides an opportunity for the majority decision to be clarified, modified, or strengthened in the face of the weaknesses or points presented by the

[73] Article 54(3) ICJ Statute; Rule 29 ICTY Rules of Procedure and Evidence ('RPE'); Article 74(4) ICC Statute. On the secrecy of deliberations, see Section 6.2, below.

[74] S. Fuld, 'The Voices of Dissent' (1962) 62 *CLR* 923 at 928.

[75] C. Nemeth and J. Goncalo, 'Rogues and Heroes: Finding Value in Dissent' in J. Jetten and M. Hornsey (Eds) *Rebels in Groups: Dissent, Deviance, Difference, and Defiance* (Blackwell 2011).

[76] For more on the importance of additional opinions as written opinions, see Section 4.3.1.

[77] See Chapter 3, Section 4.3.1.

[78] Belleau and Johnson (2008) n.63, at 175; A. Scalia, 'The Dissenting Opinion' (1994) 19 *JSCH* 33 at 41.

additional opinion.[79] Similarly, such a process of committing putative minority opinions to written form (irrespective of whether they are published) also helps the deliberative process of the individual judge. As one former US judge noted, it is often only through the process of attempting to articulate tentative views in writing that an author can determine whether 'it works'.[80] As Chapter 3 will elaborate,[81] the benefit of the circulation of reasoned draft opinions from the perspective of internal deliberations, and even the quality of reasoning within the Court's decision (and thus its legitimacy and therefore authority) is recognised in the procedure adopted by the ICJ for the process of deliberation and drafting of its judgments and opinions.

However, the sustained expression of divergent views in the course of internal deliberations has not escaped criticism. The persistent and strong expression of judicial disagreement during the deliberative process can be disruptive to the collegiality of the bench,[82] with deleterious effect on a court's productivity.[83] Such friction within a court may also prove detrimental to the efficiency of a court.[84] When the workload of a court is high, practical constraints limit the amount of time that can, and should, be devoted to the production, circulation, deliberation and exhaustion of individual written opinions.[85] In contrast, where there exists the possibility that a judge may have their diverging views made public through the publication of an additional opinion, the assurance of publication can serve to mitigate this risk of obstructionism.[86] On this view, judges are less likely to 'confront their colleagues at every turn, in the hope of having at least a few of their views incorporated into the majority decision'.[87] Consequently, any additional time taken to produce additional opinions may be mitigated by the time saved during the process of judicial deliberations and negotiations.

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[79] See R. Ginsburg, 'Remarks on Writing Separately' (1990) *WLR* 133 at 143; R. Traynor, 'Some Open Questions on the Work of State Appellate Courts (1957) 24 *UCLR* 211 at 218-23; W. Brennan, 'In Defense of Dissents' (1985) 37 *HLJ* 427 at 430.

[80] Traynor (1957) n.79; M. Arden, 'A Matter of Style? The Form of Judgments in Common Law Jurisdictions: A Comparison' (20/06/2008) Conference in Honour of Lord Bingham, Oxford, UK, at http://bit.ly/ZDmFOS.

[81] See below, Section 4.5.1 and Chapter 3, Section 4.3.1.

[82] Brennan (1985) n.79 at 429; Ginsburg (1990) n.79, at 142; Fuld (1962) n.74 at 923-4; R. Raffaelli, 'Dissenting Opinions in the Supreme Courts of the Member States' (2012) European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs – Legal Affairs, PE 462.470, at http://www.europarl.europa.eu/studies at 11.

[83] K. Lipez, 'Some Reflections on Dissenting' (2005) 57 *MaLR* 313 at 319.

[84] On the manifestation of this in the context of the ICC, see Chapter 5, Section 4.3.

[85] Lipez (2005) n.83 at 319.

[86] C. L'Heureux-Dubé, 'The Dissenting Opinion: Voice of the Future?' (2000) *OHLJ* 495 at 513.

[87] Ibid.

In sum, by participating in internal deliberation, decision-making and drafting, individual judges have the power to influence the manner in which the *institution* exercises its power in the *external* sphere, namely the society (or societies) within which the institution operates and its decisions have authority.

4.3 External Deliberative Context

The external deliberative context denotes the process of deliberation by those actors subject to the exercise of institutional power by which the legitimacy of the exercise of that power is assessed and the authority of the institution and its decision determined. The outcome of processes of deliberation in the external sphere will differ depending upon the purposes for which authority is being claimed or being reviewed and the actors undertaking that process of deliberation and their criteria for legitimacy.

In international law, judgments and decisions of international courts and tribunals are both the product of deliberation (in the 'internal' deliberative dimension) and contribute to the continual process of deliberative discourse between law-making and interpreting actors through which international law is determined and developed.[88] For the purposes of this thesis, the 'external' deliberative sphere also includes the deliberations of the same court or its chambers in subsequent cases where consideration of its previous decisions forms part of deliberations. International adjudication contributes to the external deliberative dimension through the publication of *reasoned* decisions.[89] Like deliberation, reasoning is part of the rationalist logic of all modern State legal systems, with the giving of reasons demonstrative of the process of deliberation out of which the decision arrived.[90] Reasoning goes to the heart of the legitimacy of the exercise of judicial power in the form of its decision, and thus is determinative of its authority.[91] However, it must be noted that what constitutes legitimate and legitimising reasoning will differ between

[88] Venzke (2012) n.35; Johnstone (2010) n.67 at 180.

[89] Venzke (2012) n.35 at 146.

[90] Bourdieu (1986) n.63 at 828.

[91] Hernández (2014) n.45 at 98. In the UK, it has been considered that the 'duty to provide a reasoned judgment is a well-established "function of due process, and therefore of justice".' D. Neuberger, 'No Judgment – No Justice' (20/11/2012) First Annual BAILII Lecture at http://bit.ly/SadG8C at 5 citing *Flannery v Halifax Estate Agencies Ltd* [2000] 1 WLR 377 at 381-2.

legal systems and cultures.[92] Reasoned opinions help to establish how and why decisions were reached, which is not only of benefit to the immediate stakeholders in the decision, but also contributes to enhancing the prospective certainty of future decision-making. Thus, according to Judith Resnik and Dennis Curtis, the publicity of litigation contributes to the public sphere by providing a forum for the exchange of information that shapes societal norms.[93] From this perspective, the reasoning offered by international court and tribunals in support of their decisions is one of the strongest ways in which they advance the project of international justice.

The issue is whether, in this external deliberative context, individual judges have power independent of the indirect power they assert through the court or tribunal's decision.

4.3.1 Individual Judicial Power

Without the capacity to make their individual views available to the public, individual judges would not have power (that is, the ability to influence the views or actions or status of others) by way of contributing to the external deliberative sphere. The right or ability of judges to issue additional opinions grants judges that capacity, as does the publication of the vote, or other means of judicial expression in the public sphere, such as oral dissents,[94] if to a lesser degree. Understood this way, additional opinions are a means of judicial *empowerment*. From this perspective, traditional discussions as to whether judges should be permitted to issue additional opinions are discussions as to whether judges should be permitted power in the external deliberative sphere.

For this reason, the focus in this thesis is upon the expression of the individual views of judges in written form. Whereas the language of 'dissent' is often used to refer to the position of judge who votes against the judgment/decision of a court or tribunal, independent of whether an additional opinion is issued, this thesis is concerned with the sustained commitment to the expression of disagreement embodied by the production and publication of a *reasoned written* opinion. This is also in contrast to

[92] M. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (OUP 2009).
[93] Resnik and Curtis (2011) n.8 at 288.
[94] See below at text accompanying n.106.

bare statements of the fact of disagreement or the disclosure of the voting record,[95] or even oral dissents.[96] The focus of this thesis is upon the implications of *reasoned* additional opinions as appeals to rationality.

Lacking in the inherent compliance pull enjoyed by majority opinions or views,[97] the key to the success or contribution of minority views to influencing views or behaviour is the *persuasive* effect of the expression of the minority view.[98] Whereas majorities can rely on the human tendency towards conformity and the misplaced – but often widely held – perception that the truth lies in numbers,[99] dissent is an appeal to rationality and is more likely to convert private attitudes and behaviour than majority messages, which are more likely to be accepted without processing.[100] Minorities 'create a conflict of perceptions', that require the scrutiny of the minority's position, and thus also that of the majority, in order to validate or reject it.[101] Whereas disagreement can be expressed in many ways,[102] or made public in the form of oral dissents (so-called 'dissents from the bench),[103] the process of formulating a reasoned, written opinion articulating an alternative view to that prevailing in the majority represents a particularly sustained commitment to the advancement of the alternative viewpoint.[104] Whereas today, advances in media and communication mean that almost any behaviour can be recorded and memorialised, it is the historical significance of committing thoughts to text, and the permanency of that record, that gives the additional opinions and judicial dissent in written form such force.[105]

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[95] J. Laffranque, 'Dissenting Opinion and Judicial Independence' (2003) VIII *JI* 162 at 163; R. Munday, 'Reasoning Without Dissent; Dissenting Without Reasoning' (2004) 168 *JP* 991.

[96] See below, at n.106.

[97] C. Sunstein, *Why Societies Need Dissent* (HUP 2003) at 5-13.

[98] Nemeth and Goncalo (2011) n.75 at 20.

[99] Ibid. at 21.

[100] Nemeth and Goncalo (2011) n.75 at 20-23.

[101] Ibid. at 21.

[102] Depending upon the tradition and culture within the legal system, certain acts or conduct might have particular force. For example, to take a historical example from Imperial Japan, while the legal system adhered to strict secrecy and the prohibition of reasoned dissent, Judges of the Great Court of Judicature would place their seal upside down upon the Court's judgment as an indication of their disagreement with the Court's decision. G. Schubert and D. Danelski (Eds) *Comparative Judicial Behaviour: Cross-Cultural Studies of Political Decision-Making in the East and West* (OUP 1969) at 137, cited in M. Dean, *Japanese Legal System* (2nd Ed Cavendish 2002) at 354 (fn 56).

[103] L. Guinier, 'Demosprudence Through Dissent' (2008) 122 *HLR* 4 at 14-18.

[104] Nemeth and Goncalo (2011) n.75 at 19-20.

[105] P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (MacMillan Press 1987) at 126.

This is not to say that oral individual statements are not carefully crafted, reasoned opinions; it is unlikely that oral dissent by judges will be extemporaneous or unprepared. However, such practice in the context of international justice is rare.[106] The focus of this thesis is upon the much more prevalent practice of publishing *written* additional opinions upon the authority of the institutions of international justice.

Additional opinions, like the decision to which they are attached, form the subject of deliberations within the external sphere in their own right. Also, and more contentiously, they contribute the deliberative process in regards to the authority of the court or tribunal's decision and the authority of the institution. The purpose of this thesis is to determine how through their contribution to both the internal and external deliberative spheres by way of producing and publishing additional opinions, individual judges can use their individual power or authority to influence the manner in which institutional authority is deployed.

4.4 Relationship Between Internal and External Deliberative Spheres

While the above sections have discussed additional opinions as expressions of individual judicial power in the internal and external deliberative contexts separately, those spheres are not discrete. As suggested in sub-section 4.2.1, when discussing individual judicial power in the internal sphere, it may be the very fact of the prospect of the publication of additional opinions and their effect upon how the judgment and court's authority is perceived within the *external* dimension that grants draft opinions greater purchase in the *internal* deliberative context. In the words of one former US judge, a 'dissent in the offing is also an antidote for judicial lethargy'.[107] On this view, the actual utility of additional opinions lies in their earlier incarnation as draft opinions, and that the source of the strength of draft opinions is the prospect of their publication. This view lead one Canadian judge to conclude that 'dissenting opinions become obsolete the instant that they are published'.[108]

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[106] The most high-profile example being that of Judge Alternate Sow before the Special Court for Sierra Leone, for which he was disciplined. For details of the disciplinary proceedings, see *Prosecutor v Taylor* 'Transcript of Sentencing Hearing' (Trial Chamber II) 16th May 2012 (SCSL-2003-01-T) at 49681 (line 9) - 49683 (line 14), and *Prosecutor v Taylor* 'Decision on Charles Ghankey Taylor's Motion for Partial Voluntary Withdrawal or Disqualification of Appeals Chamber Judges' (Appeals Chamber) 13/09/2012 (SCSL-03-01-A-1323) Separate Opinion of Justice George Gelaga King (SCSL-03-01-A-1324).

[107] Fuld (1962) n.74 at 927.

[108] L'Heureux-Dubé (2000) n.87 at 517.

Therefore, attempts to obtain the benefits of additional opinions to the internal deliberative context without bearing their perceived costs in terms of their impact on deliberations determining the authority of the court's decision in the external deliberative sphere would not be effective. Such attempts might include, for example, permitting the internal circulation of draft opinions but then prohibiting their publication. Because opinions circulated during internal deliberations do not in themselves challenge the institutional authority of a court as expressed in its decision, the incentive to engage with the minority views and where necessary review or strengthen a court's decision is weak since the content of that minority view is never to be made public.

4.5 From 'Individual Power' to Individual Judicial Authority

The preceding sections have discussed the existence of judicial power within the two deliberative dimensions. Whether that power translates to authority depends, as has already been explained, upon whether the exercise of that power is accepted as legitimate by those subject to that power.[109]

4.5.1 Internal Sphere

Whether the expression of the individual views of judges constitutes legitimate contributions to internal judicial deliberation depends on the conformity of those expressions with the adopted (both formal and through established practice) procedure. At the ICJ, the formal internal judicial procedure requires individual judges to produce and circulate written 'notes' that explain their views on the case at hand once all submissions by the parties have been made and preliminary oral deliberations have been undertaken.[110] These written notes in turn provide the basis of the oral discussions and deliberations, with all judges having had the opportunity to read and reflect upon the different judicial views prior to those deliberations.[111] The process of these oral exchanges is formally structured to encourage full participation by all members of the Court,[112] with judges required, in reverse order of

[109] See above Section 3.

[110] Article 3 and Article 4, Resolution Concerning The Internal Judicial Practice of the Court, Adopted on 12/04/1976 ('ICJ Resolution'); elaborated upon by Jennings (1988) n.57, and H. Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations' (2006) 5 *CJIL* 15 at 17.

[111] Article 5 ICJ Resolution, elaborated upon Jennings (1988) n.57; Interview #01 n.46.

[112] On the fullness of deliberations in practice facilitated by the process of deliberation followed at the ICJ, see K. Keith, 'The International Court of Justice: Reflections on the Electoral Process' (2010) 9 *CJIL* 49 at 73-74.

seniority,[113] to present to their colleagues their views on the case and to respond to questioning by those colleagues.[114] Once the drafting has commenced the process of reading the draft judgment and the circulation and reading of draft additional opinions constitutes an ongoing process of deliberation,[115] whereby both the Court's draft judgment and the draft opinions are the subject of critical reflection, review and amendment in light of each other.[116] Thus, there is a rigorous formal procedure designed to require individual participation in deliberation, one that is complemented by informal discussions between judges as the formal process of the Court's deliberation and drafting proceeds.[117]

Deliberative procedure within the international criminal tribunals is markedly different and less formally prescribed. While all judges are clearly expected to contribute to deliberations upon the cases to which they are assigned, there is no formalised procedure such as that at the ICJ compelling it.[118] Deliberations are conducted orally or through the exchange of informal notes, and once it is clear where the majority (in the absence of unanimity) lies, responsibility for drafting the Chamber's decision is assumed by that majority.[119] Whereas at the ICJ, the process of deliberation formally commences once all submissions have been made and hearings have been conducted, deliberations within the international criminal tribunals – given the length and complexity of the cases – is an ongoing process from the commencement of proceedings before the given Chamber through to the delivery of the Chamber's decision.[120]

In light of the lack of formally prescribed procedure for deliberations and the principle of the secrecy of deliberations, it is difficult for outsiders to this process to ascertain the criteria for the legitimate expression of individual views in the course of

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[113] Ibid. Interview #01 n.46; Interview #06 Transcript of Interview with ICC Judge, 27/05/2015, The Hague, on file with author.

[114] Jennings (1989) n.45; Jennings (1988) n.57; Interview #01 n.46; Interview #06 n.60.

[115] Jennings (1989) n.45; Jennings (1988) n.57.

[116] Article 7 and Article 8 ICJ Resolution.

[117] Interview #01 n.46.

[118] Interview #02, Transcript of Interview with ICC Judge, 11/05/2015, The Hague, on file with author; Interview #03, Transcript of Interview with ICC Official, 25/05/2015, The Hague, on file with author; Interview #07, Fieldnotes of Interview with ICTY/ICTR Official, 27/05/2015, The Hague, on file with author.

[119] Interview #02 n.118; Interview #03 n.118; Interview #05, Transcript of Interview with former ICC Judge, 26/05/2015, The Hague, on file with author; Interview #06 n.60.

[120] Interview #03 n.118; Interview #05 n.119; Interview #06 n.60; Interview #07 n.118; M. Divac Öberg, Processing Evidence and Drafting Judgments in International Criminal Trial Chambers (2013) 23 *CLF* 113 at 123 *et seq.*

internal deliberations. A concern that emerged during the course of interviews with ICC judges and legal officers was that the expression of individual views during deliberations ossifies individual viewpoints, thereby making actual deliberation and consensus forming more difficult.[121] A number of those interviewed referred to scenarios involving the breakdown of deliberation.[122] The reasons suggested for this were, first, the sentiment that the entitlement of judges to issue additional opinions explaining their views provides no incentive for judges to participate in deliberations.[123] The second factor identified giving rise to a breakdown in deliberations was the weak (or absent) sense of collegiality between judges which was exacerbated by the publication of additional opinions as critical expressions of disagreement. While these issues are the subject of closer examination in Chapter 5,[124] for now it can be concluded that the criteria for individual judicial authority in the internal deliberative sphere are still under development in the context of international criminal justice.

Having said that, as a matter of logic it is possible to identify one possible general criterion for the legitimacy of the expression of judicial views in the context of internal deliberation irrespective of the court or tribunal in question. That is one of timing. If the purpose of the expression of individual views is to *contribute* to deliberations, then those views have to be expressed at a time when deliberations are still ongoing. If additional opinions are circulated too late so as to preclude their consideration in the course of the deliberations and drafting of a court or chamber's decision, then from the perspective of the internal deliberative sphere at least, the legitimacy of the expression of judicial power might be questioned. This can happen when they have been completed and either circulated too late in the day before the chamber's decision is scheduled to be issued or is not circulated at all prior to the delivery of the chamber's decision.[125] Where this occurs, the benefits of producing, circulating and reflecting upon *written* individual views to internal deliberation are

[121] Interview #02 n.118; Interview #03 n.118; Interview #05 n.119.

[122] Ibid.

[123] Interview #02 n.118; Interview #03 n.118.

[124] Chapter 5, Section 4.3.

[125] Interview #03 n.118; Interview #04, Transcript of Interview with ICC Official, 25/05/2015, The Hague, on file with author; Interview #05, n.119.

not obtained, and has given rise to criticism of judicial practice in regard to additional opinions.

4.5.2 External Sphere

Whereas there is little publically known about the criteria for the legitimate expression of individual judicial power in the internal decision-making sphere due to the implementation of the principle of the secrecy of deliberations,[126] much more can be said about the legitimate exercise of judicial power in the external sphere. The entire discourse surrounding additional opinions – whether they should be permitted, why, and if so what may be the legitimate use of those opinions – concerns precisely the questions of whether the expression of individual judicial power in the external sphere is legitimate, and if so, what the criteria for that legitimacy is, or should be. However, the purpose of the discussion here is to consider whether there is an inherent or basic level of authority that individual judges are assumed to possess that explains why additional opinions have greater weight or force than opinions or critiques of a court's decisions authored by other actors. Here, it is necessary to recall the observation made in Section 3 that 'acceptance' of the legitimacy of the exercise of power by a particular actor (and thus the authority of that actor in that given moment) is a function of three variables. The first is the nature and substance of the expression of power; second are the interests and standards of legitimacy held by the 'accepting' actor, and third are the particular attributes of the power-wielding actor. This section, focusing as it does upon the intrinsic individual authority possessed by international judges, concentrates upon this third basis for legitimacy giving rise to authority.

The expression of disagreement with – or criticism of – a court or tribunal's decision, for example, by academics or policy makers is not subject to the same criticism and calls for its suppression as additional opinions. The expression of such views are not considered to threaten the authority of the decision or the institution responsible for it. Rather, it is because the views expressed in additional opinions are those of an individual bearing the title, or holding the office, of 'judge' that these opinions are particularly forceful. This link to the judicial office suggests that the source of individual judicial authority lies in what Max Weber referred to as legal-rational

[126] On which see Section 6.2.

authority,[127] in that they derive authority from the office that they hold rather than some intrinsic personal authority.[128] While international judges do hold office in accordance with the rules contained in the respective governing statutes of the judicial institutions in question, it is less clear whether that office *per se* bestows upon the office-holder any individual authority independent of the authority that judges assert collectively in the name of the institution.

Yet, despite the apparent lack of formal individual authority granted to judges independent from their responsibilities in regards to the exercise of the institutional authority,[129] they do possess some form of authority by reason of who they are or their attributes – whether perceived or assumed. The judicial office is associated with particular qualities that imbue the exercise of power by holders of that office with legitimacy, irrespective of the institution in question. The attributes of independence and impartiality that are so integral to the identity of the judicial office alone imbue those who hold that office with a certain authority.[130] Furthermore, the criteria for the nomination and appointment of judges to international judicial office – requiring a high level of experience and expertise – also gives rise to the assumption that those individuals holding that office are particularly qualified to express the views contained in their additional opinion.[131] This charismatic authority is further consolidated by the unique position that judges have as participants in the decision-making process in comparison to other commenters on the decision of the court.[132] As an 'insider' who heard the entire case and participated in the deliberations of which the decision was the product, the author of an additional opinion has the benefit of full knowledge of the same information upon which the

[127] Weber (1978) n.29 at 219.

[128] Ibid.

[129] As judges can, in regards to certain interlocutory decisions in the context of the international criminal tribunals, issue single-judge decisions on behalf of the Chamber. At the ICTY, authority is granted to single judges to issue specific kinds of decisions and orders (See Rule 65*ter* ICTY RPE on the Pre-Trial Judge). At the ICC, Article 57(2)(b) stipulates that all decisions of the Pre-Trial Chamber other than those listed in Article 57(2)(a) may be issued by a single judge. In such cases, the individual judge is not exercising their individual authority, but rather are acting on behalf of the Chamber of which they are a member and in which the institution's authority is vested. Note, in this context, Rule 65*ter*(B) of the ICTY RPE, which specifically states that the decision-making authority of the Pre-Trial Judge is subject to the 'authority and supervision of the Trial Chamber seised of the case'.

[130] See Section 6.1 for more on independence and impartiality.

[131] See Chapter 3 at Section 2.1 and Chapter 4 at Section 2.1.

[132] Hernández (2014) n.45 at 122.

decision of the court or tribunal was reached.[133] By contrast, others who critique the court's decision do so only on the basis of the information contained in that decision or other official documents made publically available.

Consequently, to summarise, the very attributes of judicial office that imbue the exercise of institutional judicial power with authority are those which imbue the exercise of individual judicial power with authority.[134] This charismatic authority distinguishes statements made by the judge in their personal capacity with that in their individual judicial capacity. Irrespective of the substantive merits the views expressed in their opinion, or the criteria applied by interpretive audiences in determining whether to accept an additional opinion as a legitimate expression of individual judicial authority, statements made by judges in additional opinions bear the minimum of judicial authority by the identity of the author and attributes of the capacity in which it was expressed.

Finally, it is necessary to observe that involvement of legal officers, assistants or clerks in the production of additional opinions does not diminish the 'judicial' quality of additional opinions and judicial dissent. Irrespective of the degree of involvement of such assistants, a judge who signs an additional opinion and permits its publication *in their name* does so knowing that the views and intentions objectively ascertained from the content of that opinion will be attributed to them, and will thus be endowed and enrobed with the authority of the individual judge.[135] Therefore, properly understood, the issue here is the use of individual judicial authority to undermine the institutional judicial authority.

Whereas additional opinions authored by a single judge are the expression of a single judge's individual authority, joint opinions are imbued with the authority of each of

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[133] An example of where participation in relevant proceedings in related and relevant cases or earlier stages in the present case can be asserted by individual judges to claim their particular authority upon the subject of their additional opinion can be found in the Joint Declaration of Judges Ranjeva, Shi, Koroma, and Parra-Aranguan to the judgment on Preliminary Objections in the Genocide Convention case between Croatia and Serbia. Using their Joint Declaration to criticise the interpretation of the Court's previous caselaw in regards to the same case or related cases, the judges opened their Declaration by observing that they were the only four current members of the Court who had participated in the related earlier judgment on preliminary objections in the Bosnian Genocide case, and one of them had participated also in the much earlier 1993 judgment on provisional measures in the present case. The clear implication being that these four judges, although now in the minority, perceived themselves to be more authoritative figures on the correct interpretation of that previous caselaw. *Case Concerning Application of The Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections) (Croatia v Serbia [2008) ICJ Rep 412 at para.1.

[134] See Section 2.

[135] Belleau and Johnson (2008) n.63 at 177.

the individual judges in whose name the opinion is published. Whereas some judges attribute purely practical significance to joint opinions (in that they enable a more efficient division of labour that avoids the duplication of judicial efforts where individual judges hold the same views)[136] others have identified the particularly strong challenge posed by jointly authored additional opinions to the institutional authority of a court as expressed through the decision.[137] While it is possible for minority judges to each issue their own individual additional opinion, potentially observing the same points and arriving at the same conclusion as their colleagues also writing separately, their decision to 'come together' to issue a single joint additional opinion bearing all of their names demonstrates a strength in solidarity rivalling that of the institution. For example, numerically speaking, there can be as many judges signing on to a joint additional opinion as there are to a court's decision.[138]

This section has explained the manner in which additional opinions – as the vehicle for the expression of individual judicial power and authority – feed in to the process by which the institutional authority of a court or tribunal as expressed in its decision is assessed. They do so by contributing to processes of deliberation. However, as Section 3 explained, the actual impact of additional opinions depends upon how the relationship between individual and institutional judicial authority is conceived within the wider system of justice. The following section will return to Damaška's idealtypes for the organisation of official authority to demonstrate how different attitudes towards additional opinions in the context of international justice are premised upon differing assumptions regarding the structure of official authority. In the course of doing so, it will introduce the framework according to which the structure of authority in the context of international justice will be determined and in

[136] Interview #02 n.118.

[137] Hernández (2014) n.45 at 122.

[138] Ibid. For example, the PCIJ advisory opinion in *Customs Region Between Austria and Germany* ((Advisory Opinion) [1931] PCIJ Series A/B.41) was accompanied by a joint dissenting opinion of 7 of the Court's 15 judges (Joint Dissenting Opinion of Judges Adtaci, Kellogg, Rolin-Jaequmyns, Hurst, Schücking, van Eysinga and Wang) 1 individual separate opinion (Separate Opinion of Judge Anzilotti), and the joint declaration of the majority judges (Joint Declaration of Judges Guerrero, Rostworowski, Fromageot, Altamira, Urrutia and Negulesco). At the ICJ, 2 joint opinions have been authored by 7 judges (*Corfu Channel* (Preliminary Objections) (UK v Albania) [1948] ICJ Rep 15, Joint Separate Opinion of Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badawi Pasha and Krylov and *Legality of the Use of Force* (Preliminary Objections) (Serbia and Montenegro v Belgium) [2004] ICJ Rep 279, Joint Declaration of Vice President Ranjeva and Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby), At the international criminal tribunals, joint opinions are always going to occur where there was a slim majority, with panels of five judges in the Appeals Chamber, a joint opinion can only occur where there was a 3-2 majority.

accordance with which the effect of additional opinions upon that authority will be determined in Chapters 3 and 4.

5 The Structure of Authority and Additional Opinions

In 1921, during the drafting of the Statute of the PCIJ the Italian submission commenting upon the proposals for the draft Statute observed that to permit the publication of dissenting opinions would *undermine* the authority of the Court and its pronouncements.[139] At the same time, in support of the right to publish dissenting opinions, it was proposed that to permit them would *enhance* the authority of the court and its judgments.[140] A second theme driving the discussion as whether to permit additional opinions was the extent to which the publication of the individual views of judges would enhance or endanger the independence of the judges. Advocates of the 'elixir of anonymity' suggested that the publication of individual views put judges – particularly judges who were nationals of one of the State parties to the dispute – in an 'embarrassing' position.[141] On the other hand, proponents of the right to issue additional opinions considered it the *sine qua non* for the judicial freedom of conscience and impartiality, providing a guarantee against the subconscious intrusion of extraneous or 'political' considerations.[142]

Ninety years after the negotiation of the Statute for the first permanent international court, the same themes recurred in the course of the negotiations of Rome Statute of the ICC.[143] How can advocates and opponents of the publication of judicial disagreement advance the causes of independence and authority to advance their claims? Moreover, why, after nearly a century of international judicial practice – before the PCIJ, ICJ, the war crimes tribunals at Nuremberg and Tokyo, ICTY and the

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[139] PCIJ, *Documents Concerning the Action Taken by the council of the League of Nations under Article 14 and the Adoption by the Assembly of the Statute of the Permanent Court* (January 1921) at 24.

[140] Ibid., Sir Cecil Hurst at 138.

[141] Ibid. On the 'elixir of anonymity' see Jhabvala (1977) n.62 at 67. See also Albert de Lapradelle in Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (June-July 1920) at 531.

[142] The position of Max Huber, as expressed at Committee of Jurists on the Statute of the PCIJ ('PCIJ Committee of Jurists'), *Minutes* (May 1929) at 50. See also the commentary to the ILC Drafts on the Draft Statute of the Permanent International Criminal Court in both 1993 (ILC, 'Report of the International Law Commission on the Work of its Forty-Fifth Session' (03/05/1993-23/07/1993) UN Doc. A/48/10 at 127 (ILC *Draft Statute* (1993))) and 1994 (ILC, 'Report of the International Law Commission on the Work of its Forty-Sixth Session' (02/05/1994-22/06/1994) UN Doc, A/49/10 at 122 (ILC *Draft Statute* (1994))).

[143] For example, see ILC *Draft Statute* (1993) n.142, Commentary to Draft Article 51 at 124 (para.4); ILC *Draft Statute* (1994) n.142, Commentary to Draft Article 45 at 122; UNGA, Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Forty-Ninth Session Prepared by the Secretariat' (22/02/1995) UN Doc A/CN.4.464/Add.1 at 38 (para.166); ICC Preparatory Committee, *Press Release L/2801* (36th Meeting (PM) 19/08/1996).

ICTR – did the question whether to permit the publication of dissenting opinions continue to generate the same debate that occurred nearly a century later?[144]

Using the analytical framework developed by Mirjan Damaška and introduced in Section 3 of this Chapter, this section will explain the reasons for the longevity, and circularity, of this debate. Damaška's framework for the comparative analysis of justice systems has been identified as an appropriate analytical framework for the critique of attitudes towards additional opinions for a number of reasons. Orthodox critiques of additional opinions in international justice place emphasis upon how the differing, sometimes often diametrically opposed, views upon the virtues and vices of additional opinions is a symptom of the differences in attitudes towards additional opinions between the 'common law' and the 'civil law' legal traditions. The consequence of this approach is always a stalemate, with each position being argued from a different set of assumptions regarding the nature of judicial authority and the structure of authority. By contrast, Damaška's framework encourages the consideration of the subject of additional opinions in light of the wider structural characteristics of international judicial authority. As shall be demonstrated, the application of Damaška's framework to international justice has three consequences.

First, when applied to the different attitudes towards additional opinions, it helps to identify how those attitudes are premised upon historically rooted conceptions of judicial authority. Second, by applying the framework to international justice, it enables the characterisation of the structure of authority therein, independently of more familiar, but less nuanced, comparative dichotomies. Thirdly, in turn, this will enable the critique of existing attitudes towards additional opinions and to identify those which are predicated upon accurate assumptions regarding the nature of judicial authority in the international sphere.

The following sub-sections will sketch out the key attributes of each of the idealtypes on the 'organisation of official authority' axis. The first is the 'hierarchical' idealtype of authority and the second is the 'coordinate' idealtype. Whether a legal system

[144] In addition to the international courts and tribunals that form the subject of this thesis, all of the hybrid/internationalised criminal tribunals and the ICTR permit additional opinions (Article 22(2) ICTR Statute, Article 18 SCSL Statute, Article 23 STL Statute, Article 14(2) ECCC Statute (read alongside Rule 101(2) and Rule 111(1) ECCC Internal Rules), as does the International Tribunal for the Law of the Sea (Article 30, ITLOS Statute) and the International Centre for the Settlement of Investment Disputes (Article 48(4) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States).

tends towards the hierarchical or coordinate idealtype will depend upon the configuration of three elements: the attributes of official decision-makers, the distribution of official authority and the manner in which that decision-making authority is exercised. In order to illustrate the relevance and appropriateness of Damaška's framework for the appraisal of the relationship between institutional authority and individual authority as expressed through additional opinions, the following discussion will draw heavily upon literature upon additional opinions drawn from domestic legal systems. Chapters 3 and 4 will turn to the international sphere, and by considering international justice through the prism of Damaška's idealtypes, will assess where on the hierarchical-coordinate axis they lie.

5.1 The Hierarchical Model

Damaška's hierarchical model of official authority is characterised by a professionalised body of official decision-makers,[145] who are organised hierarchically and among whom official authority is distributed widely and vertically, from the top down.[146] The style of decision-making can be characterised as two variants upon legalistic – pragmatic legalism and logical legalism.[147]

5.1.1 Professionalised Body of Decision-Makers

The professionalised system of official decision-making refers to a system of permanent officials, who over time and experience in the same or similar role carve out a sphere of practice.[148] In turn, this provides for the routinisation and specialisation of decision, namely the ability to address issues in a general, rather than individualised, manner by uniformly applying a narrow selection of decision-making criteria and limiting the range of factors taken into consideration.[149]

5.1.2 Hierarchical Distribution of Authority

The second dimension of the hierarchical model of authority is a vertical distribution of decision-making power. Within this pyramid of authority, power is concentrated at the top and diffused downward,[150] with decision-making at lower levels subject to

[145] Damaška (1986) n.40 at 18-19.
[146] Ibid. at 19-21.
[147] Ibid. at 21-23.
[148] Ibid. at 21.
[149] Ibid.
[150] Ibid. at 19.

superior review.[151] Combined with the routinised and specialised characteristics of a professionalised body of decision-makers, the strict hierarchisation of this model of decision-making affords little room for official discretion in the exercise of authority.[152] Accordingly, the exercise of decision-making authority is subject to a comprehensive system of institutional and professionalised accountability. Here, Damaška observes, the stratification of official authority combined with specialisation and superior oversight 'promotes an ethic of cooperation, and the dynamics of hierarchical promotion contribute to a spirit of "team playing"'.[153] By contrast, officials of the same rank do not resolve disagreement between themselves, but rather submit contested matters to the superior for review.

5.1.3 Formal Justice

The third dimension to the hierarchical model concerns the standards applicable to the process of decision-making. Rather than technocratic forms of decision-making, Damaška focuses upon legalistic approaches to decision-making that are common to most judicial systems. Here, decisions are expected to be made 'when facts are found that are specified under a normative standard' and where 'the attainment of desirable consequences is not an independent justificatory ground'.[154] In this form of decision-making, 'the propriety of the decision is evaluated in terms of fidelity to the applicable standard',[155] rather than upon its outcome. Distinguishing further between 'pragmatic legalism' and 'logical legalism', Damaška observes that 'logical legalism' with its focus upon the consistency of decision-making through the application of context-free rules and principles is more consistent with the hierarchical model of authority.[156]

5.1.4 Implications for Additional Opinions

Damaška explicitly addressed the implications of the professionalisation of decision-making upon the approach towards the expression of individual views, in the form of

[151] Ibid. at 20.
[152] Ibid.
[153] Ibid at 21.
[154] Ibid.
[155] Ibid.
[156] Ibid at 22.

additional opinions. Because the professional decision-maker is expected to decouple their personal views from the official function,[157]

> [j]udgments become pronouncements of an impersonal entity (a curia) even where a single individual is entrusted with their rendition. And because the institution must be univocal so as not to be equivocal, the announcement of a judgment made by several officials nullifies prior internal dissent: those who disagree must now repress their feelings.[158]

In systems tending towards the hierarchical model of authority typically associated with strong top-down enforcement,[159] the court is expected to 'speak with the voice of command rather than persuasion'.[160] To appreciate the significance of this, it is necessary to consider how the role of the judge is conceived within the particular legal system. For a clear example, it is possible to look to the Napoleonic civil code legal systems, such as the French legal system. Within such legal systems judges are, to borrow Montesquieu's phrase, conceived as 'la bouche de la loi',[161] namely mouthpieces for the proclamation of the law. Decisions of higher courts, such as the Cour de Cassation are thus characterised by their conciseness, and their 'apodictic' reasoning; the justification being that such an approach is needed in order to ensure the uniform application and coherence of the law.[162] Writing in the context of the French legal system, one commentator has observed that ultimately the decision as to whether to maintain the image of unanimity or to make public the existence and nature of judicial disagreement rests upon a choice between 'understanding' and 'belief'.[163] Here, the choice is between conceiving the law in terms of secular rationality or as 'une religion à mystères, comme un dogme révélé et inaccessible à la raison'.[164]

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[157] Ibid.

[158] Ibid. at 19.

[159] Ibid. at 18-23.

[160] M. Wells, 'French and American Judicial Opinions' (1994) *YJIL* 81 at 103.

[161] Baron de Montesqueiu, *L'Esprit des Lois* (Catelain 1749) Book XI, at Chapter 6.

[162] C. van Dam, *European Tort Law* (OUP 2013) at 54.

[163] D. Rousseau, 'La Transposition des Opinions Dissidentes en France est-elle Souhaitable? - " Pour " : une Opinion Dissidente en Faveur des Opinions Dissidentes' (July 2000) *Cahiers du Conseil Constitutionnel n° 8*, at http://bit.ly/17KFJSZ

[164] Ibid.

Hierarchically-oriented legal systems characterised by the professionalisation of the judiciary tend to adopt a technocratic approach towards legal education and judicial training, selection and appointment.[165] The French approach to judicial accountability

> yields a tremendously unified and centralised educational, vocational and professional system … The French judicial system, in short, prepares the normative judicial ground extremely carefully, and then reinforces this preparation through an elaborate and effective system of professional carrots and sticks. The French mode of control of individual judges is therefore profoundly and rigorously institutional: mastery of the judicial institutions normative and professional values is the *sine qua non* for advancement through the ranks.[166]

This approach towards selection and appointment, which is based upon technical and professional competence rather than on the individual attributes of the individual, is designed to reduce the chance of external influences impinging upon the independence and impartiality of the decision-makers. Within such systems, there is a greater likelihood that a stronger conception of secrecy will be observed; if decision-making is meant to be impersonal, then additional opinions, which by definition are the personal or individual views of the judge (albeit expressed in their professional capacity), would seem a contradiction.

5.2 The Coordinate Model

5.2.1 Lay Decision-Makers

The coordinate model is typified by temporary, non-professional decision-makers, appointed for non-permanent periods of time and without any specific specialist training to equip them for official decision-making in the post their hold.[167] Reference to 'lay' does not suggest that decision-makers lack any legal qualification or experience – for example, in the sense of a lay jury. Rather, 'lay' is used to

[165] Lasser (2004) n.92 at 308 and J. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (SUP 1985) at 101-110.
[166] Lasser (2004) n.92 at 308.
[167] Damaška (1986) n.40 at 24.

distinguish coordinate decision-makers from the professionalised judiciary of the hierarchical idealtype. In the hierachical idealtype newcomers to the judicial profession enter the profession as graduates at the beginning of their career and progress 'up the ranks'. By contrast, judicial decision-makers within the coordinate idealtype join the bench after a lengthy career and do so from a diversity of backgrounds. As such, while they are not 'lay' in the general sense of the word, coordinate decision-makers are lay in that they have not received a rigorous and uniform education and training in 'being a judge'. Instead, the diversity that lay decision-makers bring to the judiciary due to the diversity of their previous careers and their experiences and background is considered a quality that makes them qualified to be a judge.

A consequence of these characteristics of diversity and non-professionalisation is that the decision-making traits of specialisation and routinisation are unlikely to take hold. It follows that there is greater opportunity for flexibility and an individualised approach to justice, both in terms of responding to the specific circumstances of the issue to be decided, and in terms of the identity of the decision-maker as an individual with individual views.[168] In order to maintain consistency in decision-making, the coordinate model of authority usually incorporates an element of professionalisation, in the form of a body of expert legal advisers whose object is to advise and inform the authoritative lay decision-makers.[169]

5.2.2 Horizontal Distribution of Authority

The coordinate ideal is typified by 'a wide distribution of authority among roughly equal lay officials; with no one clearly superior to others, there is essentially a single stratum of authority'.[170] Consistency and unity of decision-making is guaranteed through the overlapping of the jurisdiction of decision-makers and the risk that they might undermine or contradict each other; because of this, cooperation and adjustment between decision-makers is encouraged. As Damaška explained, 'the

[168] Ibid.
[169] Ibid. at 25.
[170] Ibid.

fear of reciprocity becomes a cohesive force, replacing the duty to submit to the imposed and the ordained that prevails in the hierarchical organizations'.[171]

5.2.3 Substantive Justice

The final dimension to the coordinate ideal of official authority rejects the style of decision-making found in the hierarchical model – that is so called technical or legalistic decision-making, divorced from ethical, political, religious or societal norms.[172] Instead, decision-makers are expected to arrive at outcomes that are supported by prevailing, or perhaps the desired, community standards.[173] According to Damaška, it is possible that under this model 'decision-making standards need not mirror widespread social convictions and expectations, but may rather reflection precepts of "the good life" shared only by a narrow elite'.[174] On this view, the activist vision of the administration of justice, the application of desired community standards, is seen as a means of bringing about changes in society in accordance with the ideals inspiring the standards applied.[175]

Although 'substantive justice' is used to suggest reference to common sense, ethical, political or religious sources, it is not devoid of predictability and can be capable of being justified on objective, rational grounds. Whereas predictability and objectivity is ensured in the hierarchical model by the application of 'textually fixed rules', transparency in the coordinate model 'depends upon the clarity of consensus in the community or in the dominant group'.[176]

5.2.4 Implications for Additional Opinions

As in the instance of the hierarchical model, Damaška identifies specific consequences for the attitude towards the publication of individual views and opinions of decision-makers.[177] Here, there is an expectation that decision-makers – whether acting collectively or individually – retain their individual identity and views, independent of the institution of which they are a constituent member. Given that decision-making is viewed as a matter concerning the personal integrity of the

[171] Ibid.
[172] Ibid. at 27.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid. at 28.
[177] Ibid. at 24.

decision-maker, the notion that the publication of individual opinions be suppressed in favour of preserving a singular institutional view is viewed as an affront to that dignity.[178]

However, given that judges are selected because of their particular attributes and experience, there may be concern that this negatively impacts upon their impartiality – or perceived impartiality. Because of this, the logic of transparency is preferred as it demands that judges provide reasons for their decisions, which in turn acts both as a mechanism of constraint and of accountability.[179] When their decisions are open to public scrutiny, they are more likely to take greater efforts to ensure that their decision-making meets the expectations of impartiality and that their decision stands up to reason.[180] Similarly, the lack of professionalisation in decision-making means that the system lacks the institutional mechanisms of training and accountability designed to condition judges to exercise their power in a legitimate manner.

At the institutional level, absent the institutional mechanisms of accountability, additional opinions within co-ordinately structured systems hold the court or tribunal accountable to the wider legal and/or political communities. In the public sphere, a dissenting opinion may contribute to the deliberative process by 'challeng[ing] the reasoning of the majority, test[ing] its authority and establish[ing] a benchmark against which the majority's reasoning can continue to be evaluated'.[181] On this view, dissenting opinions provide an important interpretative tool with regards to the court's judgment – they can highlight weaknesses in the majority's reasoning or decision,[182] or can in fact serve to strengthen the persuasiveness of the majority's decision in instances where the dissenting opinion fails to persuade.[183] It can also serve to highlight the limits to the judgment's authority, by providing lower courts and potential litigants with advice as to how to distinguish subsequent cases, if it is viewed that the judgment itself is overly broad.[184] In those systems that recognise a system of precedent, or judge-made law, the question of 'authority'

[178] Ibid.
[179] See Section 6.3.
[180] See Section 4.3.
[181] Brennan (1985) n.79 at 435.
[182] L'Heureux-Dubé (2000) n.87 at 515;
[183] H. Lauterpacht, *The Development of International Law by the International Courts* (Stevens and Sons 1958) at 67.
[184] Brennan (1985) n.79 430.

takes on an additional dimension. In this context, additional opinions may help establish the boundaries of the authority of the judgment in regards to its application to future cases, since it is precisely through the reasoning provided in the judgment that the applicability of the cases' *ratio* to future cases is determined.[185]

Again, within co-ordinately structured systems, the emphasis upon the individual integrity of the judge provides a further source of accountability for the exercise of institutional authority. This is done by placing emphasis on the individuality of the judge, by focusing on their personal assent to the judgment of the court (as signified by the signature of the judge).[186] In the US for instance, there is an expectation that individual judges are held accountable for the court's judgment, with the personal judicial signature standing to assure 'the parties that he has thoroughly participated in the process and assumes individual responsibility for the decision.'[187] Judges are expected to bear full responsibility for the decision and to not 'slip stream' with the majority.[188] Consequently, there is the expectation that the independent judge guided by individual conscience, when properly fulfilling their adjudicative duties, must be given the means by which to make known their disagreement and the reasons therefore.[189] Commentators further point to the personal and professional reputational consequences of attributing judicial decisions to individual and specific judges, which provides an indirect accountability mechanism.[190] As a consequence of this, additional opinions becomes less a 'mere' entitlement and more one of 'duty'.[191]

From the perspective of independence, in light of the personal attributes of the individual decision-maker, the question of individual judicial independence vis-à-vis their colleagues on the bench is also a more prominent issue when assessing the legitimacy of the decision-making in coordinately structured systems of judicial

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[185] Arden (2008) n.80 at 2; N. Duxbury, *The Nature and Authority of Precedent* (CUP 2008) at 62-63 (fn19).

[186] L'Heureux-Dubé (2000) n.87 513.

[187] O. Fiss,'The Bureaucratization of the Judiciary' (1983) 92 *YLJ* 1442 at 1458.

[188] B. Hale, 'Judgment Writing in the Supreme Court' (30/09/2010) First Anniversary Seminar, at http://bit.ly/13lQEz4 at 2.

[189] C. Hughes, *The Supreme Court of the United States: Its Foundation, Methods and Achievements* (Beard Books 2000) at 67-68.

[190] D. Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) *Journal of Legal Education* 518 at 528-530.

[191] See Lord Browne, cited by B. Kerr, 'Dissenting Judgments – Self Indulgence or Self Sacrifice?' (08/10/2012) The Birkenhead Lecture, at http://bit.ly/T7P02u at 15.

authority. Here, the matter is often expressed in terms of individual judicial integrity. For one UK Supreme Court judge, the 'fact that a judge is constrained by no more than his or her own conscience in deciding how he should adjudicate is as fundamental to the health of our system of justice as it is possible to imagine', placing the individual judicial opinion at the heart of the vision of the law and justice system.[192] In the view of an American judge, 'there are unacceptable personal costs to a judge who always buries disagreements just to "go with the flow". Self-respect suffers from too much silence.'[193] Similarly Michael Kirby, formerly a Justice of the High Court of Australia, has opined that satisfying individual judicial conscience, independence and truth outweigh the (albeit laudable) objectives of certainty and clarity.[194] By giving judges the right to publish their individual views, these coordinately structured systems provide an opportunity for judges to act upon and *demonstrate* their independence of conscience when participating in the deliberations over the case.

Both hierarchical and co-ordinately structured legal systems derive their legitimacy, and thus their authority, from the consent of the governed. In the case of hierarchical systems of justice, the democratic legitimacy of the judiciary and its decisions is derived from the constitutional settlement and the Code, such that the legitimacy of a decision depends upon the extent to which it demonstrates its fidelity to those sources.[195] In the case of coordinate systems of justice, there is an additional (or alternative) source of such legitimacy. In coordinate systems, subjects are not merely told the law, but convinced that it is 'just or inevitable, or necessary'.[196] Here, recalling the Venzke's tripartite conception of authority, the 'acceptance' of the legitimacy of the exercise of judicial power by those subject to that power receives greater emphasis than in hierarchically oriented systems. Consequently, within coordinately structured systems of judicial authority, characterised by a more diffuse and decentralised system of accountability with

[192] Ibid. at 21. For a similar statement, see L'Heureux-Dubé (2000) n.87 at 513 citing the definition of 'impartiality' set forth in *R v RDS* [1997] 3 SCR 484.

[193] Lipez (2005) n.83 at 346.

[194] M. Kirby, 'Judicial Dissent' (26/02/2005) James Cook University, at http://bit.ly/10mBxs8.

[195] See above, Section 3.

[196] Belleau and Johnson (2008) n.63 at 173.

greater and wider participation of those subject to that authority, the external deliberative sphere gains particular prominence.

In view of the systemic importance of the external deliberative process within coordinately structured systems, the 'misleading impression of unanimity' that would be created by the suppression of the individual positions of decision-making judges is considered a greater evil than revelation of disagreement.[197] The revelation of disagreement does encourage participants in the external deliberative sphere to challenge the legitimacy and thus authority of the exercise of institutional power. However, it is precisely the fact that the exercise of institutional power is subjected to this process of challenge and review that grants the external deliberative sphere is legitimising force. Therefore, false unanimity misinforms the external deliberative sphere, and undermines the credibility of the deliberative process and its outcomes.

On this account, additional opinions enhance the rationality of deliberation within the external sphere by equipping and thereby empowering those participating in that deliberation with the information necessary to enable them to evaluate the court's decision. Additional opinions also widen participation in those deliberations. Whereas legal elites may have the knowledge and expertise required to critically evaluate the judgment themselves, additional opinions empower those actors that may lack such expertise or experience to participate in deliberations in a more informed manner, thereby advancing the ideal-speech situation.[198]

In Section 4.4, it was explained how the internal and external deliberative spheres are related. It was stated how the prospect of additional opinions being made available to the external deliberative sphere can serve as an impetus to enhance the quality and rigour of deliberations in the internal sphere, which in turn strengthens the court or tribunal's reasoned decision and its persuasive force once relayed to the external sphere. Not only do additional opinions have a systemic function of facilitating deliberation in the external sphere but, it has been argued, they can also strengthen the persuasive force of the court or tribunal's decision once communicated within external deliberative sphere. Here, advocates of publicising

[197] R. Jackson, 'Advocacy Before the Supreme Court: Suggestions for Effective Case Presentation' (1951) 37 *ABAJ* 801 at 863. See J. Komárek, 'Reasoning with Previous Decisions: Beyond the Doctrine of Precedent' (2013) 61 *AJCL* 149.
[198] See Section 4.1.

disagreement point to the benefit to the coherence of the court's reasoned decision gained from the publication of additional opinions.[199] If dissentient judges can be satisfied in the knowledge that they can express their differing perspective in the form of a publicised individual opinion, the drafters of the judgment are free to construct a judgment based upon comprehensive and complete reasoning, rather than having to compromise in order to satisfy the diverging voices.[200] Given the emphasis upon personal judicial conviction in coordinately structured systems, the resistance put up by individual participants in the course of internal deliberations is likely to be greater than in hierarchically oriented systems where there is a greater detachment between the 'institution's' decision and the individual convictions of the members of that institution.

5.3 Additional Opinions as a Legal Transplant

By now the importance of legal and judicial procedure upon the nature of justice administered by official decision-makers, and the bearing that this has upon the relationship between those in positions of authority and those over which they assert that authority has been established. Therefore, it is unsurprising that legal systems often engage in a process of legal transplantation, whereby they incorporate various legal concepts and infrastructure into a legal system and taken from others.[201] Often this process of transplantation occurs in the context of fundamental changes in society (for example, post-war reconstruction, political revolution and political transition) in order to introduce or encourage certain changes within that *society*.[202]

The issue of whether to permit additional opinions by individual judges is one area in which this phenomenon of legal transplantation can be seen. For example, a number of States transitioning to democracy have included the right for judges to express their disagreement with the majority within the constitutional codes of their new systems, even if that system otherwise tends towards the hierarchical end of

[199] L'Heureux-Dubé (2000) n.87 at 513; Arden (2008) n.80 at 7; Neuberger (2012) n.91 at 11. In the context of the European Court of Justice, which does not permit the public expression of disagreement, the introduction of a right to dissent has been advocated by some in order to improve, inter alia, the quality of the Court's decision-making and the reasoning provided. J. Laffranque, 'Dissenting Opinions in the European Court of Justice – Estonia's Possible Contribution to the Democratisation of the European Union Judicial System' (2004) XI *Juridica International* 14.

[200] Ibid.

[201] D Nelken and J. Feest (Eds) *Adapting Legal Cultures* (Hart 2001).

[202] Ibid.

Damaška's spectrum.[203] Indeed, the Greek Constitution goes further, placing an *obligation* on dissenting judges to publish their written 'minority' opinions.[204] Similarly, under the rules of the Japanese Supreme Court enacted during the Allied Occupation that followed World War II, the Court's decision must include the views of 'every' Justice.[205] This has been interpreted in light of the attempts made to strengthen the norm of freedom of speech within societies transitioning out of repressive authoritarian rule.[206] On this view, the inclusion of additional opinions with a view to fostering a culture of individual judicial conscience can be considered in the context of the broader socio-political reforms undertaken by such societies in the field of justice and constitutional matters.

Similarly, relatively recent comments by a former senior Chinese judge on the merits of permitting the publication of individual opinions provides an example of how additional opinions have been rationalised in terms of governance reform. In a speech to a meeting of the Organisation of American States, Wan Xiang outlined the process of judicial reform undertaken by the Chinese government during the course of the last two decades as part of the broader project of implementing the 'rule of law'.[207] In his speech, he explained how the introduction of the right to publish dissenting opinions in Chinese courts was aimed at improving transparency in the process of judicial decision-making.[208] The objective behind enhanced transparency has been described by the Shanghai No.2 Intermediate Court as to 'bring sunshine to the courtroom' and to 'make judges feel more responsible' in response to increasingly voiced concerns as to the quality of deliberation and legal and factual analysis on some courts.[209]

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[203] Raffaelli (2012) n.82. For example, see the adoption of the entitlement to issue additional opinions by former Soviet-bloc states such as Bulgaria, The Czech Republic, Estonia, Latvia, Lithunia, Hungary, Poland, Romania, Slovenia, Slovakia, most of which are otherwise characterised by a hierarchical structure of judicial authority.

[204] Article 93(3) Greek Constitution 1975 following the votes of the 27th May 2008 of the 7th Reform of the Hellenic Parliament.

[205] Article 11 Court Organization Law 1947.

[206] The introduction of the publication of judicial disagreement in the Japanese Supreme Court into the post-War constitutional order by the American has been described as a 'revolutionary innovation' when considered against the prevailing societal culture in Imperial Japan in which the norms of consensus and homogeneity were notably strong. Dean (2002) n.102 at 354.

[207] Wan E., Latest Developments And Potential Challenges: Remarks By H.E. Wan Exiang (25/09/2007) Washington, DC (http://bit.ly/13u2Lhb).

[208] Ibid.

[209] Quoted in "Bringing More Accountability to the Courts – Shanghai Court Includes Dissenting Opinion in Judgment" (2004) 1 *China Law and Governance Review* at 6. See also C. Lin, 'A Quiet Revolution: An Overview of China's Judicial

On the other hand, various social objectives have been used to justify the prohibition of additional opinions in the context of fragile political settlements, wherein the systems might not be 'mature enough' to accept the publication of judicial disagreement.[210] For example, the publication of additional opinions is forbidden by the Constitution of the Republic of Ireland on constitutional matters in light of the sensitivity of such matters arising from the social and political divisions within the Republic.[211] Similarly, the prohibition of additional opinions in the context of the Court of Justice of the European Union (CJEU) has been justified as a necessary means by which to encourage a greater sense of pan-European solidarity and consensus.[212] By reducing the appearance of disagreement and divisions between its judges, it was considered that this would enable the CJEU to resist political pressure and consolidate its authority.[213]

Accordingly, while it has been argued that the attitude towards additional opinions is a function of the structure of official authority and the purposes served by the administration of justice within a given justice system, this section has acknowledged that there may be certain objectives which explain the adoption of a stance which is at odds with the designs of the extant legal system. However, even in such circumstances, acknowledgment of this does not preclude the relevance of the consideration of the structure or nature of authority within the legal system as this bears directly upon the effectiveness of those legal transplantations in obtaining the objectives sought. As Nelken observes, the success of such transplants depends on the 'relationship or the "fit" between law and society' as well as between the

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Reform' (2003) 4 *Asian-Pacific Law and Policy Journal* 255 at 309-310; X. Yu, 'Judicial Professionalism in China: From Discourse to Reality' in W. Alford, W. Kirby, and L. Winston (Eds) *Prospects for the Professions in China* (Routledge 2011) at 95.

[210] Arden (2008) n.80 at 6; Laffranque (2003) n.95 at 165.

[211] Article 34(5) Constitution of the Republic of Ireland.

[212] Article 35 of the Statute of the CJEU states the secrecy of deliberations, and Article 36 stipulates that 'Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.' 'Protocol No.3 on the Statute of the Court of Justice of the European Union' (30.03.2010) *Official Journal of the European Union* C/83/210 at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/statut_2008-09-25_17-29-58_783.pdf. D. Edwards, 'How the Court of Justice Works' (1995) 20 *ELR* 539 at 557; M. Jacob, *Precedent and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (CUP 2014) at 202 explaining opposition to additional opinions at the ECJ (now CJEU) on the basis that '[t]he ECJ is particularly cagey about its authority, a protectiveness cemented in its deterministic 'new legal order' founding myth and constant insistence that this is still a fragile construct.'

[213] D. Wyatt and A. Dashwood, *European Community law* (Sweet & Maxwell 1993) at 109; L. Brown and T. Kennedy, *The Court of Justice of the European Communities* (Sweet & Maxwell 1994) at 52; Laffranque (2004) n.199.

transplanted and the extant legal system, and the degree to which the transplanted law penetrates society'.[214]

To return to some of the examples of the transplantation of the publicity of additional opinions within domestic legal systems, it can be seen how the intended consequences of legal transplants might be frustrated by the wider structural regime. The actual effectiveness of admitting additional opinions from the perspective of enhancing transparency and accountability in the judicial decision-making process in China can be called into question given the existing legal and political culture that focuses more on centralised and collective decision-making rather than individual accountability.[215] On a more pragmatic level, given that it is not common practice to officially publish court decisions, one can question the actual impact of the introduction of the (after all, discretionary) *right* to publish a dissenting opinion alongside court decisions. More generally, it would be difficult to reconcile the introduction of the right (or even duty) to publish additional opinions with the extant legal system tends towards the hierarchical idealtype of the structure of official authority, which is built upon a logic of anonymous and depersonalised decision-making.[216]

This suggests that although relevant to the appraisal of the attitudes towards additional opinions, where a formal approach has been transplanted into a judicial procedure in order to procure certain objectives, it is nevertheless still necessary to critique the coherence of that attitude within the broader legal system and the judicial culture therein in order to assess the likelihood that its introduction will achieve the objectives sought.

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[214] D. Nelken, 'Towards a Sociology of Legal Transplantation' in Nelken and Feest (Eds) (2001) n.201 at 14.

[215] A. Garapon, 'A New Approach for Promoting Judicial Independence' in R. Peerenboom (Ed) *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (CUP 2010) at 45.

[216] While it is common to characterise the Chinese legal system as resembling most closely the civil law tradition (Garapon 2010, n.215, at 45 and R. Perez-Perdomo and J. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (SUP 2007) at 4) it would be misleading to suggest that the Chinese legal system, with its myriad of philosophical, political, historical and social influences can be said to be of the same 'tradition' as the European notion of the civil law tradition. See Xin R, The Chinese Legal Tradition: Law and Morality' in Xin R. *Tradition of the Law and Law of the Tradition: Law, State and Social Control in China* (Greenwood Publishing 1997) and W. Jones 'Trying to Understand the Current Chinese Legal System' in Hsu C. (Ed) *Understanding China's Legal System: Essays in Honour of Jerome A. Cohen* (NYUP 2003).

6 Three Themes

At the outset of Section 5, it was noted how traditionally, both advocates and opponents of permitting judges to express their individual views upon a decision before an international court or tribunal advance 'authority' and' independence' in support of their views. While the concept of 'authority' has already been addressed,[217] this section will clarify what is meant by 'judicial independence'. It will further outline the key concepts of 'secrecy' and 'transparency', referred to in the previous section as values to which recourse is made in order to preserve and enhance both independence and authority, depending upon how the organisation of judicial authority within a given system is configured.

6.1 Independence

The 'independence of the judiciary' is an expansive term comprising a range of different elements and dimensions.[218] At the broadest level, it is typically associated with the ability of the judiciary to 'decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.'[219] Other definitions make a distinction between independence and impartiality. Independence requires that 'judges [are] in a position to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, armies, churches, newspapers or any other source of power and influence that may otherwise bear upon them'.[220] Impartiality, by contrast, denotes the 'judicial characteristic of disinterest towards the parties and their causes',[221] and is the 'subjective characteristic by which the

[217] See Section 3.

[218] Generally, see J. Crawford and J. McIntyre, 'Independence and Impartiality of the 'International Judiciary' and M. Bohlander, 'Separation of Powers and the International Judiciary – A vision of Institutional Judicial Independence in International Law' in S. Shetreet and C. Forsyth (Eds) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (MN 2011); D. Shelton, 'Legal Norms to Promote the Independence and Accountability of International Tribunals' (2003) 2 *LPICT* 27; C. Brown, 'The Evolution and Application of Rules Concerning Independence of the "International Judiciary' (2003) 2 *LPICT* 63; G. Guillaume, 'Some Thoughts on the Independence of International Judges Vis-à-Vis States' (2003) 2 *LPICT* 163; G. Ulfstein, 'International Courts and Judges: Independence, Interaction, and Legitimacy' (2014) 46 *NYUJILP* 849; T. Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99 *AJIL* 359.

[219] Principle 2, UN UN Basic Principles on the Independence of the Judiciary.

[220] *Prosecutor v Norman*, 'Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence)' (Appeals Chamber) 13/03/2004 (SCSL-2004-14-AR72(E)), Separate Opinion of Judge Robertson at para.2.

[221] Ibid.

international decision maker achieves a reputation for consistency'.[222] The independence of the judiciary goes to the heart of the rule of law and is central to the notion of the administration of justice.[223] One simply has to consider the images of law and legalism in terms of objectivity and dispassionate reason – it is that which distinguished the politics of law and legalism from other forms of politics,[224] as well as other forms of third party dispute settlement.[225]

While the first dimension of judicial independence concerns the independence of the institution and judges from other actors and power holders, the second dimension is internal. This internal dimension concerns individual judicial independence vis-à-vis the other judges in the decision-making group. This refers to the dangers of conformity in group decision-making, and the importance attached to guarding against the intended or unintended pressures placed upon individual participants in the decision-making process to conform to the particular views held by dominant members of the decision-making group.[226]

In addition to structural characteristics such as the separation of powers which are designed to maintain the independence of the judiciary vis-à-vis other political organs of government, there are certain principles which inform judicial procedure that are aimed at, *inter alia*, preserving the independence and impartiality of the judiciary in practice. The principles of secrecy and transparency are drawn upon by legal systems – both domestic and international – as a means to vindicate those attributes of the judicial process that are key to its integrity. Both are upheld as mechanisms by which the fairness of the process can both by ensured and

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[222] T. Moorhead, 'Book Review' (1969) 117 *UPLR* 926 at 927, quoted by D. Amman, 'Impartiality Deficit and International Criminal Judging' in W. Schabas, E. Hughes, and R. Thakur (Eds) *Atrocities and International Accountability: Beyond Transitional Justice* (UNUP 2007) at 213.

[223] Shelton (2003) n.218 at 27; A. Bogdandy and I. Venzke, *In Whose Name: A Public Law Theory of International Adjudication* (OUP 2014) at 159.

[224] Shklar (1964) n.10 at 20; F. Mégret, 'International Judges' and Experts' Impartiality and the Problem of Past Declarations' (2011) 10 *LPICT* 31 at 42; J. Shaman, 'The Impartial Judge: Detachment or Passion' (1995) 45 *DePaul Law Review* 610.

[225] R. Mackenzie, C. Romano and P. Sands, *Selecting International Judges: Principle, Process, and Politics* (OUP 2010) at 10; Advisory Committee of Jurists, *Documents Presented to the Committee Relating to the Existing Plans for the Establishment of a Permanent Court of International Justice* (September 1920), Appendix to Memorandum Presented by the Legal Section of the Permanent Secretariat of the League of Nations' at 113.

[226] The work of sociologists and group psychologists has consistently demonstrated the human inclination towards conformity when in a group context. See S. Asch, 'Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority' (1956) 70 *Pyschological Monographs* 1; R. Bond and P. Smith, 'Culture and Conformity: A Meta-Analysis of Studies Using Asch's Line Judgment Task' (1996) *Psychological Bulletin* 119; J. Jetten and M. Hornsey, 'The Many Faces of Rebels' in Jetten and Hornsey (Eds) (2011) n.75 2.

demonstrated.[227] Given the utility and value of both secrecy and transparency when ensuring and demonstrating the fairness of proceedings, both find some expression – possibly to varying degrees – within most legal systems, with few maintaining an absolute commitment to one at the exclusion of the other.[228] The balance reached between the two within a given legal system will be informed by the organisation and structure of authority.

6.2 Secrecy

The relationship between authority and secrecy is a long one. Traditionally, it was secrecy and the aura of mystery that secrecy helped to generate that formed a source of legitimacy for those exercising official power, thereby consolidating the charismatic authority of 'the law' as an institution.[229] Whereas now, transparency has supplanted secrecy as a principal source of legitimacy for the exercise of judicial power within the rational State,[230] to the extent that the independence – both actual and perceived – of the judges is considered a legitimating factor for the exercise of judicial power, secrecy still bears relevance to our discussions regarding authority.

The principle of secrecy,[231] as manifested in the prohibition of the publication of details concerning the course of deliberations and individual views of the judges, operates at the individual and decisional level of the judicial process in order to ensure the independence of the individual decision-makers when deliberating upon and deciding the case at hand.[232] By enabling judicial deliberation and decision-making to be conducted under the cloak of anonymity, secrecy helps to guarantee that those judges are not subjected to undue influence, pressure, inducements or threats that may affect the impartiality and objectivity of their deliberations and in turn that of the decision. The principle of secrecy operates to shield judges from personal repercussions and does so in order to foster a climate in which, in practice,

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[227] W. Schabas. 'Independence and Impartiality of the International Judiciary: Some lessons Llarned, and Some Ignored' in Schabas, Hughes and Thakur (Eds) (2007) n.222 at 185.

[228] D. Neuberger, 'Sausages and the Judicial Process: the Limits of Transparency', 01/08/2014, Annual Conference of the Supreme Court of New South Wales, Wollongong at http://www.supremecourt.uk/docs/speech-140801.pdf.

[229] A. Peters, 'Towards Transparency as a Global Norm' in A. Bianchi and A. Peters (Eds) *Transparency in International Law* (CUP 2013) at 556.

[230] See Weber's tripartite classification of authority. See K. Allen, *Max Weber: A Critical Introduction* (Pluto Press 2004) at 100; P. Lassman, 'The Rule of Man over Man: Politics, Power and Legitimation' in S. Turner (Ed) *The Cambridge Companion to Weber* (CUP 2012) at 91.

[231] UN Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (26/08/1985-06/09/1985), Principle 15.

[232] On the decisional and institutional levels of judicial independence, see Arden (2008) n.80 at 6.

members of the judiciary feel free to adjudicate cases in accordance with the law and their conscience.[233]

It has been stated that there are two interpretations of the principle of the secrecy of deliberations; the first operates to prohibit the publication of any information that may shed light on the content of the judicial deliberations and the views of individual judges therein.[234] On this view, the principle of secrecy further operates to ameliorate the risk that individual judges will appear partial, a particularly acute risk in those systems where judicial appointments are made by political branches of government.[235] The second view of the principle takes into consideration the individual independence of judges from an internal perspective as well as an external perspective. It does this by creating a distinction between the *deliberations* – which commands secrecy – and the *matter of the decision*, which commands transparency. In this context (as was explained in more detail in the sub-section 5.2.4), the publication of the existence and nature of disagreement over the *decision* is not only tolerated but also encouraged. This is in order to guarantee and to demonstrate the independence of individual judges from the potential influence of their colleagues or the pressures of conformity in group decision-making. At the same time, the secrecy surrounding the deliberative process safeguards independence and impartiality from an institutional decision-making perspective.

6.3 Transparency

The quality of transparency (to 'have the capacity of being seen without distortion') is the attribute of being 'open and available for examination and scrutiny'.[236] The attribute of transparency has become the watchword of good governance, democracy, information and knowledge,[237] a 'fundamentally distinctive trait of contemporary Western culture'.[238] Transparency is increasingly assumed to be a

[233] Ginsburg (1990) n.79 at 140; K. Nadelman, 'The Judicial Dissent: Publication v. Secrecy' (1959) 8 *AJCL* 415 at 422; Raffaelli (2012) n.82 at 9.

[234] Jhabvala (1977) n.141 at 50.

[235] F. Luchaire and G. Vedel, 'La Transposition des Opinions Dissidentes en France est-elle Souhaitable? "Contre": le Point de Vue de Deux Anciens Membres du Conseil Constitutionnel' (July 2000) *Nouveaux Cahiers du Conseil Constitutionnel n° 8* at http://bit.ly/ZwxLcF.

[236] F. Schauer, 'Transparency in Three Dimensions' (2011) *UILR* 1339 at 1343.

[237] A. Buijze, 'The Six Faces of Transparency' (2013) 9 *ULR* 3, at 3-4; A. Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Bianchi and Peters (Eds) (2013) n.229 at 7.

[238] Bianchi (2013) n.237 at 1.

legitimising attribute for the exercise of power,[239] the absence or presence of which distinguishes the exercise of power from the exercise of authority. In the sphere of judicial decision-making, the duty to give reasons for decisions is one clear manifestation of the concept of transparency – the trend towards transparency coincides with the Enlightenment era thinking and appeal to rationality.[240] Transparency is manifested in a number of different ways and stages throughout the judicial process, such as the publication of written and oral submissions, the open or public nature of hearings, the publication of a reasoned decisions and additional opinions. The strength of transparency has led some, including former ICJ judge Nagendra Singh, to opine that the publicity of proceedings and publication of pleadings and the ICJ's judgments is 'one of the classic features of a proper court of law'.[241]

Transparency can also be a tool to enhance deliberation and the quality of decision-making both in the internal and external spheres of deliberation.[242] In the internal, the knowledge that a decision will be made open to scrutiny by reason of the transparency offered by the reasoned quality of the decision and any additional opinions attached thereto strengthens the impetus for stronger and more thorough deliberations.[243] In the external sphere, the transparency offered by such measures empowers deliberations concerned with the determination of the legitimacy and thus degree of authority commanded by the particular decision and the institution in general.[244] Thus, from this perspective, transparency is a mechanism of accountability, by opening up decision-making to those to whom the exercise of judicial power is accountable to.[245]

At the same time, it must be acknowledged that reasoned decisions are mechanisms of transparency only to the extent that provide an accurate reflection of the actual basis' upon which the decision of the court is based.[246] After all, irrespective of the

[239] Ibid. at 8.

[240] Peters (2013) n.229 at 556-557, referencing philosophers such as Jeremy Bentham, Jean-Jacques Rousseau, Immanuel Kant and John Stuart Mill.

[241] N. Singh, *The Role and Record of the International Court of Justice* (MN 1989) at 9.

[242] See Section 4.2 and 4.3.

[243] See Section 4.4.

[244] See Section 4.3.

[245] Peters (2013) n.229 at 558.

[246] K. Llewellyn, *The Common Law Tradition* (Little Brown 1960) at 56.

court or tribunal in question, secrecy prevails when it comes to the actual content of the deliberations in the course of which the decision of the court or tribunal is reached.[247] By extension, additional opinions are only a mechanism of transparency to the extent that they paint an accurate portrait of the views of the individual judge and their contribution to the internal deliberations. Furthermore, transparency may also have negative consequences for deliberativeness; participants may be less willing to compromise or reverse upon previously declared positions, while proceedings conducted in high profile circumstances may be open to manipulation and grandstanding.[248]

Transparency provided both by the publication of reasoned opinions and by additional opinions has, in recent decades, taken on new a dimension. There is disagreement whether 'transparency' involves simply making information available, or whether transparency requires positive measures to make it not only available but practicably accessible.[249] However with the possibilities of limitless dissemination through publication and open access via the internet,[250] the potential for the publication of reasoned opinions, whether the decisions or additional opinions, to provide greater transparency in practice has become much greater. As will become evident throughout the course of this thesis, attitudes towards additional opinions are motivated by concerns as to the effect of their publication upon the *perception* of judicial institutions and their decisions by audiences of their decisions. Historically, the dissemination of published judicial decisions (and additional opinions attached thereto) was limited to elite or specialist circles with access to the printed court reports. However, advances in communication and the growth of information technology, the internet and the rise of social media, has made the jurisprudence of courts and tribunals much more accessible with greater potential for much broader dissemination (to intended audiences or otherwise). Accordingly, many of the arguments in favour or against additional opinions, while not new, take on a much greater resonance today.

[247] See above, Section 6.2.

[248] Bogdandy and Venzke (2014) n.223 at 169.

[249] Buijze (2013) n.237; Schauer (2011) n.236 at 1343-1346.

[250] T. Neumann and B. Simma, 'Transparency in International Adjudication' in Bianchi and Peters (Eds) (2013) n.229 at 463-464.

7 Conclusion

This purpose of this chapter was to explain the connection between the project of international justice, encapsulating a normative project shared by the international courts and tribunals that form the subject of this thesis, and a form of judicial practice – that being the production and publication of additional opinions. It explained how, in order to advance the project, the institutions of international justice discharge a range of social functions. In turn, the ability to discharge these functions depends upon the strength of authority commanded by those institutions – and as expressed through their decision – and the effectiveness by which that authority can be deployed.

Section 3 continued by explaining the concept of authority as understood for the purposes of this thesis and explained how a range of different variables determines authority. Those were the standards of legitimacy according to which authority is judged by those subject to that authority, the attributes and qualities of the actors claiming authority and the substantive nature of the expressions of authority. Against this backdrop, Section 3 closed by explaining how the process and practice adopted by and within judicial institutions can have implications for how that authority is appraised and determined. In particular, it emphasised the need to appraise particular forms of practice or procedure within the wider procedural context in order to appreciate its consequences for authority.

The practice of issuing additional opinions by individual judicial members of judicial institutions constitutes a form of practice with implications for judicial authority – both that of the individual judge and that of the institution of which they are a part. Section 4 elaborated upon the basic description of additional opinions provided in Chapter 1 in order to explain what additional opinions are – distinguishing them from other forms of individual judicial expression and explained how this practice fits within the process of determining authority. It explained that additional opinions – as the expression of individual judicial power – contribute to deliberations. These deliberations occur within two spheres, each having consequences for the authority of an institution in general and its decisions in particular. In the internal deliberative sphere, additional opinions grant individual judges power in the course of deliberations determining the outcome of the institution's decision-making and decision-drafting process. In the external sphere – through their publication and

their availability to actors subject to institutional authority and whose acceptance of the legitimacy of the exercise of institutional power that authority is dependent – additional opinions inform their deliberations determining that legitimacy.

Section 5 turned to consider the factors that determine how additional opinions affect deliberations within the external sphere. It returned to the heuristic framework introduced at the end of Section 3 to explain how the organisation of judicial authority within a particular system of justice determines the implications of additional opinions upon the appraisal of institutional judicial authority. Within strongly hierarchically oriented systems, the prohibition of the expression of individual judicial views is consistent with the prioritisation of institutional judicial authority. In this context, individual judicial authority and institutional judicial authority are mutually exclusive and inconsistent. By contrast, within co-ordinately structured systems, individual judicial authority – and the possibility of its expression through additional opinions – is not only considered to be consistent with institutional authority, but also constitutive or reinforcing of that authority.

Drawing from this, when considering additional opinions in the sphere(s) of international justice, it is similarly necessary to consider the wider context of international judicial authority in order to ascertain the relationship between individual and institutional authority. Accordingly, the following two chapters will consider in turn international justice as pursued by the ICJ and international *criminal* justice as pursued by the ICTY and the ICC.

3. Additional Opinions at the Peace Palace

1 Introduction

The ICJ (and its predecessor the PCIJ) is the paradigmatic judicial institution of international justice,[1] sitting symbolically at the pantheon of international adjudication.[2] The President of the Advisory Committee of Jurists, the body entrusted with drafting the PCIJ's Statute, pronounced that the 'object of international justice is to substitute procedure before a judge for methods of violence'.[3] Even the less sanguine members of the Committee considered that 'the *raison d'être* and function of the Court: to facilitate and develop the solution according to law, not of the great international conflicts, but of the ordinary disputes which to-day are less adequately dealt with by diplomacy'.[4]

The PCIJ departed from its institutional precursor, the Permanent Court of Arbitration, in its shift from arbitration to adjudication (both forms of third party dispute settlement)[5] and brought about a fundamental shift in how international law and legal authority was conceived by its architects and advocates.[6] For many, the PCIJ's greatest contributions to the project of international justice lay in its procedural innovations and in the development of the international judicial function and procedure that provided the blueprint for subsequent international courts and

[1] G. Abi-Saab, 'The International Court as a World Court' in V. Lowe and M. Fitzmaurice (Eds) *Fifty Years of the International Court of Justice* (CUP 1996); E. McWhinney *The World Court and the Contemporary Law-Making Process* (Sijthoff and Noordhoff 1979).

[2] S. Murphy, 'International Judicial Bodies for Resolving Disputes' in C. Romano, K. Alter and Y. Shany *The Oxford Handbook of International Adjudication* (OUP 2014) at 182. This is not to say that there is a hierarchy between the institutions of international adjudication, see R. Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *ICLQ* 791.

[3] Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (June-July 1920) at 533.

[4] O. Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (CUP 2005) at 146.

[5] J. Merrills, *International Dispute Settlement* (5th Ed CUP 2011) at 83. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, General Assembly, Resolution No. 2625 (XXV) (24 October 1970), Principle 2.

[6] Spiermann (2005) n.4 Chapter 1.

tribunals.[7] One such procedural innovation – as this chapter will demonstrate – was the instigation of a culture of writing separately and of dissent by individual judges.

Despite the fate of the League of Nations and the trauma to the advancement of world order caused by the World War II, faith in the promises of international adjudication appeared undiminished.[8] Echoing the sentiments expressed during the negotiation of the PCIJ Statute, at the San Francisco Conference in 1945, it was proclaimed that the ICJ, the 'principal judicial organ of the United Nations,[9] was tasked with 'substituting orderly and judicial processes for the vicissitudes of war and the reign of brute force'.[10] As Gill observed, the lessons of the previous decades only strengthened the resolve to strengthen the effectiveness of the international court by integrating it more firmly into the 'world political organization'.[11]

This integration of the ICJ into the United Nations thus marked a new era in the project of international justice.[12] Although the realities of the international order and state engagement with the Court suggest that the Court has played, if anything, the most marginal of roles in the prevention of inter-state conflict,[13] the ICJ has nevertheless played a central role in facilitating and shaping how (State) members of the post-WWII international society engage with and contribute to international law.

Acting as the 'principal judicial organ of the United Nations',[14] the ICJ has competence to decide inter-State disputes concerning 'any question of international law',[15] and to provide advisory opinions upon the request of 'whatever body may be authorized' by the UN Charter on 'on any legal question'.[16] Given this broad remit, and the unique status of the ICJ as the only *permanent* international judicial

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[7] B. Kingsbury, 'International Courts: Uneven Judicialisation in Global Order' in J. Crawford and M. Koskenniemi (Eds) *The Cambridge Companion to International Law* (CUP 2012) at 206; N. Singh, *The Role and Record of the International Court of Justice* (MN 1989) at 8-9; I. Scobbie, 'The Permanent Court of International Justice, Arbitration, and Claims Commissions of the Inter-War Period' in C. Tams and M. Fitzmaurice (Eds) *Legacies of the Permanent Court of International Justice* (MN 2013) at 203.

[8] R. Falk *Reviving the World Court* (University Press of Virginia 1986) at 1.

[9] Article 1 ICJ Statute; Article 7(1) UN Charter.

[10] UN Doc. 913, IV/1/74(1), 13 UNCIO Docs 393 (1945) (cited in Falk (1986) n.8 at 1). See also H. Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) at 3-5.

[11] T. Gill, *Rosenne's The World Court: What It is and How It Works* (6th rev. ed. MN 2003) at 13.

[12] S. Rosenne, *The Law and Practice of the International Court 1920-2005: Volume 1 The Court and the United Nations* (MN 2006) at 3.

[13] Falk (1986) n.8 at 2.

[14] Article 92 UN Charter; Article 1 ICJ Statute.

[15] Article 36(2)(b) ICJ Statute.

[16] Article 65(1) ICJ Statute.

institution up until 2002, the ICJ has historically been the principal prism through which understanding of the functions and nature of international judicial institutions and the role of the international judge has developed.[17] It might be argued that the Peace Palace paradigm of international justice has now been eclipsed in light of the proliferation of international courts and tribunals with more specialised mandates and jurisdiction.[18] Despite this, the Peace Palace constitutes an essential starting point when understanding the development of international judicial authority, and understanding where, how, and why attitudes towards additional opinions in international justice have been forged.

While there are differences in the structure of judicial authority between the specialised paradigms of international justice, the ICJ nevertheless has both general and systemic relevance, and specific relevance for understanding judicial dissent in international justice.[19] Given the pre-eminence of the Peace Palace institutions, the practice of its judges has had a particular importance in shaping the international 'juridical field', that is the 'area of structured, socially patterned activity or "practice"' of international judges.[20] This field, like any other, is 'organized around a body of internal protocols and assumptions, characteristic behaviors and self-sustaining values', otherwise referred to as the 'legal culture'.[21] The PCIJ and ICJ have constituted a key context within which the international legal culture in general and the international judicial culture more specifically have developed. Irrespective of the structural differences in the nature of judicial authority in the context of other paradigms of international justice, such as international criminal justice, the ICJ has provided a blueprint for judicial practice with regard to additional opinions and also attitudes towards additional opinions. Put differently, the PCIJ and the ICJ have been instrumental in the development of the 'sets of values, norms, and practices that influence' how international judges, not just those of the Peace Palace, behave.[22]

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[17] See L. Prott, *The Latent Power of Culture and the International* Judge (Professional Books 1979).

[18] R. Mackenzie, C. Romano, Y. Shany and P. Sands, *The Manual on International Courts and Tribunals* (2nd ed OUP 2010) at 35; Murphy (2014) n.2 at 182.

[19] G. Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) at 98-99.

[20] R. Terdimen, 'The Force of Law: Toward a Sociology of the Juridical Field by Pierre Bourdieu. Translator's Introduction' (1986-1987) 38 *HLJ* 805 at 805.

[21] Ibid. at 806.

[22] E. Voeten, 'International Judicial Behaviour' in Romano, Alter and Shany (Eds) (2014) n.2 at 564.

As Gleider Hernández has suggested in respect of the ICJ, 'to understand its judgments is considered by the epistemic community of international lawyers as the benchmark of one's grasp of the international legal discipline, as these form the backbone of the primary reference materials on international law to validate an argument'.[23] Given the polyphonic character of the ICJ's juridical output,[24] additional opinions have been a prominent factor shaping understanding of not only the Court's judgments and advisory opinions but also how international lawyers conceive and understand the international legal discipline more generally. Thus, analysis of the Peace Palace paradigm of international justice provides a useful and general starting point to obtain a basic understanding of judicial authority in the context of international justice.

This chapter will first consider the organisation of judicial authority. In light of the structural continuity between the PCIJ and the ICJ, unless otherwise specified this section will for the sake of convenience refer to the ICJ when speaking generally of the Peace Palace institutions. Having concluded that there is a strong tendency towards Damaška's coordinate idealtype of official authority introduced in Chapter 2, the second half of the chapter will appraise the validity and strength of attitudes towards additional opinions expressed in reference to the ICJ and the PCIJ. All the while, it will reflect upon how the individual ICJ judge has influenced how international justice as pursued by the *institution* has been conceived through the expression of their individual authority in the form of additional opinions.

2 Organisation of Authority

In the previous chapter, it was explained how – according to Mirjan Damaška – the organisation of official authority within a given legal system is determined by the configuration of three factors: the attributes of judges, the distribution of judicial authority and whether there is greater prioritisation of formal justice or substantive

[23] Hernández (2014) n.19 at 5.

[24] T. Poole and S. Shah, 'The Law Lords and Human Rights' (2011)74 *MLR* 79 who refer to the 'polyphonic character' of the UK House of Lords by reason of the delivery of its decisions, *in seriatim* (that is, in the form of a chorus of the individual views of the Law Lords). See also Vaughan Lowe who describes international law as 'deal[ing] in polyphony, not plainsong', at V. Lowe, 'The Function of Litigation in International Society' (2012) 61 *ICLQ* 209 at 211 cited in Hernández (2014) n.19 at 287.

justice in the course of decision-making.[25] This section will appraise judicial authority at the ICJ through the prism of this framework.

2.1 Attributes of Judges

ICJ judges are appointed through a political process of election, albeit one that takes into consideration their experience and qualification,[26] for renewable nine year terms.[27] The Statute of the Court adopts a *laissez-faire* approach in order to determine who may qualify for election to the position of a judge. It stipulates that judges must be qualified for high judicial office within their respective national jurisdictions or must be 'jurisconsults of recognised competence in international law'.[28] Beyond this, there is a significant degree of discretion as to who is considered competent to hold office as an ICJ judge. This results in a high degree of variance in the professional backgrounds of ICJ judges, both past and present. Typical career profiles of ICJ judges can range from academia, service within the national judiciary and service within the national diplomatic corps or civil service.[29] Often, ICJ judges have experience of all three. Further to this, the nomination and selection process of judges is not transparent, with the approach of States to the nomination of judges being described as a 'fragmented, inconsistent and highly variable approach'.[30] In sum, taking what appears to be a highly politicised system of appointment,[31] it is difficult to identify the attributes characteristic of Damaška's hierarchical idealtype of authority.[32] Rather, the individual attributes and experience of judges, the diversity of their background and the acknowledgement of the benefits that this diversity can bring, all push the ICJ towards the coordinate idealtype of justice, characterised by lay decision-makers.[33]

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[25] See Chapter, Section 5.

[26] Article 2 ICJ Statute.

[27] Article 13(1) ICJ Statute.

[28] Article 2 ICJ Statute.

[29] R. Mackenzie, C. Romano and P. Sands, *Selecting International Judges: Principle, Process, and Politics* (OUP 2010) at 51; D. Terris, C. Romano and I. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (OUP 2007) at 20. Typically ICJ judges have had experience in two or more of these fields.

[30] Mackenzie, Shany and Sands (2010) n.29 at 98 summarising a chapter of analysis of the diversity of processes for the nomination of judicial candidates.

[31] Ibid. at Chapters 3-4.

[32] See Chapter 2, Section 5.1.1.

[33] See Chapter 2, Section 5.2.1.

As Frédéric Mégret has observed, because of the qualifications and experience required for appointment, 'international legal experts are typically appointed to international legal positions later in their careers'.[34] Further, he explained that 'the politicized nature of the designation processes means that judges/experts are in fact sometimes chosen not despite their previous declarations, but on the very basis of having made them'.[35] The appointment of individuals who have an already established career – during the course of which they would have expressed their personal position on both general and specific issues of international law and policy – renders it inevitable that knowledge of those positions will inform deliberations upon their appointment. Once appointed, from the perspective of the judge, there is a tension between the adversarial, questioning and destabilising experiences and habits developed while they were in private practice or academia with the demands of greater collegiality inherent in membership of the judiciary.[36] While Mégret made these observations when considering their implications upon judicial impartiality, these observations support the characterisation of the Peace Palace system as being co-ordinately structured given the significance of the particular personal attributes and experience of particular decision-makers.

The priority placed upon the individual characteristics of judges is most evident in the 'diversity requirements' for the composition of the Court. The ICJ Statute provides that the composition of the Court as a whole should represent 'the main forms of civilization and of the principal legal systems of the world'.[37] According to a former President of the Court, Taslim Elias, 'the expressions "civilizations" and "legal system" are not coterminous, but are intended to represent the divergent ways of political thought and social action as well as the diverse juridical ideas in the world today'.[38] In view of the systemic importance of the ICJ jurisprudence,[39] this representation has also been considered an important factor in making *international*

[34] F. Mégret, 'International Judges' and Experts' Impartiality and the Problem of Past Declarations' (2011) 10 *LPICT* 31 at 32.
[35] Ibid.
[36] J. Alder, 'Dissents in the Courts of Last Resort: Tragic Choices?' (2000) 20 *OJLS* 221 at 226.
[37] Article 9 ICJ Statute.
[38] T. O. Elias, 'Report on "Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirements which Follow from its Function as the Central Body of the International Community?' in Max Planck Institute for International and Comparative Law, *Judicial Settlement of International Disputes: International Court of Justice, other Courts and Tribunals, Arbitration and Conciliation: An International Symposium* (Springer 1974) at 23.
[39] See above Section 1.

law less Euro-centric and, at least geographically, more representative of the post-Charter era of world order.[40] From the perspective of advancing the project of international justice – which aims at instituting a universal international rule of law – the diversity of the membership of the Court and the representativeness that it is taken to bring is a key legitimising factor, not only for the institution but also for the project itself that the institution is a symbol.[41]

Yet, it has been rightly observed that the degree of universalism and pluralism actually manifested in the composition of the Court is less than might be expected.[42] This is because the vast majority of ICJ judges have obtained at least some of their legal education in Western Europe or the United States.[43] Moreover, the legacies of colonialism have meant that 'some of the principal European systems of law have penetrated over large areas of the globe, mixing in greater or lesser degree with the indigenous law and often displacing it'.[44] This also casts doubt upon the degree of diversity found represented upon the Court.[45] However, even if the statutory requirements for diversity and the representation of the plurality of legal systems has not been translated into practice, the mere fact that diversity is something formally celebrated stands in contrast to the trend within hierarchically-oriented systems towards an institutional identity as a univocal – or singular – curia, where difference is downplayed or obscured.[46] A further characteristic of hierarchical systems is the specialisation and routinisation of decision-making, with judges in the course of their professional judicial careers carving out a sphere of expertise.[47] Once again, while judges may be appointed to the Court bearing in mind their pre-existing experience and expertise, once on the bench, the opportunity for specialisation and

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[40] M. Bedjaoui, 'From an Oligarchic Law to a Law of Community' in M. Bedjaoui (Ed) *International Law: Achievements and Prospects* (MN 1991) at 5-11; Abi-Saab (1996) n.1; McWhinney (1979) n.1; Singh (1989) n.7 at 257; A. Anghie, *Imperialism, Sovereignty and the Marking of International Law* (CUP 2007) at 198.

[40] Singh (1989) n.7 at 26

[41] Y. Shany and R. Giladi, 'The International Court of Justice' in Y. Shany, *Assessing the Effectiveness of International Courts* (OUP 2014) at 185; K. Keith, 'The International Court of Justice: Reflections on the Electoral Process' (2010) 9 *CJIL* 49 at 73-74; See Section 4.3.1.2 for further discussion.

[42] Hernández (2014) n.19 at 133.

[43] Ibid.; G. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 *HoLJ* 95 at 100; M. Burgis, *Boundaries of Discourse in the International Court of Justice: Mapping Arguments in Arab Territorial Disputes* (Brill 2009) at 23.

[44] H. Waldock, General Course on Public International Law (1962-II) 106 *Recueil des Cours* 1, at 65. See also K. Knop, 'Reflections on Thomas Franck, *Race and Nationalism* (1960): "General Principles of Law" and Situated Generality' (2002-2003) 35 *NYJILP* 437 at 456-7.

[45] Ibid.

[46] Chapter 2, Section 5.1.4.

[47] Chapter 2, Section 5.1.1.

routinisation of decision-making to take hold is slim. The reasons for this are numerous. One such reason is the diversity in the factual and legal issues raised by cases and questions submitted to the Court because of its general jurisdiction and the infrequency with which they are referred.[48] This forces the Court to address directly and explicitly the individual and unique characteristics of each case on an *ad hoc* basis (characteristic of Damaška's coordinately structured systems).[49] Furthermore, disputes or questions are only submitted to the Court once they have reached a certain degree of complexity or difficulty, both legally and politically.[50] Taken with the temporary (but albeit renewable) terms of office of individual judges, this renders the capacity for specialisation or routinisation to develop (both at an individual and institutional level) weak.

The following section will turn to a unique attribute of the composition of the ICJ, and that is the system of admitting *ad hoc* judges. In a similar vein to the diversity criteria discussed above, the system of admitting *ad hoc* judges stands as testament to the emphasis placed upon the particular attributes and knowledge, consistent with the coordinate idealtype of justice.

2.1.1 *Ad hoc* Judges

Like all of the international courts and tribunals that are considered in this thesis (and in contrast to others, such as the Court of Justice of the European Union), the ICJ is an example of a 'selective representation court', whereby the composition of the Court does not comprise of a representative of every State party.[51] International adjudication and international justice were originally and primarily conceived as an alternative to the 'politics of interest'.[52] It implies and involves the submission of disputes for resolution according to a body of laws outside of the immediate control of the disputing parties.[53] The disputes are to be decided by impartial and

[48] Singh (1989) n.7 at 31.

[49] See Chapter 2, Section 5.1.2.

[50] Report of the Informal Inter-Allied Committee 1944 at para.81(a); T. Franck, *Judging the World Court* (Twentieth Century Fund 1986) at 11; C. Romano, K. Alter, and Y. Shany 'Mapping International Adjudicative Bodies, the Issues, the Players' in Romano, Alter and Shany (Eds) (2014) n.2 at 17.

[51] Mackenzie, Shany and Sands (2010) n.29 at 7-8.

[52] Chapter 2, Section 2.

[53] S. Besson, 'Legal Philosophical Issues of International Adjudication: Getting Over the Amour Impossible Between International Law and Adjudication' in Romano, Alter and Shany (Eds) (2014) n.2 at 417, defined adjudication as

independent judges in accordance with the pre-existing body of law of general application and pre-determined rules of procedure.[54] Since not all State parties have a national on the Court, and in light of the 'unique sensitivity' of the international sphere to actual or perceived bias,[55] the architects of the Peace Palace regime of international justice developed a system for allowing *ad hoc* judges to participate in proceedings on behalf of States who did not have a national on the Court.[56]

The purpose of *ad hoc* judges is to ensure (and reassure that) that neither party to a dispute has an unfair advantage over the other in terms of the composition of the bench.[57] This has been justified by some as a 'concession to diplomatic susceptibilities',[58] and 'more general and psychological grounds connected with the nature of international relations'.[59] At the same time, the practice of admitting *ad hoc* judges is commonly criticised for undermining one of the ordinarily defining characteristics of adjudication – namely adjudication by permanent and independent judges not selected by the parties.[60]

The system of *ad hoc* judges should not to be taken as to imply the perceived bias of the Court's full members. Today, it is justified on the basis that it enhances the equality between the parties and the equality of arms by ensuring both parties have had the same opportunity to be equally heard in fact.[61] The function of *ad hoc* judges is to ensure that the Court as a whole has been able to fully understand, appreciate and thus appraise the merits of both parties' submissions.[62] Traditionally, this has been understood in terms of the ability of the *ad hoc* judge to provide 'local knowledge' or to inform proceedings in light of their particular appreciation of the

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i) the function, role or task ii) belonging to permanent and independent judges (as a court) iii) to state and apply the law iv)in order to settle the specific disputes brought before them v) by issuing legally binding decisions vi) according to a pre-determined set of rules of procedure.

[54] Ibid.

[55] Mégret (2011) n.35 at 32.

[56] Article 31 ICJ Statute; Article 31 PCIJ Statute.

[57] However, even when both states do not have a national sitting as a permanent judge on the bench, both are entitled to appoint an *ad hoc* judge. Article 31(3) ICJ Statute.

[58] Gill (2003) n.11 at 57.

[59] Ibid. at 56.

[60] 'Advisory Committee of Jurists, *Documents Presented to the Committee Relating to the Existing Plans for the Establishment of a Permanent Court of International Justice* (September 1920), Appendix to Memorandum Presented by the Legal Section of the Permanent Secretariat of the League of Nations at 113.

[61] Hernández (2014) n.19 at 150.

[62] *Application of the Convention on the Prevention and Punishment of Genocide* (Further Requests for the Provision of Additional Measures) (Bosnia and Herzegovina v Serbia and Montenegro) [1993] ICJ Rep 325, Separate Opinion of Judge *ad hoc* Lauterpacht at 409.

particular context in which the pleadings of the parties should be understood, as typically *ad hoc* judges were nationals of the appointing State.[63] However, it has now become common for States to appoint non-national *ad hoc* judges,[64] with the consequence that there may be more than one judge sitting on the Court of the same nationality.[65] Accordingly, the function of *ad hoc* judges might be more general so as to enhance what was referred to in Chapter 2 as the 'ideal speech situation' in the internal deliberative context,[66] and to do so by ensuring that the interests of the parties are represented throughout the whole course of proceedings, including the process of deliberation and judgment drafting.[67] Moreover, the willingness of States to appoint non-nationals does at least suggest a greater trust in the ability of judges as individuals (or at least, those appointed as *ad hoc* judges) to act independently of their own national State.

Having demonstrated the emphasis placed upon the specific individual attributes of ICJ judges, the following section will consider the ICJ system of justice through the prism of the second characteristic of Damaška's idealtypes for the organisation of official authority, that is, the distribution of authority.

2.2 Distribution of Authority

Chapter 2 described how Damaška's hierarchical idealtype of authority is characterised by a vertical distribution of authority where power is concentrated at the top by a few and diffused down widely and there is a greater tendency towards

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[63] G. Guillaume, 'Some Thoughts on the Independence of International Judges Vis-à-Vis States' (2003) 2 *LPICT* 163 at 164.

[64] Hernández (2014) n.19 at 149.

[65] Examples of where there are two judges sitting on the Court of the same nationality include: *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamarhiriya)* (Tunisia v Libyan Arab Jamarhiriya) [1985] ICJ Rep 192 (with Judge de Lacharriere and Judge *ad hoc* Bastid both being of French nationality); *Case Concerning Certain Property* (Preliminary Objections) (Lichtenstein v Germany) [2005] ICJ Rep 6 (with Judge Higgins and Judge *ad hoc* Berman both being UK nationals); *Military and Paramilitary Activities in and Against Nicaragua* (Jurisdiction and Admissibility) (Nicaragua v USA) [1984] ICJ Rep 392 (with Judge de Lacharriere and Judge *ad hoc* Colliard both being French nationals); *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal) [2012] ICJ Rep 423 (with Judge Abraham and Judge *ad hoc* Sur both being French nationals.
An example where both *ad hoc* judges were of French nationality, meaning there were 3 judges of the same nationality on the Court, see *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 [2013] ICJ Rep 281 (with Judge Abraham and Judges *ad hoc* Guillaume and Cot).

[66] Chapter 2, Section 4.1.

[67] Gill (2003) n.11 at 56; Singh (1989) n.7 at 193. Contrast with P. Kooijmans, 'Article 31' in A. Zimmermann et al (Eds) *The Statute of the International Court of Justice: A Commentary* (2nd Ed OUP 2012) at 533.

superior review of decision-making.[68] By contrast, Damaška's coordinate ideal is typified by 'a wide distribution of authority among roughly equal lay officials; with no one clearly superior to others, there is essentially a single stratum of authority'.[69] The Peace Palace paradigm of international justice, as will be discussed in this sub-section, is an exemplar instance of a system of judicial authority horizontally organised.

Within the ICJ itself, there exists no appellate mechanism of review of the Court's judgments; there exists only a single level of decision-making authority composed of (and within) a single body.[70] While it is possible for parties to request an interpretation by the Court of its previous decisions or to review its previous decisions in specific circumstances,[71] there is no general appellate procedure for review. In the context of the Court's advisory opinions, which by definition are not binding, there is similarly no opportunity for judicial review or appeal. For this reason, in light of this single stratum of authority, the limited prospects for career progression *within the Court* calls into doubt the existence of the hierarchical dynamics wherein 'team playing' and obtaining consensus is rewarded by promotion.[72]

Looking at the wider system of international justice within which the ICJ must be understood, international adjudication has 'become largely accepted and a central feature in the practice of contemporary international law'.[73] At the same time, it remains the case that international adjudication is an 'exception to the rule of autointerpretation in the context of international law by [S]tates'.[74] Within coordinate systems of justice, even if the judiciary is not the sole institution responsible for exercising official authority in the determination, application and enforcement of the law, they nevertheless still enjoy a privileged position with a

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[68] Chapter 2, Section 5.1.2.

[69] M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (YUP 1986) at 25. See Chapter 2, Section 5.2.2.

[70] However, it is possible for the Court to sit in a Chamber formation rather than a full plenary. See Articles 26 and 27 ICJ Statute.

[71] E.g. *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) [1995] ICJ Rep 288.

[72] See, Chapter 2, at 5.1.1.

[73] Besson (2014) n.53 at 415.

[74] A. Paulus, 'International Adjudication' in S. Besson and J. Tasioulas (Eds) *The Philosophy of International Law* (CUP 2010) at 207.

superior degree of authority. By contrast, in the international sphere, a wider array of actors, primarily States but increasingly non-State actors and organisations, enjoy an equal (or higher) degree of formal authority than the Court.[75]

Even in the context of dispute settlement, long considered to be the primary function of international adjudication,[76] it is acknowledged that adjudication is 'not necessarily States' first choice among international dispute settlement mechanisms'.[77] There are a wider variety of dispute mechanisms settlements – whether legal or diplomatic available to States.[78] Moving beyond dispute settlement, the plurality of actors that possess law-determining and law-making authority also lends support to the coordinate characterisation of international judicial authority.[79] Under the orthodox doctrine of the sources of international law, judgments of international courts and tribunals are not regarded as formal sources of obligation.[80] Judicial decisions and opinions may be accepted as correct statements of the law, and customary international law may subsequently emerge through the practice and *opinio juris* of States in line with the law as stated in a judicial decision. However, doctrinally-speaking at least,[81] ICJ judges have no legislative power.[82] As such, the ICJ is only one actor among many within the system of international justice with authority to provide interpretations of the law. Further, whereas compliance with the decisions of domestic courts and tribunals is guaranteed by some means of enforcement – irrespective of the views of the parties to the case – the ICJ lacks

[75] E.g., J. Alvarez, *International Organizations as Law-Makers* (OUP 2005).

[76] J. Alvarez, 'What are International Judges For? The Main Functions of International Adjudication' in Romano, Alter and Shany (Eds) (2014) n.2 at 158 *et seq*.

[77] Besson (2014) n.53 at 415.

[78] Ibid.

[79] M. McDougal, H. Lasswell and W. Reisman, 'The World Constitutive Process of Authoritative Decision' in R. Falk and C. Black (Eds) *The Future of the International Legal Order: Volume One – Trends and Patterns* (PUP 1969) at 81; I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012); A. Boyle and C. Chinkin, *The Making of International Law* (OUP 2007).

[80] Article 38(1)(d) of the ICJ Statute, widely accepted as an accurate articulation of the orthodox sources of law, describes judicial decisions as subsidiary means of the determination of the law. See I. Brownlie, *Principles of Public International Law* (7th Ed OUP 2008) at 5; G. Schwarzenberger, International Law (3rd Ed Stevens and Son 1957) at 30 *et seq*; H. Thirlway, *The Sources of International Law* (OUP 2014).

[81] In practice, lawmaking by international courts and tribunals, including the ICJ is an inevitability. See Venzke (2012) n.79 at 146.

[82] Ibid.

enforcement authority,[83] at least in the sense conceived and implemented in domestic spheres of action.

Nevertheless, despite the limited formal role ascribed to the ICJ, in practice, the ICJ as an institution and its individual judges do enjoy a high degree of semantic authority. This denotes the capacity to 'shape meanings as well as the ability to establish its communications as authoritative reference points in legal discourse'.[84] The consequence of this semantic authority, as Ingo Venzke has explained, is to 'increase an actor's capacity to create and its faculty to control – to make law and to constrain by way of law'.[85] As Judge Fitzmaurice explained, 'judicial pronouncements of one kind or another constitute the principal method by which the law can find some concrete measure of clarification and development'.[86] Combined with the infrequency of disputes and questions submitted to the Court, such that the Court rarely obtains the opportunity to revisit the same legal question, every statement on the law by the Court holds considerable authoritative potential. However, the authority of each judicial decision for these purposes is contingent upon how they are interpreted and the degree of legitimacy that they are considered to hold in that process of interpretation.[87] This once again makes it difficult to identify the Peace Palace paradigm of international justice with the hierarchical idealtype.

2.3 Formal versus Substantive Justice

Chapter 2 explained how Damaška's hierarchical and coordinate idealtypes of judicial authority can be distinguished based upon the degree of emphasis placed upon formal and substantive justice as applicable standards in decision-making.[88] In hierarchical systems with a stronger inclination towards formal justice, the correctness of a decision 'is evaluated in terms of fidelity to the applicable standard' rather than quality and consequences of its outcome.[89] However coordinately organised systems of justice tend to place greater emphasis upon the merits of the

[83] However, under Article 94(2) of the UN Charter, there is envisaged the right of parties to disputes before the ICJ to petition the UN Security Council to take make recommendations or take decisions in respect of non-compliance with a judgment of the Court by the other party to the case.

[84] Venzke (2012) n.79, at 63.

[85] Ibid.

[86] *Barcelona Traction, Light and Power Company, Limited* (Second Phase) (Belgium v Spain) [1970] ICJ Rep 3, Separate Opinion of Judge Fitzmaurice at para.2.

[87] Chapter 2, Section 3.

[88] Chapter 2, Sections 5.1.3 and 5.2.3.

[89] Damaška (1986) n.69 at 21. See Chapter 2, at Section 5.1.3.

outcome.[90] Therefore, while in hierarchical systems, 'the attainment of desirable consequences is not an independent justificatory ground' for a decision,[91] in coordinate systems, decisions are expected to be also supported by prevailing, or desired, community standards.[92]

Whereas the attributes of ICJ judges and the distribution of decision-making authority within the Peace Palace paradigm tend heavily in favour of the coordinate idealtype, the situation is more balanced when considering the standard of decision-making legitimacy.

Article 38(1) of the ICJ Statute outlines the applicable law that the Court shall apply when deciding a case or providing an advisory opinion. It identifies four sources through recourse to which the Court may identify applicable law, the first three being the formal sources and primary material or evidential sources and the last being secondary material or evidentiary sources:

a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) International custom, as evidence of a general practice accepted as law;
c) The general principles of law recognised by civilised nations;
d) judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the law.[93]

Given the correctness of a decision is assessed according to the fidelity of a judgment or advisory opinion with Article 38(1), this might suggest a strong tendency towards formal justice, given the only legitimate grounds for decision-making are those that fall within Article 38(1)(a)-(c). However, in practice, the variance in methodologies for the interpretation of treaties and the identification of custom – which in turn result in potentially great disparities in outcome – preclude a formalist conception of

[90] Damaška (1986) n.69 at 27. See Chapter 2, at Section 5.2.3.
[91] Damaška (1986) n.69 at 21.
[92] Ibid. at 27, Chapter 2, Section 5.2.3.
[93] Article 38(1) ICJ Statute.

decision-making involving the simple identification and application of the applicable standard.[94]

The second factor mitigating the purely formalist conception of decision-making is the incorporation of principles of equity in the decision-making of the Court. It might be argued that equity, as one of the 'general principles of law recognised by civilised nations', constitutes one of the formal applicable standards. However, by definition, equitable standards are intended to imbue a dimension of substantive justice.[95] The degree to which equitable principles may be relied upon as the basis for the Court's decision-making has traditionally been a source of disagreement among the judges of the Court, as the additional opinions to the Court's leading decision on the matter aptly demonstrate.[96] Despite this, ability of the Court to legitimately take into consideration flexible considerations such as 'the interests of justice' to mitigate the harshness of the strict positivist application of formal sources of legal obligation is well established within the Court's jurisprudence.

Not only are there differences between individual judges as to the degree of tolerable flexibility in the Court's adherence to the strict rules, but the Court's approach appears to take a differential approach depending upon the stage of proceedings. Both the PCIJ and the ICJ have, particularly on questions of jurisdiction and admissibility, been willing to depart from a purely formal application of the law, where the consequences of adherence to the formal rules would, in the Court's view, be inconsistent with 'the interests of justice' and 'judicial economy'.[97] The Court's handling of jurisdiction in the *Genocide Convention* case between Croatia and Serbia provides a controversial example.[98] Here the ICJ invoked a statement made in *obiter* by the PCIJ in its 1924 *Mavrommatis Palestine Concessions* judgment in order to

[94] Moreover, see the principle of unilateral undertakings developed by the Court, whereby the Court has found States to be under a legal obligation to act in conformity with any 'declarations made by way of unilateral acts, concerning legal or factual situations' where they are considered to create legal obligations. Such acts are deemed to take on the character of a 'legal undertaking' where they are made in public 'and with an intent to be bound', can give rise to a legal obligation to which they may be held bound by the Court. See *Nuclear Tests* (New Zealand v France) [1974] ICJ Rep 457 at para.46; *Nuclear Tests* (Australia v France) [1974] ICJ Rep 253 at para.43; *Case Concerning the Frontier Dispute* (Burkina Faso v Republic of Mali) [1986] ICJ Rep 573 at para.39; *Legal Status of Eastern Greenland* (Norway v Denmark) [1933] PCIJ Series A/B.53 at 71.

[95] V. Lowe, 'The Role of Equity in International Law' (1989) 12 *AuIL* 54.

[96] *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark) [1969] ICJ Rep 3. Compare the position of Judge Ammoun (Separate Opinion of Judge Ammoun at 132) with that of Judge Koretsky (Dissenting Opinion of Judge Koretsky at 166).

[97] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections) (Croatia v Serbia) [2008] ICJ Rep 412 at paras.87 and 89.

[98] Ibid. See the 10 additional opinions authored by 13 of the Court's judges.

justify departure from the formal law, the operation of which would have deprived the Court of jurisdiction over the case.[99] The reason for the *prima facie* lack of jurisdiction was that the respondent State, Serbia, was not, at the time the application was submitted to the Court, a Member State of the UN and thus party to the ICJ Statute.[100] In *Mavrommatis*, the jurisdictional problem derived from the fact that at the time the applicant State submitted its application to the Court, Protocol XII to the Treaty of Lausanne (the source of the contested obligations forming the subject of the dispute) had not yet entered into force.[101] In *Mavrommatis*, the PCIJ interpreted the events subsequent to the initial procedural defect, that is the entry into force of the Protocol prior to the commencement of the Court's deliberations, as curing that initial defect, allowing the Court to continue to consider the case on the merits.[102] In 2008, in the *Genocide Convention* case, the ICJ drew an analogy between, on the one hand, the procedural defect and curative event in *Mavrommatis*, and on the other hand, the procedural defect (Serbian non-membership of the UN) and the curative event (Serbian membership of the UN), so as to establish the Court's jurisdiction over the case on the merits.[103] As the additional opinions to the *Genocide Convention* judgment illustrate, the Court's willingness to apply the *Mavrommatis* 'principle' given the substantive nature and implications of the procedural defects in the immediate case, demonstrates the contentiousness of the Court's approach towards jurisdiction in the case at hand.[104] By contrast, if one compares the flexibility of the preliminary objections judgment with the Court's recent judgment on the merits in *Genocide Convention*,[105] it can be seen that when identifying, interpreting and applying the substantive rules of

[99] *The Mavrommatis Palestine Concessions* (Objection to the Jurisdiction of the Court) (Greece v UK) [1924] PCIJ Series A.02.

[100] *Genocide Convention* n.97 at para.45.

[101] *Mavrommatis* n.99 at 34.

[102] Ibid.

[103] *Genocide Convention* n.97 at para.81-91.

[104] 10 Judges of the Court expressed their disagreement with the Court's reliance upon the *Mavrommatis* decision of the PCIJ: See *Genocide Convention* n.97, Separate Opinion of Vice President Al-Khasawneh at 468-471, Separate Opinion of Judge Abraham at para.51-55, Dissenting Opinion of Judge Skotnikov, Dissenting Opinion of Judge Ranjeva at para.29-34), Dissenting Opinion of Judge Owada at para.8-27, Declaration of Judge Bennouna, Dissenting Opinion of Judge *ad hoc* Kreca at para.79-95 and Joint Declaration of Judges Ranjeva, Shi, Koroma and Parra-Arranguan at para.6-14. For discussion and similar criticism, Y. Blum, 'Consistently Inconsistent: The International Court of Justice and the Former Yugoslavia (*Croatia v Serbia*)' (2009) 103 *AJIL* 264 at 267-271.

[105] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Merits) (Croatia v Serbia) Judgment of 03/02/2015.

international law, the Court is less willing to depart from formal standards of judicial decision-making.

To conclude, the diversity of approaches towards decision-making represented by the judges of the Court – some maintaining a strict approach in favour of formal justice and some eschewing the boundaries of formalistic conceptions of justice in favour of more equitable approaches – means that it is impossible to ascertain a particular culture of decision-making of the institution as a whole. The diversity of legal and philosophical traditions represented through the diverse membership of the Court as required by Article 9 of the Court's Statute suggests that it was never intended for the Court to adopt a single jurisprudential approach towards decision-making.[106] In this regard, it is also necessary to recall the description of the Court's internal deliberative process provided in Chapter 2.[107] For former ICJ judge Kenneth Keith,[108] much of the Court's institutional authority as the 'World Court' lies in not only the diversity of its individual judges but the manner by which the structure of the Court's internal deliberative process translates and transposes the diversity of its *individual* judges into its decisions.[109] He cites former President of the Court, Sir Robert Jennings, in support of his assertion that the Court's deliberative

> process lends to the Court's pronouncements a unique world-wide authority in a world were a developing, general international law is a most important – possibly the most important – single vehicle of common action and understanding, and where any determination of a contentious point of international law must have a very considerable political as well as legal significance.[110]

The result, he argues by quoting Georges Abi-Saab, is that the Court's decisions do, or at least should, 'by synthesis or symbiosis, [reflect] the legal visions, needs and

[106] Sharing this view, see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Declaration of Judge Herczegh at 275.
[107] See Chapter 2, Section 4.5.1.
[108] Keith (2010) n.41.
[109] Ibid. at 73-4.
[110] Ibid. referring to R. Jennings, The Internal Judicial Practice of the International Court of Justice (1988) 59 *BYIL* 32.

aspirations, of all the components of this community [being the international community as a whole]'.[111]

Article 9 has been read alongside Article 38 of the ICJ Statute,[112] which articulates the breadth of the sources of law to which recourse may be made in the course of judicial decision-making.[113] On the basis of such a parallel reading, some individual judges of the Court have justified their conclusion that the Court is 'under a particular obligation to search in all these traditions and legal systems [of the world] for principles and approaches that enrich the law it administers'.[114] As Gleider Hernández concludes, while it would be too far to argue that the ICJ system of international justice is one that may be characterised as an agent of legal pluralism, it can be equally said that it was never intended to reinforce homogeny or universality in the system.[115] The decisions of the Court are rarely explicitly based on surveys of 'the law of Western Europe and Latin America, the common law, Muslim law, Chinese law, Soviet law, Hindu law, the law of Asian and African countries and related customs'.[116] However, the diversity requirements under Article 9 combined with the authorisation provided by Article 38 for individual judges to canvas the world's array of legal traditions and cultures, synthesised by way of the inclusive process of internal deliberations together create a picture of institutional decision-making more in line with Damaška's coordinate idealtype than the hierarchical one.

2.4 Summary

In this section, it has been argued that the Peace Palace paradigm of international justice has a strong tendency towards the coordinate idealtype of authority. The flexibility of the criteria for the selection and appointment of judges and the diversity of their professional backgrounds, the ICJ judiciary as a whole may be taken as a prime example of lay decision-makers. The structure and distribution of authority, both within the ICJ as an institution and more generally, can be described as the

[111] Keith (2010) n.41 at 74, citing G. Abi-Saab, 'The Portrait of the Jurist as an International Judge' in C. Peck and R. 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* (MN 1997) at 171.

[112] Reproduced above, text accompanying n.93.

[113] *North Sea Continental Shelf* n.96 Separate Opinion of Judge Ammoun at para.33-34.

[114] *Maritime Delimitation in the Area Between Greenland and Jan Mayen* (Denmark v Norway) [1993] ICJ Rep 38, Separate Opinion of Judge Weeramantry at para.234.

[115] Hernández (2014) n.19 at 286-7.

[116] Keith (2010) n.41 at 69.

archetypal example of a horizontal distribution. Finally, it was considered that while there is evidence of both formalist and substantive justice tendencies in the Court's reasoning, the inherent accommodation of the plurality of different modes of reasoning suggests a degree of flexibility that finds more in common with the coordinate idealtype.

The consequence of this is that the permissive attitude towards additional opinions that has developed is fully consistent with the wider culture of judicial authority. This conclusion is consistent with that of former ICJ judge, Mohamed Shahabuddeen, who – based on a similar range of considerations – concluded that arguments against admitting additional opinions derived from Code-based legal traditions.[117] The considerations he relied upon were the absence of a judicial hierarchy; the absence of a system by which academics are entrusted with producing 'doctrine' based upon the case law; the diversity of the 'international community' and the intended representativeness of the Court of that diversity.[118]

Having arrived at this conclusion, the rest of this chapter will critically reflect upon views upon the effect of additional opinions, and will consider what role the expression of individual judicial authority plays within the coordinately structured paradigm of ICJ justice. Before exploring those views, the following subsection will provide a brief overview of the relevant legal texts governing the matter of additional opinions and a general descriptive overview of the practice.

3 Additional Opinions at the ICJ

3.1 PCIJ

The legal basis for additional opinions at the PCIJ is found in Article 57 of the 1920 Statute of the PCIJ. It provided that:

> [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.[119]

[117] M. Shahabuddeen, *Precedent in the World Court* (CUP 1996) at 206-207.
[118] Ibid.
[119] Article 57, PCIJ Statute 1920.

Although the Statute was silent upon whether judges were entitled to deliver dissenting opinions in the context of the Court's advisory jurisdiction, two declarations were attached to the first advisory opinion delivered by the Court.[120] Accordingly, the Rules of Procedure and Evidence published in 1922 confirmed the ability of judges to publish dissenting opinions from an advisory opinion of the Court.[121] While there continued to be discontent among the judges with the statutory provisions and practice thereunder throughout the 1920s, the right of a dissenting judge to publish a reasoned dissenting opinion remained undiminished in the reviews of the Rules of the Court in 1926,[122] 1931[123] and 1936.[124]

Although the statutory language referred only to 'dissenting' judges, judicial practice indicates that from the outset, there has been a tendency within the international judiciary adopt a liberally permissive approach, eschewing a literal (and restrictive) interpretation of the Article 57 entitlement. On a literal reading of the Statute, although Article 57 refers both to the 'dissenting judge' and to the 'separate opinion',[125] it would have seemed that by explicitly identifying *dissenting* judges as those holding the right to deliver a separate opinion, the PCIJ Statute only envisaged the publication of what is commonly understood to be 'dissenting opinions'.[126] Despite this, it is possible to identify a number of cases where judges issued either declarations (bare or brief statements of their position) or separate opinions in explanation of their vote where they agreed with the Court's operative paragraphs, but disagreed in whole or in part with the Court's reasoning. For example, while Judge Anzilotti agreed with the operative parts of the Court's advisory opinion in *Customs Region Between Austria and Germany* case,[127] he delivered an individual opinion detailing his disagreement with the basis of the opinion.[128] Similarly, declarations by both Judge Altamira and Judge Anzilotti in the *Railway Traffic*

[120] *Competence of the ILO in Regards to International Regulations of the Conditions of the Labour of Persons Employed in Agriculture* (Advisory Opinion) [1922] PCIJ Series B.02), Declarations of Judges Weiss and Negulesco.
[121] Article 71 PCIJ RPE 1922.
[122] *Acts and Documents Relating to the Organisation of the Court* (Statute and Rules of Court) [1926] PCIJ Series D.01.
[123] *Acts and Documents Relating to the Organisation of the Court* (Modification of the Rules) [1931] PCIJ Series D.02, Second Addendum.
[124] *Acts and Documents Relating to the Organisation of the Court* (Elaboration of the Rules of Court) [1936] PCIJ Series D.02, Third Addendum.
[125] Article 57, PCIJ Statute.
[126] Ibid.
[127] *Customs Region Between Austria and Germany* (Advisory Opinion) [1931] PCIJ Series A/B.31.
[128] Ibid. Individual Opinion of Judge Anzilotti.

Between Lithuania and Poland,[129] state their agreement with the operative paragraphs, but not the reasoning adopted by the majority.[130]

By the time the PCIJ was formally dissolved in 1946,[131] the publication of judicial disagreement in the form of additional opinions was a familiar characteristic of international adjudication. Between 1922 and 1939, the PCIJ was responsible for delivering 59 judgments and advisory opinions. Only 15 of these were delivered without the publication of a single additional opinion; 13 were advisory opinions[132] and 2 were contentious proceedings.[133]

3.2 ICJ

There was some discussion within the Informal Inter-Allied Committee ('Committee') on the Statute of the Court replacing the PCIJ on whether and to what extent the Statute should make provision for additional opinions.[134] The outcome of that debate was to confirm the practice of the judges at the PCIJ under its Statute. The statutory provisions of the PCIJ were transposed into the ICJ Statute, amended only to provide an explicit statutory footing for any judge, not just those dissenting, to issue an opinion. While the drafters of the ICJ Statute acted upon the recommendation of the Committee to create an explicit statutory basis for separate as well as dissenting opinions,[135] they rejected the recommendation to *oblige all* dissenting judges to

[129] *Railway Traffic Between Lithuania and Poland* (Advisory Opinion) [1931] PCIJ Series A/B.42.

[130] Ibid. Declarations of Judges Altamira and Anzilotti.

[131] 'Resolution of the Assembly of the League of Nations' reproduced in (1946-1947) *ICJ Yearbook* 28-29.

[132] *Designation of the Workers' Delegation for the Netherlands at the Third Session of the International Labour Conference* (Advisory Opinion) [1922] PCIJ Series B.01; *Monastery of Saint-Naoum* (Advisory Opinion) [1924] PCIJ Series B.09; *Exchange of Greek and Turkish Populations* (Advisory Opinion) [1925] PCIJ Series B.10; *Polish Postal Service in Danzig* (Advisory Opinion) [1925] PCIJ Series B.11; *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne* (Advisory Opinion) [1925] PCIJ Series B.12; *Competence of the ILO to Regulate Incidentally the Personal Work of the Employer* (Advisory Opinion) [1926] PCIJ Series B.13; *Jurisdiction of the Courts of Danzig* (Advisory Opinion) [1928] PCIJ Series B.15; *Competence of the ILO to Examine Proposal for the Organization and Development of the Methods of Agricultural Production* (Advisory Opinion) [1922] PCIJ Series B.03; *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)* (Advisory Opinion) [1928] PCIJ Series B.16; *Greco-Bulgarian "Communities"* (Advisory Opinion) [1930] PCIJ Series B.17; *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) [1923] PCIJ Series B.04; *German Settlers in Poland* (Advisory Opinion) [1923] PCIJ Series B.06; *Jaworzina* (Advisory Opinion) [1923] PCIJ Series B08.

[133] *Treaty of Neuilly, Article 179, Annex, Paragraph 4* (Interpretation) [1924] PCIJ Series A.03; *Interpretation of Judgment No.3 Judgment of 26th March 1925* (Chamber of Summary Procedure) [1925] PCIJ Series A.04.

[134] 'Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice' (10/02/1944) available at (1945) 39 *AJIL Supplement* 1 at para.81-82.

[135] Ibid. at para.82.

publish a dissenting opinion in explanation of their vote against the Court's decision.[136] Accordingly, Article 57 of the ICJ Statute reads:

> If 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.[137]

Drafters of the Statute also rejected a suggestion made by the Informal Committee to require *all* judges to produce and publish individual opinions, thereby furnishing the judgment arrived at by the majority with a series of opinions to support the *dispotif*.[138] Taken together, they were conceived as providing a collection of cohesive and coherent opinions that might have greater persuasive force to counter any dissenting opinions.[139] To have adopted this approach of making it obligatory for all judges to publish an individual opinion, or to participate in a joint opinion, would have been controversial. To turn what was – and still is – an *entitlement* into an *obligation* under international law, would have appeared unduly ambitious given the wider ambivalence towards additional opinions and disagreement over their implications upon judicial authority.

In addition to Article 57 of the Statute, Article 95(2) of the Rules of Court reads:

> Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court.

The significance of this is threefold. First, it clarifies the entitlement of all judges – not just those who vote against dispositive paragraph – to issue individual opinions, even when the judge is in full concurrence with the Court's decision.[140] Second, it confirms the entitlement of judges to issue bare or unreasoned statements indicating their vote on the case in the form of a declaration instead of providing a

[136] Ibid.

[137] Article 57, Statute of the ICJ.

[138] Report of the Informal Inter-Allied Committee (1944) n.134 at para.84.

[139] Ibid. at para.143-144.

[140] Contrast this with Article 57 of the Statute which might be read as only granting that entitlement when the Court's judgment is not a full reflection of the judge's individual views.

reasoned opinion styled as a 'separate' or 'dissenting'. This provision pre-dates the amendment to the Rules of Court, which required the publication of the names of the judges who voted in the majority.[141] The amendment in principle rendered 'declarations' obsolete as the revelation of the names of the judges who voted in the majority and minority achieves the same purpose as bare statements of dissent or concurrence. Despite this, declarations are in practice extensively used by judges.[142]

ICJ judges have been prolific in their use of their entitlement to issue additional opinions.[143] The right of judges to express their individual views in the manner they wish, and irrespective of the nature of the disagreement,[144] has become firmly entrenched in the practice of the Court. Of the 134 judgments (taken to include all interlocutory judgments and opinions, but excluding orders) delivered by the ICJ since its inception in 1945,[145] only one has been delivered without a single additional opinion attached.[146] Some judgments and opinions are well-known for the exceptionally high number of additional opinions. For example, the 1959 *Interhandel* (Preliminary Question) judgment was accompanied by 13 additional opinions,[147] and the 1996 *Nuclear Weapons* advisory opinion was accompanied by 14 additional opinions.[148] However, the average number of additional opinions attached to the Court's judgments or advisory opinions is 6, while the most frequent number of additional opinions to a given judgment or opinion is 9.

Of the 16 judges to have never participated in a single additional opinion of some kind, 12 of those were *ad hoc* judges whose participation in the Court's proceedings had only ever been in that *ad hoc* capacity.[149] Therefore, only 4 exclusively full

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[141] See below, Section 4.2.2.

[142] 173 Individual Declarations have been issued by ICJ judges to judgments of the Court, 103 of which have been issued since the change in the Rules of Court in 1978. 18 Joint Declarations have been issued by ICJ judges, the majority of which authored by two judges, but a few by multiple judges.

[143] For the purposes of this discussion, taken to denote all opinions additional to the judgment or opinion of the Court - declarations, dissenting opinions, separate opinions, individual opinions, or joint variants of the aforementioned. See Appendix 6.

[144] See Article 95(2) ICJ Rules of Court and Article 7 of ICJ, *Resolution Concerning the International Judicial Practice of the Court (Rules of Court, Article 19)* adopted 12/04/1976.

[145] As of 16th June 2015. Accordingly, it does not include *Obligation to Negotiate Access to the Pacific Ocean* (Preliminary Objection) (Bolivia v Chile) Judgment of 24th September 2015.

[146] *Maritime Delimitation in the Black Sea* (Merits) (Romania v Ukraine) [2009] ICJ Rep 61.

[147] *Interhandel* (Preliminary Objections) (Switzerland v US) [1959] ICJ Rep 6.

[148] *Nuclear Weapons* n.106.

[149] See Appendix 6. *Ad hoc* Judges (country of origin, not country of appointment): Jorge Castañeda (Mexico), Maxwell Cohen (Canada), Claude-Albert Colliard (France), Ahmed Sadek El-Kosheri (Egypt), Walter Jean Ganshof van der Meersch (Belguim), Carlos Garcia Bauer (Guatamala), Philippe Kirsch (Belgium), Marc Lalonde (Canada), Bernard

members of the Court never participated in a single additional opinion in the course of their career on the ICJ bench.[150] Even then, Judge Baxter only participated in one judgment;[151] Judge Pathak participated in a single advisory opinion;[152] Judge De Lacherrière participated in 6 decisions[153] and Judge Fabela participated in 5 judgments and opinions.[154] The number of additional opinions participated in by a single judge over the course of their career on the ICJ in general lies between 1 and 9. At the same time, it is possible to identify notable outliers – not only in regards to the number of additional opinions for which they were responsible, but also for the number of judgments and opinions that they participated in.[155] Judge Stephen Schwebel (USA) issued 22 individual additional opinions over the course of his 32 judgment ICJ career, Judge Abdul Koroma (Sierra Leone) issued 25 individual additional opinions over the course of his 47 judgment ICJ career, and – most significantly – Judge Shigeru Oda (Japan) issued a total of 41 individual additional opinions over the course of his 42 judgment ICJ career.[156] At the same time however, when comparing the average number of additional opinions per judgment participated in of these judges with that of other full judges, then the practice of these judges does not seem to be outlying.

Whereas 777 individual additional opinions have been issued in the course of the 134 decisions of the Court that form the subject of this study's quantitative analysis,[157] only 43 joint opinions have been issued.[158] 2 of those joint opinions were co-authored by 7 Judges, 7 joint opinions were co-authored by 5 judges, 8 were co-

Oxman (USA), Sir Ninian Stephen (Australia), Fredrik Julius Christian Sterzel (Sweden), Yaroslav Zourek (Czechoslovakia).

[150] See Appendix 6. Judges (country of origin): Richard Baxter (USA), Guy Ladreit de Lacherrière (France), Isidro Fabela (Mexico) and Raghunandan Swarup Pathak (India).

[151] *United States Diplomatic and Consular Staff in Tehran* (Merits) (USA v Iran) [1980] ICJ Rep 3.

[152] *Applicability of Article VI, S.22 of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 177.

[153] *Application for Review of Judgment No.273 of the UNAT* (Advisory Opinion) [1982] ICJ Rep 325; *Continental Shelf* (Libya/Malta) (Permission to Intervene) [1984] ICJ Rep 3; *Nicaragua* n.65; *Continental Shelf* (Libya/Malta) (Merits) Judgment [1985] ICJ Rep 13; *Application for the Revision and Interpretation of the Judgment of 24 February 1982 Concerning the Continental Shelf* (Tunisia/Libya) (Merits) [1985] ICJ Rep 192; *Military and Paramilitary Activities in and Against Nicaragua* (Merits) (Nicaragua v USA) [1986] ICJ Rep 14.

[154] *Corfu Channel* (Preliminary Objections) (UK v Albania) [1948] ICJ Rep 15; *Conditions of Admission into the United Nations* (Advisory Opinion) [1948] ICJ Rep 57; *Corfu Channel* (Merits) (UK v Albania) [1949] ICJ Rep 4; *Reparations for Injuries Suffered in the Service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174; *Corfu Channel* (Compensation) (UK v Albania) [1949] ICJ Rep 244.

[155] See Appendix 6.

[156] Ibid.

[157] Ibid.

[158] Comprising of 19 joint dissenting opinions, 6 joint separate opinions, and 15 joint declarations. For a list of these joint opinions, and their authors, see Appendix 5.

authored by 4 judges, 9 were co-authored by 3 judges, and the remaining 17 were co-authored by 2 judges.[159]

As this limited quantitative overview illustrates, additional opinions are an important attribute of the ICJ jurisprudence. The following sections will consider the qualitative arguments in favour and against that practice, and will appraise those views in light of the coordinate nature of international justice at the Peace Palace.

4 Attitudes Towards Additional Opinions

The attitudes towards additional opinions canvassed in this section come from a number of sources: *first*, the negotiating history of the Statute and Rules for the PCIJ (and to the extent that they are available, the ICJ) and amendments thereto, *second*, in both judicial and extra-judicial writing by judges and former judges of the Court, and, *third*, in opinions expressed in academic literature. From the outset, it is necessary to qualify the critique of those views expressed in the course of the negotiations of the PCIJ Statute. The views expressed in that context were made not in light of an extant system of judicial authority, but rather in the course of deliberations that *established* the structure of judicial authority. Therefore, while it might not be valid to use the coordinate characterisation of ICJ justice arrived at earlier in this chapter to appraise those views from the perspective of the context in which they were expressed, it does not preclude the consideration of their continuing or subsequent validity.[160]

The following sections will discuss the arguments in favour and against additional opinions thematically, taking in turn 'independence' and 'authority'. It will then turn to consider specifically the criticisms of that practice in order to ascertain the criteria for the legitimate – and thereby authoritative – use of additional opinions.

4.1 Independence

Independence, as was explained in Chapter 2, is one of the cornerstones of judicial legitimacy – and, thus, authority.[161] It relates both to the authority of the institution

[159] Ibid.

[160] On the validity of this distinction between 'legislative intent' and 'what has actually happened' see F. Berman, 'The International Court of Justice as an 'Agent' of Legal Development' in C. Tams and J. Sloan (Eds*) The Development of International Law by the International Court of Justice* (OUP 2013) at 7-8.

[161] See Chapter 2, Section 6.1.

as a decision-making body, and the individual judges who are members of that institution and who together are responsible for deciding on behalf of the institution.[162] Whereas Section 4.3 will address arguments that cast institutional and individual authority in opposition to each other, this section will demonstrate how both advocates and opponents of additional opinions acknowledge the importance of preserving actual and apparent individual judicial independence in order to preserve the institutional authority of the Court. Their disagreement, rather, lies in the solution that they prescribe to preserve that individual independence. Those opposed to additional opinions proffer adherence to secrecy, whereas those supportive of additional opinions advocate in favour of transparency.

The negotiations for the PCIJ Statute were permeated by a tension between, on one hand, the aspirations and expectations for the Court to operate as an independent body and, on the other, a pragmatic acceptance of the inevitability of, at the very least, the perception of bias. The observation made by the French member of the Advisory Committee of Jurists, Albert de Lapradelle, that 'if international justice reached a high degree of perfection, it would not be necessary to meddle with the composition of the Court' epitomises the concern.[163] If such perfection existed, the taking of the oath of impartiality would have been sufficient to assure States of the Court's independence and thus encourage them to submit their disputes to the Court.[164] One example of such meddling is the system of *ad hoc* judges.[165] A second area in which this tension is evident is in the discussions upon the desirability of permitting additional opinions.

4.1.1 Independence and Secrecy

During both the negotiations of the PCIJ Statute and deliberations on the amendment of the Court's Rules, one of the key concerns motivating the advocacy of greater secrecy was the preservation of judicial *independence* vis-à-vis the State from which the judge came.[166] This was particularly the case where a judge (either an *ad*

[162] Ibid. On the particular issues raised in the context of international justice when considering judicial independence and impartiality, see e.g., H. Lauterpacht, *The Function of Law in the International Community* (OUP 1933) at 210-249.
[163] Advisory Committee of Jurists *Procès-Verbaux* (1920) n.3 at 534.
[164] Ibid.
[165] See above, Section 2.1.1.
[166] Advisory Committee of Jurists *Procès-Verbaux* (1920) n.3 at 591-2.

hoc judge or a permanent judge) was a national of one of the States party to the dispute (i.e. a 'national judge').[167] Here the concern was that national judges may be under undue influence or pressure from their governments or from other domestic constituencies.[168] In turn, this may affect their freedom to participate in deliberations and decide in the case in an independent and impartial manner.[169] One proposal intended to address this concern was to prohibit national judges and *ad hoc* judges from issuing additional opinions.[170] Supporting this was the view advanced by the French member of the Committee of Jurists responsible for the drafting of the PCIJ Statute.[171] He opined that to grant national judges the right to issue dissenting opinions 'was an extremely delicate point, because a national judge would always record his disapproval of a sentence unfavourable to his country'.[172] Similarly, in his view, *ad hoc* judges 'would always give reasons for their opinions, and as they would generally dissent from the majority, their votes would have no value: but the statement of the reasons for their opinions would restate all the arguments likely to hurt the parties' feelings'.[173]

Later in the negotiations, the justification advanced for barring national judges from recording their vote was replaced by the claim that to do so would 'afford them a greater measure of independence with regards to their own country'.[174] It was stated that to do so would 'shield the judge from the reproaches of national public opinion', presumably in cases where the national judge voted against their State.[175] Consequently, the justification shifted away from the motive of the judge and the judge's personal impartiality towards the conduct of external actors – that is the judge's national State – that might undermine the judge's independence and capacity to participate in proceedings impartially in practice.

[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Advisory Committee of Jurists *Procès-Verbaux* (1920) n.3 at 570, Draft Article 19.
[171] Advisory Committee of Jurists *Procès-Verbaux* (1920) n.3 at 531.
[172] Ibid.
[173] Ibid. at 535.
[174] Ibid. at 592.
[175] Ibid. at 743.

Although it was ultimately decided to permit *ad hoc* judges to issue additional opinions,[176] the objections to national judges issuing additional opinions persisted. In negotiations for the amendment to the PCIJ Rules of the Court in 1929, the French delegate once again asked whether it was wise to test the independence of a national judge.[177] He further explained that:

> the duty of a judge of the Court was to judge according to his conscience and not in accordance with the interests of his country, and there was a risk that the authority of a national judge would be greatly weakened if he could be regarded as being merely an advocate of his Government. A national judge who knew that his opinions would be published might easily be led to defend his Government instead of judging it. The fact that his attitude during the deliberations of the Court would be publicly declared exposed him, if he decided against his country, to the remonstrances of his Government. Was it reasonably possible always to count on the necessary independence of judgment and firmness of character?[178]

The only safeguard against this, he submitted, was to prohibit any public reference to the course of deliberations, including the numerical outcome of the vote; only then could 'full liberty and independence of spirit' be guaranteed.[179] Recently, this argument has been more sophisticatedly raised in a more general defence of the principle of the secrecy of *deliberations*.[180] Here, Thore Neumann and former ICJ judge Bruno Simma have argued that the secrecy of deliberations is an essential safeguard of the independence of international judges.[181] The reason they advance in support of this claim is that secrecy of deliberations prevents governments from 'monitoring the discursive behaviour of individual judges, [and seeking] to influence them by indirectly 'disciplining' their discursive 'inputs' and by using information

[176] Ibid.

[177] Committee of Jurists on the Statute of the PCIJ ('PCIJ Committee of Jurists'), *Minutes* (May 1929) at 50.

[178] Ibid. It is claimed that Cecil Hurst, one of the original proponents of the right to publish dissenting opinions, was also coming to form this personal view – see Spiermann (2005) n.4 at 313 (fn.73).

[179] PCIJ Committee of Jurists *Minutes* (1929) n.177 at 50.

[180] T. Neumann and B. Simma, 'Transparency in International Adjudication' in A. Bianchi and A. Peters (Eds) *Transparency in International Law* (CUP 2013) at 457.

[181] Ibid.

from the deliberations to thwart a judge's re-election'.[182] Duncan French, for example, has suggested that some may interpret Judge Weeramantry's failure to secure re-election for a second term office on the basis of his 'steadfast refusal to accept the argument that the International Court should act timidly in the face of 'the great issues' or deferentially in the face of entrenched political interests is arguably a constant feature of his opinions'.[183] While this is a valid argument in favour of preserving the secrecy of the deliberative process, this does not translate to a justification for the prohibition of additional opinions. Additional opinions are voluntary and the content of such opinions is within the discretion of the individual author. Individual judges are entitled to reveal as much of their own process of deliberation and discursive input as they wish. Provided judges who issue additional opinions do not reveal in their opinions views expressed by their colleagues in the course of deliberations, then additional opinions are consistent with the secrecy of deliberations.

4.1.2 Independence and Transparency

Whereas the foregoing arguments were underpinned by an assumption that secrecy would be the guarantee of independence, those in favour of admitting additional opinions seemed to accept the reality that individual judges would be under pressure from a variety of sources. The priority for these however was less the elimination of these pressures – which would presumably impress upon national judges irrespective of whether additional opinions were permitted or not – and more the capacity of the Court to decide *impartially*, that is irrespective of the pressures upon it or its individual members.[184]

On this view, consistent with the logic of coordinately structured systems,[185] the prospect of the publication of additional opinions was considered to be a 'guarantee against any subconscious intrusion of political considerations, and that the judgments were more likely to be given in accordance with the real force of the

[182] Ibid.

[183] D. French, 'The Heroic Undertaking? The Separate and Dissenting Opinions of Judge Weeramantry during his Time on the Bench of the International Court of Justice' (2006) 11 *AYIL* 35 at 41 (fn 35), referring, to example to *Legality of the Use of Force* (Request for the Indication of Provisional Measures) (Serbia and Montenegro v Belgium) [1999] ICJ Rep 124, Dissenting Opinion of Judge Weeramantry and *Nuclear Weapons* n.106, Dissenting Opinion of Judge Weeramantry.

[184] See Chapter 2 at 6.1.

[185] Chapter 2, Section 5.2.4.

arguments'.[186] Typically, critics of additional opinions are characterised as prioritising the institution over the individual, and advocates are conceived as prioritising the individual over the institution.[187] However, contrary to that typical presentation, here advocates of additional opinions explicitly invoke the interests of the institution as justification for their position. On their argument, additional opinions are a viewed as a mechanism for ensuring that institutional judicial authority is exercised in an impartial manner, irrespective of the pressures that may be acting upon individual judges. Precisely because additional opinions invite and encourage greater scrutiny of the judgment, this view assumes that those responsible for the judgment are more likely to exercise greater diligence when providing the reasoning to support their decision in order to satisfy that scrutiny.

During the negotiations of the Statute and Rules of Court, discussion of the independence-oriented arguments in favour of additional opinions focussed upon institutional independence and impartiality. Nevertheless, the same arguments can be made in regards to individual judicial authority and independence. Secrecy – implemented through the prohibition of additional opinions – shields individual judges from scrutiny. However, the elimination of the means by which to evaluate individual judicial independence and impartiality does not equate to the removal of the inherent suspicion or distrust in the independent credentials of international judges in light of the exigencies of the 'imperfect nature' of international justice.[188] Moreover, the prohibition of additional opinions would do little to *prevent* national governments or other constituencies and stakeholders from exerting influence upon judges – whether national or otherwise – to decide in particular ways. Prohibiting additional opinions would serve only to undermine the likelihood that any partiality due to undue pressure upon a judge is uncovered. Additional opinions, *to the extent that they are utilised*, open up the personal decision-making process of the authoring judge to the same kind of scrutiny as of the judgment.

In coordinately structured systems (such as the ICJ) it can be recalled that the dispensing of justice is a matter of personal judicial integrity and the professional

[186] PCIJ Committee of Jurists *Minutes* (1929) n.177 at 52.

[187] The argument that additional opinions are a means by which the internal independence of the judges vis-à-vis their colleagues can be vindicated has been made more explicitly in the context of international criminal justice. See Chapter 4, at 2.1.1 for discussion.

[188] See above, at Section 2.1.1.

capacity of the judge is indissociably linked to their personal capacity.[189] This calls into questionable whether secrecy would be feasible in practice. In the view of the Inter-Allied Committee, the body entrusted with considering the options for the institutional replacement to the PCIJ, the views of individual judges were bound to be made known to the public.[190] Similarly, Elihu Root opined in 1929 that in the absence of any official publication, the private disclosure of the opinions of the judges would be inevitable. He reasoned '[n]o member of the Court would consent to rest under an imputation of acquiescing in views which he did not hold, and the judges would naturally defend themselves in private'.[191]

This favouring of transparency over secrecy in order to preserve judicial independence – both institutional and individual – was consistent with the general tendency within the Peace Palace institutions towards transparency, as the following discussion will illustrate.

4.2 Transparency and the Emerging Judicial Culture

From the outset of the negotiations of the Statute of the PCIJ, there was a strong sentiment in favour of transparency as a means towards ensuring impartiality and institutional legitimacy. While Max Huber noted the gratifying 'tendency to overrate the importance and effectiveness of an international judiciary for international peace', he nevertheless observed how the 'world is disgusted with the politics of interest and influence and longs for an institution of real impartiality.'[192] Accordingly, he acknowledged the 'moral responsibility of the Court in deciding its first cases and in giving their argumentation'.[193] This sentiment coincided with that of the American delegate to the negotiations in 1929 on the amendments to the PCIJ Rules, who observed the increasing degree of public interest in, and publicity of, diplomacy and government affairs, and remarked that 'it was impossible to oppose this development'.[194] Similar statements were made in academic writing, with Edward Dumbauld in 1941 considering that a policy of suppressing the publication of disagreement 'would be incompatible with the modern tendency towards greater

[189] See Chapter 2, at Section 2.1.1, and above, Chapter 3 at Section 2.1.
[190] Report of the Informal Inter-Allied Committee (1944) n.134 at para.81(a).
[191] PCIJ Committee of Jurists *Minutes* (1929) n.177 at 51.
[192] Letter from Judge Huber to Judge Moore (21 October 1921) reproduced at Spiermann (2005) n.4 at 147.
[193] Ibid.
[194] PCIJ Committee of Jurists *Minutes* (1929) n.177 at 51.

publicity and open diplomacy'.[195] This tendency towards transparency continued through to 1944, when the Report of the Inter-Allied Committee on the replacement to the PCIJ endorsed the continued permissibility of additional opinions in the future ICJ.[196] It stated its preference for enabling those who disagree with the majority to state as much 'in open court and give their reasons' for doing so.[197]

The foregoing suggests that during these formative years of the judicial culture within international justice, transparency rather than secrecy began to emerge as the dominant imperative within that nascent culture. The strength of transparency over secrecy is illustrated in each episode in the history of the PCIJ and ICJ where attempts were made to introduce greater secrecy in proceedings. These attempts were driven out of the concern about the effect of judicial practice with regard to additional opinions upon the authority and prestige of the Court. In each instance, as the following section will illustrate, transparency over secrecy prevailed.

4.2.1 Secret Dissent and the PCIJ

The preference for transparency over secrecy manifested itself most confidently in the PCIJ's resolution of the matter of 'secret dissents' in its 1926 amendments to the Rules of the Court. This referred to the practice of some PCIJ judges to attach additional opinions to the minutes of the Court's proceedings, such that they were placed on record but were not made public.[198] It has been suggested that this practice had been quite prolific.[199] Secret dissents arose in the context of the wider attempts during the negotiations in 1926 to mediate between those on the Court who wished to furnish the proceedings with greater transparency, and those on the other hand who wished to restrict dissentient practice by limiting the nature of dissenting opinions and the context in which they may be made.[200]

Those opposed to the practice of secret dissents grounded their claims on two bases. The first was the text of the Statute which, it was argued, only granted a right to

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[195] E. Dumbauld, 'Dissenting Opinions in International Adjudication' (1942) 90 *UPLR* 929 at 938.

[196] Report of the Informal Inter-Allied Committee (1944) n.134 at para.81(b).

[197] Ibid.

[198] F. Jhabvala, *The Development and Scope of Individual Opinions in the International Court of Justice* (University Microfilms International 1977) at 93.

[199] Discussed at Spiermann (2005) n.4 at 212-13, referencing *Acts and Documents Relating to the Organisation of the Court* (Revision of the Rules of Court) [1926] Series D.02, First Addendum at 206.

[200] *Acts and Documents* First Addendum (1926) n.199 at 200-223, discussed in detail at Jhabvala (1977) n.198 at 94 *et seq*.

make public statements of dissent and not private statements.[201] The second was the conviction as to the need for publicity and transparency in the Court's proceedings in order to strengthen the reputation or prestige of the infant Court.[202] For Judge Moore, the drafters of the Court's Statute adopted a general principle of publicity of proceedings in order to enhance public confidence in the Court, which was considered particularly necessary given the Court's lack of compulsive or enforcement powers.[203] Furthermore, Judge Anzilotti observed that public acknowledgement of the majority by which the judgment was adopted would inform future changes in the jurisprudence, with judgments adopted on a weak majority being more readily departed from.[204] Similarly, Lord Finlay suggested that if the Court wished to make a change in the direction of its jurisprudence, and when doing so draw upon the reasoning contained within a dissenting opinion, the Court would be placed in a difficult place if that reasoning was contained in a 'secret dissent'.[205] In light of the Court's duty to give reasons for its decisions, if the Court refrained from citing in its decisions secret dissents which it had considered and relied upon in its deliberations because of their secrecy, he considered this would constitute a 'dereliction of duty'.[206]

Whereas Judge Moore opposed secret dissents on the basis that the secrecy of deliberations established in Article 54 of the Statute was the exception to the general rule of transparency in proceedings,[207] those who supported greater secrecy in proceedings argued that Article 57 was an exception to the general principle of secrecy adopted in the Statute.[208] For Judge Loder, who led the call for stronger secrecy, the intention of the drafters of the Court was to establish 'a court on continental lines, that was to say a moral entity whose opinions would be that of the majority of its members'.[209] These discussions were being conducted during the

[201] *Acts and Documents* First Addendum (1926) n.199 at 202-203.

[202] Ibid.

[203] Ibid.

[204] Jhabvala (1977) n.198 at 105.

[205] *Acts and Documents* First Addendum (1926) n.199 at 202-203.

[206] Ibid. at 203. In practice however, the Court – whether in the form of the PCIJ or the ICJ – developed a style of reasoning whereby it does not make reference to additional opinions, either in agreement or disagreement. See below, Section 4.3.2.

[207] In addition to Article 57, he also pointed to Articles 20, 42, 43, and 46 to support the claim that the intention behind the Statute was to institute a public or transparent procedure.

[208] *Acts and Documents* First Addendum (1926) n.199 at 202.

[209] Ibid. at 204.

period in which the structure of judicial authority within the Peace Palace paradigm was ossifying. While it may or may not have been intended to establish a 'continental style system', this chapter has demonstrated that the totality of the structure established along with the subsequent institutional developments confirmed that a hierarchal structure consistent with the 'continental-style' never materialised.

The outcome of these discussions fell in favour of greater – or at least maintaining the same degree of – transparency. With regard to the matter of secret dissents, the Court decided to strengthen the wording of the Rules of the Court to clarify that if a judge wished to write a dissenting opinion, then that opinion must be attached to the Court's decision and thus be made public.[210] This was supported by an addition to Article 62 of the Rules of Court requiring that the Court's decision must include the number of judges constituting the majority, and confirmation that the same requirement applied in the context of advisory proceedings.[211]

The reasons successfully advanced for the abolition of the practice provide an insight into the view within the Court as to the nature of the Court's judicial authority. While the negotiations on the proposed amendments were lengthy, with strong views both in favour of greater secrecy and greater transparency, much of the disagreement focused upon the proposal to make it mandatory to publish the names of the judges who voted against judgment or opinion. While Article 57 of the Statute granted judges the *discretion* to disclose their dissentient identity by issuing an additional opinion, for the Court to disclose the identity of the judges in the majority and minority, irrespective of whether the individual judge chose to publish an additional opinion, was too great an incursion into what remained of the principle of secrecy.[212] It was further argued that this would dilute the notion of the institutional responsibility for the judgment or opinion of the Court, instead with judgments being associated with the individual judges who comprised the majority.[213] However, by the 1970s when the issue came up for review before the ICJ, attitudes had shifted.

[210] Article 31 Revised Rules of Court, adopted 31/07/1926.
[211] Article 62 and Article 71, Revised Rules of Court, adopted 31/07/1926.
[212] *Acts and Documents* First Addendum (1926) n.199 at 209.
[213] Ibid.

4.2.2 1976 Amendment to the Rules of Court and the Resolution on Internal Judicial Practices

The 1960s and 1970s saw an upsurge in the use of additional opinions by ICJ judges that coincided with the 'great renovating movement' in international law.[214] Whereas the periods 1948-1952 and 1953-1957 saw average numbers of additional opinions per decision issued by the Court of 3.87 and 4.03 respectively,[215] that rose in the period 1958-1962 to 7.70 additional opinions per decision, in the period 1963-1967 to 5.80 additional opinions per decision and the period 1968-1972 to 8.00 additional opinions per decision.[216] From 1973 to 1997, the average number of additional opinions per decision on a 5-year basis stabilised to between 4.20 and 5.50.[217]

As Shabtai Rosenne has observed, this 'renovating' period saw the 'breakdown in the homogeneity of the Court',[218] as its composition shifted to reflect 'the main forms of civilizations' and to represent the 'principal legal systems'.[219] This resulted in a clash between the judges of newly independent States who sought to challenge the dominance of Western European conceptions of international law and the judges of the 'old world' who sought to defend and preserve the existing orthodoxies.[220]

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[214] *Barcelona Traction, Light and Power Company, Limited* (Second Phase) (Belgium v Spain) [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun, at para.1.

[215] See Appendix 4, Figure 2.

[216] Ibid.

[217] From 1998 onwards, the average number of additional opinions per decision has increased once again. In the period 1998-2002, the average number of additional opinions per decision was 6.35, in the period 2003-2007 number of additional opinions per decision was 6.08, in the period 2008-2012 number of additional opinions per decision was 6.40, and in the period 2013-present number of additional opinions per decision is currently 8.33. While still not matching the peak of the 'renovating movement', there does seem to be an emerging upwards trend in the recourse to additional opinions in the contemporary Court. See Appendix 4, Figure 2.

[218] S. Rosenne, *The Law and Practice of the International Court, 1920-2005. Volume 1: The Court and the United Nations* (MN 2006) at 388.

[219] Article 9 ICJ Statute.

[220] In particular, Judges Alvarez (Chile) and Ammoun (Lebanon) focused in their additional opinions upon the fundamental changes to the international order and international law. Illustrative examples of the themes and substance of their additional opinions can be found at: *Barcelona Traction* n.214, Separate Opinion of Judge Ammoun; *Corfu Channel* (Merits) n.154, Individual Opinion of Judge Alvarez and *Asylum* (Colombia v Peru) [1950] ICJ Rep 266, Dissenting Opinion of Judge Alvarez.
There is a wealth of literature on the Eurocentrity of international law, and the attempts to challenge it, especially coming out of the 'TWAIL' school of critical legal studies. See M. Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2001), Anghie (2007) n.40; J. Gathii, 'International Law and its Eurocentricity' (1998) 9 *EJIL* 184; F. Johns, T. Skouteris and W. Werner, 'Editor's Introduction: Alejandro Álvarez and the Launch of the Periphery Series' (2006) 19 *LJIL* 875; A. Becker Lorca, 'Alejandro Álvarez Situated: Subaltern Modernities and Modernisms that Subvert' (2006) 19 *LJIL* 879; L. Obregón, 'Noted for Dissent: The International Life of Alejandro Álvarez' (2006) 19 *LJIL* 893; K. Zobel, 'Judge Alejandro Álvarez at the International Court of Justice (1946-1955): His Theory of a 'New International Law' and Judicial Lawmaking' 19 *LJIL* 1017; J. Gathii, 'A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias' (2008) 21 *LJIL* 317; C. Lim, 'Neither Sheep Nor Peacocks: T. O. Elias and Post-Colonial International Law' (2008) 21 *LJIL* 295.

Former Judge Taslim Elias explained the consequences of this process for the law: it 'succeeded in replacing the two previously dominant Anglo-American hegemonies with a plethora of independent and increasingly separate ones of the newly independent states'.[221] As the depth of the divisions on the Court manifested themselves in the number and strength of additional opinions, with judges vigorously asserting their individual authority in often rhetorically powerful language,[222] the judicial practice in the usage of additional opinions became the subject of critical scrutiny both within and outside the Court.[223] Within the Court, the most public manifestation of this scrutiny was President Spender's declaration attached to the *South West Africa* (Second Phase) judgment, discussed in Section 5.1. This judgment marked the high point in divisions on the bench during this period. Some went as far as to suggest that the 'uncongenial environment' evidenced by the manner in which additional opinions were used during this period damaged the image and reputation of the Court.[224] Those within and outside the Court concerned by judicial practice during this period expressed their fear that this practice – and its effects upon the authority of the Court – was, or would, contribute to what they perceived as the declining role of international adjudication caused by a reluctance of States to refer disputes to the Court for resolution.[225] While it may have been the case that the consequences of the Court's expanded membership upon its jurisprudence may have discouraged recourse to the Court by some Western States,[226] whether it was the practice of issuing additional opinions by individual judges and their content as opposed to the *Court's* actual *decision-making* is less certain.

The concern felt within the Court manifested itself to the public in three ways. *First*, was an exchange conducted between judges via the platform of additional opinions as to the appropriate usage of additional opinions.[227] *Second* was the adoption of a Resolution on Internal Judicial Practice, and *third*, was an amendment to the Rules of Court.

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[221] Elias (1974) n.38 at 23.

[222] See Chapter 5, Section 2.2.

[223] Outside the Court, see for example theses by Jhabvala (1977) n.198 and Hussain (1984) n.33.

[224] F. Jhabvala, 'The Scope of Individual Opinions in the World Court' (1982) 13 *NYIL* 33 at 34-5.

[225] Ibid.

[226] Rosenne (2006) n.218 at 388.

[227] For discussion of which, see Section 5, below.

The Resolution on Internal Judicial Practice, first adopted in 1968,[228] and revised in 1976,[229] sets out as a matter of public record the rules for the conduct of deliberative and decision-making procedure followed by the Court. Its effects are two fold: first, it acts as a mechanism of procedural governance by establishing the procedural rules with which judges of the Court are required to comply, and second, its public nature operates as a mechanism of transparency into the decision-making process.[230] By exhibiting the formal procedure by which deliberations and decision-making is conducted, during a period wherein the Court's jurisprudence was divisive and controversial, the Resolution operates to reinforce the formal legitimacy of the Court and its decisions, and thereby its authority, notwithstanding the substantive contentiousness of the judgment (or the additional opinions). Complemented by statements and extra-judicial writings by former ICJ judges once they have left the bench,[231] the transparency into the procedural regime offered by the Resolution strengthens the institutional judicial culture or tradition, and the expectation that judges – despite the diversity of their backgrounds – will conform to that culture.

The second development was the amendments to the Rules of Court, adopted in 1978.[232] It may be recalled that the PCIJ judges rejected the proposal to make known the identity of the judges that voted in favour and against each of the dispositive paragraphs, irrespective of whether judges decided to exercise their discretion to issue an additional opinion in explanation of their vote.[233] By contrast, the ICJ judges changed the Court's Rules, rendering it a requirement that the decisions of the Court contains the names of the judges who voted in favour of it.[234]

On one hand, the failure of the Court to adopt changes to judicial procedure in order to implement greater secrecy in proceedings might have been inevitable, irrespective of its perceived merit in principle. Once the Court had embarked upon the route of

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[228] 'Resolution on Deliberations of the Court and Revision of Rules' adopted on 05/07/1968, text available at (1968) 7 *International Legal Materials* 1395.

[229] 'Resolution Concerning The Internal Judicial Practice of the Court' adopted on 12/04/1976.

[230] See Chapter 2, Section 4.5.1 which draws upon the information provided in the Resolution to determine the nature of deliberations at the ICJ.

[231] See Chapter 1, n.45 for references to examples of the literature, Chapter 2, Section 4.5.1 for illustration of how that literature assists understanding of deliberative procedure, and Chapter 5, Section 4.3.1 upon the importance of that literature to strengthen judicial collegiality.

[232] ICJ Rules of Court, adopted on 14/04/1978.

[233] See above, Section 4.2.1.

[234] Article 95(1) ICJ Rules of Court.

transparency through the adoption of practices including additional opinions, attempts to subsequently curtail judicial practice in regards to additional opinions and implement secrecy would have been difficult in practice.[235] However, while it may be impracticable to row back on transparency once implemented,[236] that is quite different to taking measures to strengthen the implementation of transparency. The adoption of the above-mentioned measures and practices all operate to reinforce the dominance of transparency over secrecy within the developing judicial culture at the ICJ. This section has demonstrated how recourse to transparency combined with the empowerment of individual judges to assert their individual authority in the external deliberative sphere through additional opinions emerged as a key mechanism by which the institutional independence of the Court could be both safeguarded and demonstrated. Whether secrecy or transparency was preferred as the more appropriate mechanism to safeguard individual judicial independence, both viewpoints acknowledged the importance of individual judicial authority to the institution. The following section, however, will turn to arguments wherein the relationship between institutional and independent authority is more contested.

4.3 Authority

Opposition to permitting additional opinions on the basis that they undermine institutional judicial authority implies that individual judicial authority and institutional judicial authority are not compatible. As this thesis has explained, within coordinately structured systems such as the ICJ, individual and institutional judicial authority are not mutually exclusive and are in principle consistent with each other. This section will illustrate how the expression of individual authority through additional opinions acts as an institutionalised restraint upon the exercise of institutional judicial power. However, rather than being a negative attribute justifying their restriction, from a systemic perspective, their possibility and their

[235] Jhabvala (1982) n.224 at 34.

[236] Judge Guillaume, writing extra-judicially, described the ICJ approach to the secrecy of deliberations as 'strange' from the perspective of a 'lawyer of the civil law school'. He however conceded that '[t]t is clearly in keeping with the present tendency to insist on transparency and accountability', continuing, to express his view that 'it does nevertheless, create certain risks, and the approach adopted in Luxembourg [by the CJEU, that is, strict secrecy] is, in my view, preferable'. Guillaume (2003) n.63 at 166.

presence constitutes a legitimising factor for the exercise of institutional judicial power, thereby strengthening institutional authority.

When considering the impact of additional opinions on the authority of the Court, it is necessary to distinguish between arguments in favour and against additional opinions that refer to 'decisional authority' and those that refer to its 'interpretive authority'.[237] Decisional authority refers to the authority possessed by the institution to settle the dispute between the parties,[238] whereas interpretive authority refers to the degree of authority that the institution possesses in terms of articulating the correct interpretation and application of the law.[239] Whereas the range of functions for which the ICJ claims (or is attributed) authority extend beyond decision-making and law interpretation,[240] for the purposes of analysing *existing* discourse on the matter of additional opinions and judicial authority, the following sections will focus upon these two forms of judicial authority.

4.3.1 Decisional Authority

Those who opposed admitting additional opinions in 1921 advanced the view that to permit the publication of judicial disagreement posed 'a danger to the authority of the Court'.[241] By contrast, the Inter-Allied Committee responsible for drafting the ICJ Statute in 1944 opined that attempts to suppress the public acknowledgement of that disagreement by creating an artificial impression of judicial consensus would be 'false and misleading',[242] and would do more to threaten or diminish the authority of the Court than the revelation of disagreement on the bench.[243]

Whereas within domestic legal systems there may be habitual respect for the decisional authority of courts and tribunals, there is a lack of a similar 'tradition of

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[237] Besson (2014) n.53 at 420.

[238] Ibid.

[239] Ibid.

[240] E.g., one further function of the ICJ – and arguably the function that it is most effective at discharging – is its legitimising function for the project of international justice as a symbol of international legality. See Section 2.1 and text accompanying n.41.

[241] PCIJ, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 and the Adoption by the Assembly of the Statute of the Permanent Court* (January 1921) at 138; Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (September 1920), Draft Scheme Prepared by the Committee Appointed by the Danish Government at 209.

[242] Report of the Informal Inter-Allied Committee (1944) n.134 at para.81(a).

[243] PCIJ Committee of Jurists *Minutes* (1929) n.177 at 51-2, Judges Politis and Huber, endorsed by Dumbauld (1942) n.195 at 938.

acceptance' of the authority of international courts and tribunals.[244] This may be simply because of the comparative novelty of *international* judicial authority (as opposed to domestic judicial authority),[245] or it might be testament to the fact that the legitimacy of the exercise of official power by international institutions has not yet been established. National judiciaries are able to establish their credentials as competent decision-makers in the context of 'mundane' or non-controversial cases.[246] However international courts and tribunals – particularly the ICJ – invariably only deal with the highly politicised and much contested 'big case',[247] placing the authority of the law under further strain.[248] This concern as to the fragility of international judicial authority led to calls to limit the entitlement of ICJ judges to publish additional opinions. For example, writing in 1972, James Fawcett when comparing the UK Privy Council with the ICJ, opined that 'there is a great difference between a body that may have been sitting for a century and a half with some degree of authority and a body that is still in some respects relatively new'.[249] This led him to conclude in favour of a prohibition of additional opinions in the context of the ICJ's advisory jurisdiction.[250]

However, once again, consistent with the Damaška's coordinate idealtype of authority, the 1941 Inter-Allied Committee observed the high probability of disagreement between judges of the Court due to the diversity of the composition of the panel and the fact that the Court is faced only with those cases that have reached a sufficiently high level of complexity or contentiousness.[251] Consequently, the Committee opined that to prohibit additional opinions would prompt observers to 'question the value of every pronouncement of the Court, suspecting it to have been voted by a small majority', thereby diminishing the authority of the Court.[252]

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[244] See n.50.

[245] Ibid. Besson (2014) n.53 at 415.

[246] Report of the Informal Inter-Allied Committee (1944) n.134 at para.81(a); T. Franck, Judging the World Court (Twentieth Century Fund 1986) at 11.

[247] R. Falk, *Reviving the World Court* (University Press of Virginia 1986); K. Highet, 'Reflections on Jurisprudence for the "Third World": The World Court, the "Big Case", and the Future' (1986-87) 27 *VJIL* 287.

[248] Ibid.

[249] J. Fawcett, 'The Function of the ICJ in the World Community' (1972) *GaJIL* 59 at 60.

[250] Ibid.

[251] See above, Section 2.1.

[252] Dumbauld (1942) n.195 at 398.

Indeed, the artificiality of the 'illusion'[253] of unanimity created by the prohibition of additional opinions was itself considered by some during the 1929 revision of the PCIJ Rules of Court as being a greater threat to the authority of the Court than the revelation of the truth of the existence of disagreement on the bench.[254] Echoing the rationalist sentiments underpinning both transparency as a mechanism through which to pursue truth and also the deliberative character of modern legal systems,[255] American participant Elihu Root opined that the strength of the Court 'resided in the respect and authority secured for its judgments and that respect and authority could not be found on any suppression of the facts'.[256]

Not only are additional opinions consistent with institutional decisional authority in the context of coordinately structured systems of justice such as that of the PCIJ and ICJ, but additional opinions *enhance* the decisional authority of the Court's decision. They do so by informing deliberations within both the internal and external deliberative sphere. In the internal deliberative sphere, as discussed in Chapter 2, both the prospect of the publication of additional opinions and the circulation of draft opinions can strengthen the quality of the Court's deliberations upon the case, the rationality of it's decision and the strength of the reasoning provided for its decision. Indeed, it has been suggested that 'the most important function' of additional opinions is that the prospect of their publication may 'exert positive pressure on the majority's effort to draft convincing decisions'.[257] This, in turn, is likely to strengthen the decisional authority of the institution within the external deliberative sphere. Whereas from this perspective, the effect of additional opinions upon the authority of the institution in the external deliberative sphere is indirect – by way of strengthening the Court's decision – additional opinions in their own right

[253] M. Lachs, 'The Revised Procedure of the International Court of Justice' in F. Kalshoven, P. Kuyper and J. Lammers (Eds) *Essays on the Development of the International Legal Order, in Memory of Haro F. van Panhuys* (Sijthoff & Noordhoff 1980) at 42, rejecting the view that the authority of the Court rests upon the 'illusion' of unanimity.

[254] PCIJ Committee of Jurists *Minutes* (1929) n.177 at 52, Judge Huber.

[255] See Chapter 2, Section 6.3.

[256] PCIJ Committee of Jurists *Minutes* (1929) n.177 at 51.

[257] R. Hofmann and T. Laubner, 'Article 57' in A. Zimmermann et al (Eds) n.67 at 1396. See also H. Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations' (2006) 5 *CJIL* 15 at 19. Drawing upon his experience as a Registry official with close involvement in the drafting process within the ICJ, Thirlway recalled how one judge, Judge Oda, remarking upon the manner in which the drafting committee strengthened its reasoning after having the arguments advanced by Judge Oda in his draft dissenting opinion brought to its attention by Thirlway, stated 'in mock bitterness, ''Mr. Thirlway, you keep moving the targets that I am firing at!"'.

can strengthen and demonstrate the legitimacy of both the decision of the Court and the Court itself, thereby reinforcing its decisional authority.

In Chapter 2, it was explained how authority denotes the legitimate exercise of power. Legitimacy is the process through which power and obedience to that power is justified.[258] It is possible to identify different conceptions of legitimacy, each of which international courts and tribunals, including the ICJ, lay claim to. 'Consent legitimacy' is the traditional justificatory basis for the exercise of international judicial authority and is determined by the extent to which the Court acts within the bounds of its competence as consented to by States.[259] 'Process legitimacy', concerns fidelity to the correct process and procedure through which institutions – here the ICJ – arrive at their decisions.[260] A further two conceptions are 'purposive legitimacy' and 'universal values legitimacy'.[261] The integrity of the decision-making process and the standards applied in the course of that process distinguishes judicial adjudication from other forms of dispute settlement; process lies at the heart of institutional decisional legitimacy.[262] Whereas hierarchically-oriented justice systems with their emphasis upon formal justice place greater weight upon process legitimacy, coordinately structured justice systems with their more overt tendency towards considerations of substantive justice take *greater* account of purposive and universal values legitimacy in addition to formal justice. The following sub-sections will consider how additional opinions – as instruments of transparency – can validate the claim of institutional and decisional process, purposive and universal values legitimacy.

4.3.1.1 Additional Opinions and Process Legitimacy

Even where additional opinions are clear expressions of disagreement with the Court's decision, they have been considered to strengthen the acceptance of

[258] See Chapter 2, at Section 3.

[259] A. Von Bogdandy and I. Venzke, 'On the Functions of International Courts: An Appraisal in Light of their Burgeoning Public Authority' (2013) 26 *LJIL* 49 at 50. The fact remains that the authority of the Court over a State is conditional upon it having accepted the Court's jurisdiction, either on an *ad hoc* basis, or in the form of an Article 36(2) declaration.

[260] T. Franck, *The Power of Legitimacy Among Nations* (OUP 1990) at 19; A. Cassese, 'The Legitimacy of International Criminal Tribunals and Current Prospects of International Criminal Justice' (2012) 25 *LJIL* 491 at 492-493; J. Gibson and G. Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support and the European Court of Justice' (1995) 39 *AJPS* 459 at 460-461.

[261] Cassese (2012) n.260.

[262] Franck (1990) n.260 at 19.

unfavourable decisions. In turn, this is perceived to increase the likelihood of compliance with the Court's decision, thereby resulting in the effective fulfilment of the Court's dispute settlement function in the immediate case at hand. The following discussion will explain that additional opinions are considered to have this effect by supplementing the reasoning offered by the Court's decision in order to demonstrate that it was reached in accordance with the requirements of full deliberation of all the arguments in an impartial manner, and thus validating the Court's claim to decisional authority.

The decision of the Court is not intended to be a comprehensive reflection of the Court's deliberations upon all arguments advanced by the parties. By reason of the diversity of the bench, the judgment or opinion of the Court has been described by some ICJ judges as a synthesis of the views of each of the judges aligned together in the majority, rather than the articulation of a singular comprehensive (or even coherent) judgment. Judge Oda described the Court's decision as the product of the drafting committee's attempt to find 'one stream of though from among possibly, a total of fifteen differing judges'.[263] Whereas for Judges Tanaka and Bedjaoui, the Court's judgment represents 'nothing but the common denominator among the judges who constitute the majority'.[264]

Accordingly, to the extent that additional opinions offer a window into the issues and views deliberated upon by the Court, additional opinions provide a more comprehensive picture of the content and outcome of judicial deliberations. In doing so, they thereby lend credence to the Court's claim that its decision possesses process legitimacy. For these reasons the ICJ itself and its judges have described the relationship between additional opinions and the Court's judgment or opinion as being 'indissoluble'[265] or 'integral'.[266] Judge Jennings has written that the 'judgment of the Court and the separate opinions belong to each other, and ideally, illuminate

[263] S. Oda, 'Comments on the Report' in D. Bowett et al, *The ICJ: Process, Practice and Procedure* (BIICL 1997) at 98.

[264] *South West Africa* (Second Phase) (Ethiopia v South Africa; Liberia v South Africa) [1966] ICJ Rep 6, Dissenting Opinion of Judge Tanaka at 262. See Judge Bedjaoui, writing extra-judicially, at M. Bedjaoui (translation by B. Noble), 'The "Manufacture" of Judgments of the International Court of Justice'(1991) 3 *PYIL* 29 at 58.

[265] Observations of the International Court of Justice on the Report of the Joint Inspection Unit (05/12/1986) UN Doc A/41/591, para.8.

[266] Bedjaoui (1991) n.264 at 58.

each other',[267] whereas Judge Fitzmaurice described them as 'supplementary' to each other, with additional opinions 'acting as a foil' to the decision of the Court.[268] While both Judges Jennings and Fitzmaurice were judges from the UK, a common law jurisdiction where decision-making by higher courts is characterised by the expression of the plurality of opinions within the court, similar sentiments have been expressed by judges hailing from other judicial cultures. Judge Bedjaoui has also referred to additional opinions acting as a 'foil' to the Court,[269] whereas Judge Petrén provided a particularly vivid analogy of the relationship between the deliberation and drafting process at the ICJ and the additional opinions and the Court's decision. He explained

> reading the judgments of the Court accompanied by all the opinions attached to them is like turning the pages of one of those booklets sold to tourists in Rome and representing the monuments of Antiquity. Each of them is present on two pages, one of which, showing the monument in its ancient splendor with all its columns standing, is transparent and can be superimposed on the other one that shows the remnants left after all the earthquakes and invasions.[270]

This view has gained support within academia. Ian Brownlie explained how additional opinions set out the 'workings' of the Court and 'reflect the actual methods of approach of the Court as a whole'.[271] He did so when explaining how – in their reference to 'doctrine' (that being scholarly writings) – additional opinions reveal the manner in which the 'teachings of most highly qualified publicists' under Article 38(1)(d) do contribute to the Court's deliberations and reasoning, even if they

[267] Jennings (1988) n.110 at 43, see also on 43: 'the importance of separate opinions as an integral part of the corpus of the Court's jurisprudence'.

[268] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: General Principles and Substantive Law' (1950) 27 BYIL 1 at 1-2, expanded upon by Judge Jennings at (R. Jennings, 'The Collegiate Responsibility and the Authority of the International Court of Justice' in Y. Dinstein (Ed) *International Law at a Time of Perplexity* (MN 1989) at 352).

[269] Bedjaoui (1991) n.264 at 58.

[270] S. Petrén, 'Forms of Expression of Judicial Activity' in L. Gross (Ed), *The Future of the International Court of Justice* (Volume II) (Oceana Publications 1976) at 452-453.

[271] Brownlie (2008) n.80 at 24-25.

are not referred to by the Court in its decision.[272] Noting that the primary audience of the decisions and opinions of the ICJ are experts who operate under no illusion as to the likelihood of disagreement between judges upon the Court, Robert Kolb has explained how additional opinions restore the 'conceptual richness and colour' of the Court's pronouncement which may be sacrificed in the collegiate process by which it is drafted.[273] In turn, he suggests that this can improve understanding of the judgment and its implications.[274] An example of how additional opinions can operate to this effect can be found in Judge Owada's separate opinion to the 2015 *Genocide Convention* judgment of the Court.[275] When seeking to determine the legal effect of certain revisions to the Rules of Court – and in turn their implications for the case at hand – Judge Owada noted how the 'legal effects of the change in the 1972 revision on the language of the provision in question are not so apparent from the language introduced'.[276] In order to determine those effects, he made recourse to *inter alia* the 'lively discussion' within the Court around the time those amendments were adopted as evidenced in the additional opinions of Judges Morelli, Tanaka and Fitzmaurice delivered alongside the Court's 1970 *Barcelona Traction* judgment.[277] Evaluating that discussion (as the authors of those opinions would have participated in the deliberations upon the amendments to the Rules), alongside the information within the unpublished *travaux préparatoires* for the amendments to the Rules, Judge Owada was able to deduce what he considered to be the intended and actual legal significance of the amendments at hand.[278]

Additional opinions that address arguments or issues – whether in agreement with or otherwise – raised by the parties but not addressed by the Court's decision, can encourage acceptance of the Court's decision by reassuring parties that the Court fully considered all submissions presented before it by the parties.[279] Such opinions

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[272] Ibid. Brownlie suggested the reason for this was not only the collective nature of the process of drafting, but also 'the need to avoid somewhat invidious selection of citations'. See also to this effect, M. Mendelson, 'The International Court of Justice and the Sources of International Law' in Lowe and Fitzmaurice (Eds) (1996) n.1 at 83.

[273] R. Kolb, *The International Court of Justice* (Hart 2013) at 1014.

[274] Ibid.

[275] *Genocide Convention* (Merits) n.105, Separate Opinion of Judge Owada.

[276] Ibid. at para.5.

[277] Ibid., referring to *Barcelona Traction* n.214, Separate Opinion of Judge Morelli, Separate Opinion of Judge Tanaka, Separate Opinion of Judge Fitzmaurice.

[278] *Genocide Convention* (Merits) n.105, Separate Opinion of Judge Owada at para.5.

[279] Shahabuddeen (1996) n.117 at 193; Report of the Informal Inter-Allied Committee (1944) n.134 at para.81(c). More recently, this view has been revived at Kolb (2013) n.273 at 1014.

can demonstrate that although the decision arrived at by the majority does not explicitly address, or rejects, those submissions, that decision was based upon a comprehensive consideration of the merits of all arguments.[280] Similar arguments have made in favour of additional opinions by *ad hoc* judges specifically. In a passage widely endorsed by a number of *ad hoc* judges,[281] Judge *ad hoc* Elihu Lauterpacht expressed the view that the duty of the *ad hoc* judge is to ensure that the views of their appointing State is ultimately 'reflected – though not necessarily accepted – in any separate or dissenting opinion'.[282] It has been suggested that the effect of this transparency provided by *ad hoc* judges and their additional opinions is to help to 'secure acceptance of and eventual compliance with the decision'.[283]

An example of this use of the separate opinion – though by a full judge and not a *ad hoc* judge – was by Judge Elaraby in the *Armed Activities on the Territory of the Congo*.[284] Here he used his separate opinion in order to provide a fuller response to the Applicant State's submission on the question as to whether the use of force by Uganda on the territory of the Democratic Republic of Congo constituted aggression.[285] Judge Elaraby felt this matter was inadequately dealt with (and, according to Judge Simma, deliberately omitted)[286] by the Court in its judgment.[287] On this account, rather than giving a pretext for non-compliance with a judgment, additional opinions constitute evidence to support the integrity of the judicial process. The importance attached to engaging non-legal audiences in order to secure compliance with the Court's judgment and the attainment of the Court's social function of dispute resolution was highlighted by Judge Kooijmans in his separate opinion to the *Armed Activities* judgment.[288] While observing that the Court is bound by its judicial function to arrive at a 'clear and unequivocal determination of the legal

[280] Shahabuddeen (1996) n.117 at 193.

[281] *Nuclear Tests* n.71, Dissenting Opinion of Judge *ad hoc* Palmer at 402-21; *Arrest Warrant of 11 April 2000* (DRC v Belgium) [2002] ICJ Rep 3, Separate Opinion of Judge *ad hoc* Bula-Bula at para.3; *Sovereignty over Pulau Litigan and Pulau Sipadan* (Indonesia/Malaysia) [2002] ICJ Rep 625, Dissenting Opinion of Judge *ad hoc* Franck, at para.9; *Certain Property* (Preliminary Objections) (Liechtentstein v Germany) [2005] ICJ Rep 6, Dissenting Opinion of Judge *ad hoc* Berman at para.1.

[282] *Genocide Convention* (Additional Measures) n.62, Separate Opinion of Judge *ad hoc* Lauterpacht at 409.

[283] Hernández (2014) n.19 at 151.

[284] *Armed Activities on the Territory of the Congo* (DRC v Uganda) [2005] ICJ Rep 168, Separate Opinion of Judge Elaraby.

[285] Ibid.

[286] *Armed Activities* n.284, Separate Opinion of Judge Simma at para.2.

[287] *Armed Activities* n.284, Separate Opinion of Judge Elaraby.

[288] *Armed Activities* n.284, Separate Opinion of Judge Kooijmans.

consequences of acts',[289] it must at the same time acknowledge the importance of communicating its judgment in a manner acceptable to the non-legal political elite of the litigant State parties to the dispute. He explained:

> in order to make its legal assessments and conclusions comprehensible and thereby acceptable to litigant States whose leaders are no trained lawyers (even though they may be assisted by legal professionals), but are the main actors in the process of implementing the judgment, a court should make clear in its reasoning that it is fully aware of the wider context and the complexity of the issues involved. A judgment which is not seen as logical and fair in its historical, political and social dimensions runs the risk of being one compliance with which will be difficult for the parties.[290]

In sum, these perspectives lend support to the view that additional opinions serves as a mechanism of transparency – to demonstrate that justice was not only done, but that it can be seen to be done.[291] More generally concerning additional opinions by any member of the Court, early commentators referred to this as the 'psychological advantage' of additional opinions.[292] Others have described their effect as providing some consolation to such parties that their case had not only convinced some of the judges on the Court and thus vindicated their view that there had been a reasonable case to answer.[293] At the same time, extensive opinions on matters falling outside the immediate scope of the Court's judgment might suggest that the judge felt there had been some deficiency in the Court's deliberations. Indeed, individual judges have – in the course of their individual opinions – explicitly called into question the fullness of the 'collegiate discussion'.[294] Where this is the case – by highlighting perceived defects in the procedure, compliance with which is a criteria for legitimacy and, thus, authority – such judges do challenge the

[289] Ibid. at para.3.

[290] Ibid.

[291] Gill (2003) n.58, at 57.

[292] Dumbauld (1942) n.195 at 938. See also Report of the Informal Inter-Allied Committee (1944) n.134 at para.81(c); Hofmann and Laubner (2006) n.257 at 1397.

[293] Dumbauld (1942) n.195 at 398. PCIJ Committee of Jurists *Minutes* (1929) n.177 at 51-52.

[294] *Barcelona Traction* n.214, Separate Opinion of Judge Fitzmaurice at para.37.

institutional authority of the Court. Chapter 5 of this thesis will turn to address specifically such examples of what is termed there as 'judicial dissent', and considers its implications upon institutional judicial authority.

4.3.1.2 Additional Opinions and Purposive and Universal Values Legitimacy

Consistent with the coordinate conception of decisional legitimacy, Andreas Paulus has explained how the decisional authority of the Court is enhanced by the system of admitting additional opinions. By serving as a platform upon which the plurality of the international value system can be expressed and accommodated,[295] additional opinions strengthen the institutional claim to universal values and purposive legitimacy. Drawing upon John Rawls' notion of 'overlapping consensus',[296] Paulus suggested that individual opinions – especially those separate opinions which concur with the Court's disposition of the case but upon different grounds – 'allow both sides to integrate a decision in their own value and belief system' while the judgment of the Court, founded upon doctrinal legitimacy, represents a politically acceptable compromise – the overlapping consensus.[297] In a similar vein, Gleider Hernández, has observed that the ICJ's 'practice of publishing individual opinions is part of its claim for the wider authority of its judgments, not *vis-à-vis* the parties before it but with respect to the wider audience'.[298] Section 2.1 explained the significance of the diversity and professed representativeness of the Court's composition from the perspective of legitimising not only the Court and its decisions but also the project of international justice itself. Additional opinions – as public manifestations of that diversity – play an important symbolic function, expressing the universal values and purposive legitimacy of not only the Court but also the normative objectives embodied by the project of international justice advanced by the Court through its activities.[299]

In a similar vein, the current ICJ judge interviewed for the purposes of this thesis endorsed the view that additional opinions can provide a supplementary function;

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[295] Paulus (2010) n.74 at 219-220. A contrary perspective is suggested in response by D. Regan, 'International Adjudication: A Response to Paulus – Courts, Custom, Treaties, Regimes, and the WTO' in Besson and Tasioulas (Eds) n.74 at 230.

[296] J. Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *OJLS* 1.

[297] Paulus (2010) n.74 at 219-220.

[298] Hernández (2014) n.19 at 124.

[299] On the legitimising consequences of the Court's 'production of extensive, exhaustive, plurivocal, and highly formal judicial outputs', see Shany and Giladi (2014) n.41 at 185.

permitting individual judges to acknowledge the wider political, social and historical contexts that may not be appropriate for inclusion in the Court's judgment.[300] Here it is worth here recalling a statement by Judge Alvarez pertaining to the Court's interpretive and systemic authority,[301] which encapsulates this viewpoint. In his separate opinion to the Court's judgment in *Corfu Channel*, Judge Alvarez offered a comprehensive review of the state of the law and placed the Court and its jurisprudential activities in their wider historical, social and legal context.[302] Justifying this approach, he explained:

> [i]t is therefore necessary to consider what is the present state of that law. We must examine it in connexion with the questions raised by the dispute submitted to the Court. That does not mean that this Court should pronounce on all the legal issues which those questions connote; but it seems desirable that one of the judges, at least, should examine them, and that is the task I have set myself in this individual opinion.[303]

On this view, individual judicial authority plays (or is at least perceived to play by ICJ judges, both former and present) a supplementary function to the authority of the institution by achieving what cannot – or will not – be done by the institution but which is expected by the parties or other audiences of the Court's jurisprudence.

Finally, it is necessary to consider a rationale offered for the implementation of secrecy on the basis of decisional authority (as opposed to independence). Thore Neumann and Bruno Simma have explained how the secrecy of *deliberations* can be justified on the basis that it provides an 'information filter' by preventing the publication of voluminous debates and deliberations, the content of which might

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[300] Interview #01, Fieldnotes of Interview with ICJ Judge, 06/05/2015, The Hague, on file with author. E.g., some – including judges of the ICJ – have criticised the practice of the Court to issue recommendations in its decision to the parties, imploring them to abide by the relevant law, or to 'express concern' or empathy for the positions of the parties or the suffering of those affected by conflicts and violence that form the subject of the case. See to this effect, *Armed Activities on the Territory of the Congo (New Application: 2002)* (Order of 10/07/2002 on the Request for the Indication of Provisional Measures) (DRC v Rwanda) [2002] ICJ Rep 219, Declaration by Judge Buergenthal at para.2 and 4. Supporting this view, see H. Thirlway, 'The Recommendations Made by the International Court of Justice: A Sceptical View' (2009) 58 *ICLQ* 151, where Thirlway (at 162) describes such recommendations and observations as 'empty gestures' that are 'beneath the dignity of the principal judicial organ of the United Nations'. Contrary to this view, see J. de'Aspremont, 'The Recommendations Made by the International Court of Justice' (2007) 56 *ICLQ* 185.

[301] See below, Section 4.3.2.

[302] *Corfu Channel* (Merits) n.154, Separate Opinion of Judge Alvarez at 39.

[303] Ibid.

'complicate and obfuscate the reception of the caselaw'.[304] From this perspective, it might argued that additional opinions, rather than complementing and illuminating the decision of the Court, risk undermining the decisional authority of the Court by making its decision unclear or incomprehensible. While there may be validity in this argument regarding the secrecy of deliberations, its application by extension to additional opinions should be questioned. Certainly, the number and length of additional opinions may damage the likelihood that they themselves will be read and will influence understanding of the judgment or opinion or development of the law. However, they do not as such affect whether the *Court's decision* will be read and its impact. It is entirely within the discretion of the audiences of international courts and tribunals whether they choose to read and take into consideration additional opinions. Although advocates of additional opinions emphasise their interpretive utility in enhancing understanding of the judgment or opinion of the Court, additional opinions do not have to be read. The choice as to whether to read an additional opinion is made even easier by the Court's website, where additional opinions are published as distinct documents from the decisions of the Court. Given the far greater convenience of accessing the Court's jurisprudence in electronic form via the Court's website rather than in the form of physical bound copies, arguments that additional opinions congest the ICJ Reports and obscures the Court's judgment or opinion less sustainable.

4.3.2 Interpretive Authority

Moving beyond the function of the Court as a mechanism of dispute settlement, additional opinions have been considered an appropriate mechanism to strengthen the authority of the Court for the purposes of other functions pursued by the Court. From the perspective of the development of the law and the clarification of legal norms,[305] the degree of consensus upon the Court's judgment within the Court may inform assessments within the external deliberative spheres of the legitimacy of the decision as a correct articulation of the law. Under the doctrine of sources, judicial decisions constitute subsidiary means of determining the law;[306] in light of the diversity of the bench intended to be reflective of the international community, an

[304] Neumann and Simma (2013) n.180 at 458.
[305] Generally, see Tams and Sloan (2013) n.160.
[306] Above, at Section 2.2.

articulation of a rule of customary international law by the Court which has a high degree of support within the Court may hold a high degree of authority for this purpose. James Crawford's account of customary international law places emphasis upon collective or community *opinio juris* rather than individualised State *opinio juris*.[307] On this basis the identification and development of custom is a continual process between States, institutions and other actors through which a 'collective judgment' is incrementally formed.[308] In this context, articulations of custom by the ICJ – both in its decisions and by individual judges in their additional opinions contribute to this process.

The publication of additional opinions assists determination of the strength of the authority that the *Court's decision* holds for this purpose.[309] To emphasise, the focus here is not upon the contribution that *additional opinions* themselves make towards the development of the law,[310] but how the publication of additional opinions affects the authority of the Court's decision to that effect.[311] During the negotiation of the PCIJ Statute, one of the principal rationales for the inclusion and maintenance of an entitlement to publish additional opinions in the Statute of the PCIJ was the envisaged contribution that they would make to the development of international law. The Swedish Proposal permitting additional opinions was justified precisely on this basis,[312] while the French representative to the Council of the League of Nations on the consideration of the draft PCIJ Statute, Leon Bourgeois, rationalised the entitlement to permit additional opinions on the basis that they would provide transparency into the law development process.[313] Discussing the possibility that the Court's decisions may affect *all* States, as opposed to being confined to those party to the dispute, Bourgeois acknowledged that by reason of the diversity and representativeness of the Bench, the Court's decision would represent the synthesis

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[307] J. Crawford, *Chance, Order, Change: The Course of International Law. General Course on Public International Law* (Hague Academy of International Law 2014) at 81-85.

[308] Ibid. at 85.

[309] In this regard, see also M. Manouvel, *Les Opinions Séparées à la Cour Internationale: Un Instrument de Contrôle du Droit International Prétorien par les Etats* (L'Harmattan 2005).

[310] This is the focus of the study of dissenting and separate opinions by I. Hussain, *Dissenting and Separate Opinions at the World Court* (MN 1984).

[311] A comprehensive account of this is found at Shahabuddeen (1996) n.117 at 177 *et seq*.

[312] PCIJ *Documents* (1921) n.241 at 37.

[313] Ibid. at 50.

of a number of different judicial 'lines of thought'.[314] By admitting additional opinions, he considered that those different lines of thought would appear more clearly, and would be of benefit to the wider class of States who might be affected by the Court's pronouncement of the law,[315] and who may wish to understand it more clearly or to challenge it authority as a correct statement of the law.

The value of additional opinions to determining the interpretive authority of the Court was also used to justify the maintenance of the entitlement to issue additional opinions during the 1929 negotiations on the amendments to the Rules of Court. Here, Judge Politis noted how 'the publication of dissentient opinions was of immense value' from the perspective of building up a body of international jurisprudence.[316] He continued to explain

> [t]he value of a decision of the Court varied according as [sic] it was taken by a unanimous or majority vote, and it was essential that the public should know of this fact. The duty of the Court was not merely to settle disputes brought before it. It should establish a jurisprudence based only on the opinions of the judges. It was important to be in a position to know and to appreciate the motives which had influence all the judges, those in the majority as well as those in the minority. The publication of these divergent opinions enabled observers to appreciate the scope and scientific value of the judgments.[317]

More recently, while questioning the utility of additional opinions in themselves for signposting the direction of the future development of the law,[318] Sir Franklin Berman has stated 'with confidence that an ICJ bench that tried to be too adventurous would find its judgment encircled by an array of trenchant separate or dissenting opinions that would weigh in as a useful corrective in the process of absorbing the judgment into the international bloodstream'.[319] Similarly, former ICJ judge, Mohamed Shahabuddeen, has identified a 'precedential value' of additional

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[314] Ibid.
[315] Ibid.
[316] PCIJ Committee of Jurists *Minutes* (1929) n.177 at 51.
[317] Ibid.
[318] Berman (2013) n.160 at 12-13.
[319] Ibid. at 13; Hofmann and Laubner (2006) n.257 at 1397.

opinions in their potential to reveal a 'false consensus' as the basis of the Court's judgment.[320] Using the *Lotus* case as an example, he demonstrated how separate opinions can reveal how the Court's judgment can contain a statement of the law which is in fact rejected by half of the members of the Bench.[321]

Mita Manouvel has argued that additional opinions are a mechanism by which *States* as the primary legislators in the international sphere can place limitations upon the 'praetorian' lawmaking activities of international courts and tribunals.[322] While the idea that additional opinions serve a legitimate institutional purpose of control is shared by this thesis, both in the context of decisional authority and interpretive authority, this thesis departs from Manouvel's in a number of important ways.

First, in premising her thesis upon the State-centric conception of international law and international law making, Manouvel fails to take adequate consideration of the wider system of international law. In this system other actors such as other international tribunals (as illustrated later in this section in its discussion of the ICTY in *Tadic*) have interpretive authority for the purposes of determining and developing international law. This thesis sees international courts and tribunals such as the ICJ, and international judges, operating in a more complex regime of international justice. In this regime although the State is still a dominant actor, the State no longer has a normative monopoly. In this context, while States are one – important – social actor upon whose acceptance of the legitimacy of the exercise of judicial power is judicial authority dependent, it is not the *only* relevant social actor. Consequently, in line with this more complex view of judicial authority and to who that authority is accountable, this thesis conceives additional opinions as serving a more complex function within that system of justice.

Second, by framing the control function of additional opinions in terms of State-control, Manouvel's thesis risks the interpretation of arguing that additional opinions provide States with a mechanism by which to limit institutional judicial authority. This views international judges – as the authors of additional opinions – as being agents of States. In other words, States, through the judges, limit the institutional

[320] Shahabuddeen (1996) n.117 at 180.
[321] Ibid.
[322] Manouvel (2004) n.309.

law-making authority of international courts and tribunals using the platform of additional opinions. Such an interpretation would clearly challenge the independence of judges, one of the cornerstones of judicial legitimacy, both individual and institutional.[323] Rather, the emphasis is upon additional opinion as vehicles for the expression of individual judicial authority, independent from other social actors. To be sure, the political nature of judicial appointments does increase the likelihood that those judges appointed to the Court are appointed because their approach to international law and international dispute resolution is amenable to the States appointing them. However once on the Court, to argue that additional opinions are a means by which States can *continue* to influence (by way of restriction) law development by the Court risks jeapordising the independence of the judges as individuals. When the institutional authority of the Court is constrained by additional opinions, that constraint is achieved by reason of the authority of the individual judges who author that/those opinion(s) and not by the authority of the States that elected them.

The foregoing discussion has explained how the expression of individual judicial authority plays an institutional role of informing to deliberations determining the interpretive authority *of the institution*. The following discussion will consider how additional opinions have served as a platform upon which individual judges can assert their own interpretive authority and make direct contributions to deliberations within the external sphere as to the elucidation and development of international law. ICJ judges have on occasion been explicit in indicating that their desire to contribute to the development of the law by the Court is at least one of their motives for authoring an additional opinion.[324] However, irrespective of judicial motive, in practice at the ICJ, it is difficult to pinpoint when additional opinions have in fact made a direct contribution to shaping the future jurisprudence of the Court.

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[323] See Chapter 2, Section 4.5.2.

[324] E.g., in *Whaling in the Antarctic,* Judge Cançado Trindade justified his Separate Opinion to the Order on New Zealand's Declaration of Intervention based on his view that the issue of intervention in proceedings under Articles 62 and 63 has been unsatisfactorily or insufficiently studied. In view of this, he explained – in a formula familiar to those familiar with Judge Cançado Trindade's additional opinions – that '[g]iven the importance that I ascribe to the matters dealt with by the Court in the present Order, and those underlying it, … I feel obliged to leave on the records the foundations of my personal position on the matter'. *Whaling in the Antarctic* (Declaration of Intervention by New Zealand) (Australia v Japan; New Zealand Intervening) [2013] ICJ Rep 3, Separate Opinion of Judge Cançado Trindade at para.2.

Just as the Court does not explicitly refer to scholarly writings in its decisions,[325] it rarely refers to additional opinions,[326] and when it does, it does not engage with their substance as a matter of doctrine.[327]

However, there is more evidence of the successful assertion of individual judicial authority by ICJ judges in contributions to deliberations *outside* the Court upon the identification and development of international law. One example that has been provided in existing literature is that of the joint dissenting opinions of four judges from the ICJ's *Genocide Convention* advisory opinion of 1951.[328] The influence of these dissenting opinions are said to traceable through the work of the International Law Commission on the law of treaty reservations and which later manifested in the 1969 Vienna Convention on the Law of Treaties.[329]

A second example can be identified in the recourse made to ICJ additional opinions by Chambers of the ICTY and the individual judges therein when identifying applicable law. In light of the paucity of international criminal jurisprudence on matters of jurisdiction and judicial competence, Chambers of the ICTY relied heavily upon the jurisprudence of the ICJ on questions concerning judicial competence within the UN System. For example, in the case of *Tadić,* both the Trial Chamber and the Appeals Chamber, as well as the individual members of each Chamber, cited as authority for their reasoning not only the judgments of the ICJ but also additional opinions of ICJ judges. For instance, the Trial Chamber referred to the additional opinion of Judge Weeramantry in the *Lockerbie* case, acknowledging that although Judge Weeramantry's opinion was a 'dissenting opinion', the Chamber on the point

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[325] See above, n.271 and n.272.

[326] Gleider Hernández has identified some examples of references to additional opinions by the Court in its decisions: In *Continental Shelf* (Application for Permission to Intervene) (Tunisia v Libyan Arab Jamahiriya) [1981] ICJ Rep 3, at para.27 it referred simply to the bare fact that a number of judges in their declarations attached to the Court's 1973 order issued in *Nuclear Tests* addressed Fiji's application to intervene in that case (See *Nuclear Tests* (Australia v France; New Zealand v France) [1974] ICJ Rep 535, at 536-538). Secondly, in *Barcelona Traction, Light, and Power Company* (Preliminary Objections) (Belgium v Spain) [1964] ICJ Rep 6 at 29, the Court considered some of the additional opinions attached to the Court's judgment in *Aerial Incident of 27 July 1955* (Preliminary Objections) (Israel v Bulgaria) [1959] ICJ Rep 127 in order to 'understand the majority's judgment in that case' (Hernández (2014) n.19 at 113). The third example provided by Hernández is found in the *Gabčikovo-Nagymaros* judgment (*Gabčikovo-Nagymaros* (Hungary/Slovakia) [1997] ICJ Rep 7 at para.75), where it describes the reliance by one party in its submissions upon a statement by Judge Lauterpacht in his separate opinion to *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (Advisory Opinion) [1956] ICJ Rep 23.

[327] Hernández (2014) n.19 at 113 (fn.128). See also, A. Pellet, 'Article 38' in A. Zimmerman *et al* (Eds) n.67 at 868-869.

[328] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, Joint Dissenting Opinion of Judges Guerrero, McNair, Read and Hsu Mo. See, Hofmann and Laubner (2012) n.257 at 1398; Berman (2013) n.160 at 12-13.

[329] Ibid.

under discussion Judge Weeramantry was in agreement with the ICJ's judgment.[330] The ICTY Appeals Chamber in the same case cited Judge Cordova's dissenting opinion to the ICJ's advisory opinion in *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*.[331] Judge Sidhwa, in his separate opinion to that ICTY Appeals Chamber decision drew support for his analysis from the additional opinions of a number of additional opinions by ICJ judges in the *Namibia* advisory opinion,[332] as well as an additional opinion to the *Lockerbie* judgment.[333]

The citation alone of additional opinions is itself noteworthy in contrast to the drafting practice of the ICJ. But, more substantively, the recourse to additional opinions of the ICJ by Chambers and judges of the ICTY in regards to this particular decision demonstrates the systemic value of additional opinions to the development of international law beyond the immediate institution. Here, recourse to additional opinions at the ICJ was made in order to ascertain the parameters of the institutional authority of the ICTY (as opposed to the ICJ) within the UN system. One of the questions before the Tribunal's judges was whether within the UN system, the ICTY had the legitimate power (and thus authority) to review the legality of its own establishment by the UN Security Council.[334] It is notable that both the Trial Chamber (which decided that the Tribunal did not have competence to review the legality of its establishment)[335] and the Appeals Chamber and its judges (which overturned the Trial Chamber Decision on this point, concluding that it *did* have such competence)[336] drew upon ICJ additional opinions in their analysis of the applicable law. Additional opinions by ICJ judges on questions concerning the competence and jurisdiction of

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[330] *Prosecutor v Tadić*, 'Decision on the Defence Motion on Jurisdiction' (Trial Chamber) 10/08/1995 (IT-94-1) at para.12 and para.24, citing *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Provisional Measures Order of 14 April) (Libya v. US) [1992] ICJ Rep 114, Dissenting Opinion of Judge Weeramantry at 176.

[331] *Prosecutor v Tadić*, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction' (Appeals Chamber) 02/11/1995 (IT-94-1) at para.18, citing *Judgments of the Administrative Tribunal of the ILO Upon Complaints Made Against UNESCO* Advisory Opinion [1956] ICJ Rep 77, Dissenting Opinion of Judge Cordova at 163.

[332] *Tadić* (Jurisdiction, Appeals Chamber) n.331, Separate Opinion of Judge Sidhwa at para.29-30 citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, Separate Opinions of Judges Ammoun, Petrén, Dillard, Onyeama and De Castro and Dissenting Opinion of Judge Gros.

[333] *Tadić* (Jurisdiction, Appeals Chamber) n.331, Separate Opinion of Judge Sidhwa, at para.27, citing *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* (Request for the Indication of Provisional Measures) (Libyan Arab Jamahiriya v UK) [1992] ICJ Rep 3, Dissenting Opinion of Judge Weeramantry at 56 and Dissenting Opinion of Judge El-Kosheri at 208.

[334] *Tadić* (Jurisdiction, Trial Chamber) n.330 at para.5-8.

[335] Ibid at para.12.

[336] *Tadić* (Jurisdiction, Appeals Chamber) n.331 at para.22.

the ICJ issued in the context of proceedings where the Court has been presented with disputes and questions that test the boundaries of the Court's legitimate function provide a valuable resource to the proliferating body of international courts and tribunals. In each of these, the judges of these courts and tribunals have and will continue to be presented with novel questions of a similar nature arising out their unique regimes. This thesis does not go as far as former ICJ judge Gilbert Guillaume in arguing for the development of a formalised hierarchy between international courts and tribunals, at the pinnacle of which sits the ICJ.[337] However, there is merit in the view that because of its accumulated experience and the breadth of its jurisprudence by reason of its unique universal and general jurisdiction, the ICJ has particular authority on matters of systemic relevance.[338] Reasoning contained in additional opinions that failed to gain traction within the internal deliberative context at the ICJ may have stronger resonance in a different time and different context, perhaps more aligned to the systemic and institutional conceptions of the judicial function shared by the author. Consequently, additional opinions at the ICJ provide ICJ judges as individuals with a platform upon which they can contribute to deliberations determining the nature and functions of international justice and its institutions.[339] In turn, the judges of the ICJ, who themselves bear a particular authority by reason of being judges of 'the principal judicial organ of the UN', can make their own contribution via the platform of additional opinions to the advancement of the project by other institutions.

4.4 Summary

By examining the arguments in favour and against additional opinions this section has demonstrated the symbiotic relationship between individual and institutional judicial authority consistent with coordinately structured systems of justice. Despite the gravitas of the institution as the 'world court' and 'the principal judicial organ of the United Nations', the ICJ's institutional authority is inextricably tied to that of the

[337] G. Guillaume, 'The Proliferation of Iinternational Judicial Bodies: The Outlook for the International lLegal Order' Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations 27 October 2000, at http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1. G. Guillaume, 'Advantages and Risks of Proliferation: A Blueprint for Action' (2004) 2 *JICJ* 300. Discussed at Higgins (2006) n.2 at 799.

[338] Ibid.

[339] However, the effectiveness and realisation of this potential depends not only upon their contribution, but also the degree to which they are engaged with and utilised within those deliberative spheres. See Chapter 6.

individual judges of which it is composed, consistent with the coordinate idealtype of justice. The expression of individual judicial authority through the utilisation of additional opinions works to reinforce the authority of the institution. Additional opinions – which provide a platform upon which the diversity of the judges and their judicial philosophies can be demonstrated – serve an expressive function in regards to the legitimacy of the exercise of judicial power by the institution. Irrespective of the substantive merits of a given additional opinion relative to the decision to which it is attached, additional opinions demonstrate the diversity of the participants in the process out of which the decision was reached.

The illustrative potential of additional opinions also lends them to being in important mechanism by which individual judges can assert their individual authority against the institution and hold the latter's exercise of judicial power accountable. The limits to the transparency offered by the reasoned decisions of the Court was made apparent in this section when it was noted that the Court does not acknowledge when, and to what effect, the Court made recourse to additional opinions delivered in connection to previous cases and scholarly writing when arriving at its decision. One consequence of this, this chapter explained, is that it is difficult for external observers to ascertain the influence of additional opinions upon the development of the Court's jurisprudence. However, the second consequence of this is that it limits the effectiveness by which the reasoned decision can act as a constraint or limitation upon institutional judicial authority and the ends to which institutional judicial power may be deployed. By rendering the true bases for the Court's decision opaque, the reticence of the Court to fully reveal the nature of the sources influencing its decision-making mean that on its own the reasoned decision of the Court is insufficient to determine the legitimacy of the exercise of judicial power through that decision.

Against this backdrop, precisely because individual judges possess authority, and precisely because that authority may be asserted against the institution via the platform of the additional opinion, additional opinions are an important institutionalised mechanism of control and accountability for institutional judicial power. Additional opinions can help to prevent the decision of the Court claiming, or being attributed, greater authority than it warrants by contributing to the deliberative spheres within which that authority is assessed.

The previous section also considered how the particular authority bestowed upon ICJ judges by reason of their membership of a judicial institution with a specific systemic authority, means that additional opinions at the ICJ provide a unique opportunity for judges as individuals to contribute to shaping understanding the evolving international legal system. While the institutional practice of the ICJ is to not make reference to additional opinions, the judges and Chambers of the ICTY have been more open in their acknowledgement of the influence of the jurisprudence (both institutional and individual) of the ICJ upon their own decision-making. Thus the individual international judge has a wider systemic role; irrespective of the degree to which their influence is publically acknowledged, the publicity of their additional opinions contribute to deliberations by other law-making, law-determining, or law-developing actors.

Accordingly, additional opinions are a potentially powerful instrument of expression for individual judges. While the previous sections have focused upon the institutional and systemic function of the expression of individual judicial authority against the institution, this following section will turn to consider the criteria for the legitimate use of that authority via the platform of additional opinions. In doing so, it will consider the criteria – to the extent that they are ascertainable – for the legitimacy of additional opinions, and thus their authority. While in the large part, this treats the authority of the opinion and the authority of the author as separate, but related, the following section will explain how, in fact, the manner in which a given judge uses their entitlement to issue additional opinions can affect their own individual judicial authority. In turn, this can influence the effectiveness of the contributions of individual judges to the external deliberative spheres – whether from the perspective of determining the parameters of the authority claimed by the institution in the decision to which the additional opinion relates, or from the perspective of law development and clarification.

5 The Legitimate Use of Additional Opinions

Section 4.2.2 referred to the criticism – from both within and outside of the Court – of judicial practice in connection to additional opinions during the 1960s and 1970s. It identified three public manifestations of the concern from within the Court. Two of those, the adoption of the Resolution on Internal Judicial Practice, and the 1978 amendments to the Rules of Court were addressed in Section 4.2.2. This Section

addresses the third manifestation of that concern, the attempt by President Spender to establish criteria for the legitimate scope of additional opinions and the purposes for which they may be used by judges. The following discussion will consider President Spender's proposal and the responses that it elicited from other judges of the Court.[340] Nevertheless, despite these calls for, and attempts made at, reform, and while the practice of certain judges attracts criticism for its prolificacy and style,[341] an unlimited freedom enjoyed by judges to issue additional opinions appears to have been accepted.

This section proposes that the difficulty with existing attempts to delimit the legitimate scope of additional opinions is that those attempts are rooted in a particular, formal, conception of legitimacy. However, in practice, it can be recalled that legitimacy – that being the criterion for the acceptance of the exercise of official power – is a function of three factors.[342] Those are, the attributes of the author (charismatic authority), the substantive content and merits of that content of the claim, and the criteria for acceptance as legitimate held by the accepting actor or audience.[343] The existing accounts of the legitimate use of additional opinions focus upon formalist conceptions of legitimacy. While from an internal legal perspective this is likely to be the prevailing conception, this thesis has observed that a solely internal or doctrinal analysis presents an incomplete picture of the role of additional opinions in shaping the manner in which international courts and tribunals pursue their functions.

For example, what might be rejected as illegitimate from a formal perspective might be considered as legitimate if one adopts a socio-legal analysis. For some, engagement with the surrounding political, historical or social context might be deemed illegitimate.[344] Yet, the failure to acknowledge such contextual issues could

[340] See also, Jhabvala (1982) n.224 at 34-5.

[341] See criticism of Judge Cançado Trindade's style of additional opinions by Dov Jacobs and Marko Milanovic: D. Jacobs, 'A Commentary on the ICJ Croatia v. Serbia Genocide Case (part II): Judge Cançado Trindade's dissent and thoughts on natural justice' *Spreading the Jam* (17/02/2015) at http://dovjacobs.com/2015/02/17/a-commentary-on-the-icj-croatia-v-serbia-genocide-case-part-ii-judge-cancado-trindades-dissent-and-thoughts-on-natural-justice; M. Milanovic, 'Judging Judges: A Statistical Exercise' *EJILTalk!* (12/03/2012) at http://www.ejiltalk.org/judging-judges-a-statistical-exercise/.

[342] See Chapter 2, Section 3.

[343] Ibid.

[344] See n.300 discussing Judge Buergenthal and Hugh Thirlway's criticisms of the Court's practice of issuing recommendations or expressing its concern in regards to the wider social and political context within which the particular legal dispute before the Court occurs.

delegitimise the exercise of judicial authority in the eyes of the very actors with the power and authority to implement compliance with the Court's decision.[345] For judges who claim that they write their additional opinions for no audience, but purely as an expression of their personal judicial conscience (as was the case with the ICJ judge interviewed)[346] legitimacy would logically be assessed according to whether that opinion satisfied their personal judicial conscience. However, while judges may write for a particular purpose or intended audience, the public nature of their opinions means that they are open to critique according to the multiplicity of standards of legitimacy held by various audiences. As the previous examples suggest, what may be legitimate – and thus possessing authority – for one audience may be illegitimate – and thus lacking authority – for another. This pluralist conception of the legitimate use of additional opinions therefore implies relativism in the authority of additional opinions as expressions of individual judicial authority. It is beyond the scope of this section to engage in an analysis of all the possible criteria for legitimacy for additional opinions, and as such it will not offer a suggestions as to what the criteria for the legitimate use of additional opinions are. However, it will explain the implications of this plurality of different standards of legitimacy for judicial practice.

Consistent with coordinately structured systems of justice, which place particular emphasis upon the individual views of decision makers, the responsibility to determine the appropriate standards for the legitimate use of additional opinions lies with the individual judge themselves. If, in their considered view, departure from formally accepted criteria for the legitimate use of additional opinions is necessary in order to successfully claim legitimacy within the deliberative spheres they intend to engage and influence, then that is an assessment for them to make. However, as Section 5.3 will explain, departure from common standards of legitimacy may have implications not only upon the assessment of the authority of the particular additional opinion, but also upon the individual judicial authority of the author. For this reason, it will be argued that – as in coordinately structured systems of judicial authority – the principal constraint on the use of additional opinions lies in the individual judge's concern for preserving their personal reputation as judges, and thus their individual judicial authority.

[345] See Chapter 2, Section 3.

[346] Interview #01 n.300.

Before elaborating upon this key point, this section will first consider the principal (formal) critiques of judicial practice referred to at the outset for a number of reasons. First, the debate that took place during the 1960s and 1970s occurred within the external deliberative sphere. The public nature of the views considered in this section mean that they have enriched the judicial or institutional culture, and will have informed individual engagement with the practice of additional opinions – both by judges as authors and audiences and external audiences. Second, the fact that the proposed changes to judicial practice were not acted upon itself provides an insight into the nature of the relationship between individual judicial authority and institutional authority at the ICJ. Finally, consideration of debates at the ICJ as to the legitimate purposes for which individual judicial authority may be expressed through additional opinions is valuable from the perspective of contemporary critical reflection on the same issues in the context of international criminal justice.

5.1 President Spender's Restrictive Theory

This section frames the discussion of the formal arguments regarding the legitimate use of additional opinions using Judge Spender's 1966 declaration to the Second Phase judgment in the *South West Africa* Case. Taking his declaration as a starting point, a view that at the time gained traction both among other judges and within academia,[347] it will then – in light of the discussion so far in this thesis regarding the nature of institutional and individual judicial authority – critique that theory. Prompted by the 9 additional opinions that accompanied the ICJ's highly contentious Second Phase judgment in the *South West Africa* case,[348] the then President of the Court, Sir Percy Spender, issued a declaration setting forth his conception of the legitimate uses for the additional opinion,[349] view which subsequently has been described as the 'restrictive theory' of additional opinions.[350]

In order to determine the limits of the entitlement under Article 57, President Spender conducted a historical survey of the development of the right of international judges to publish their individual opinions in the course of international

[347] Elias (1974) n.38 at 30-31, Fawcett (1972) n.249, at 62, Jhabvala (1977) n.198.

[348] *South West Africa* n.264. The 9 additional opinions comprised of 7 dissenting opinions (by Vice-President Wellington-Koo, and Judges Koretsky, Tanaka, Jessup, Padilla Nervo, Forster, and Sir Louis Mbanefo) and 2 separate opinions (by Judges Morelli and van Wyk).

[349] *South West Africa* n.264, Declaration of President Sir Percy Spender at para.26 and para.35.

[350] *Barcelona Traction* n.214, Separate Opinion of Judge Tanaka at 115.

dispute settlement.[351] On this basis, he concluded that there must be a 'close direct link between the individual opinions and the judgment of the Court'.[352] Asserting that the drafters of the Statute intended the right to be used only in regards to matters 'directly connected with and dependent upon the judgment of the Court',[353] he opined that the Court's decision 'must be the focal point of the different judicial views'.[354] Clarifying this further, he continued that individual opinions 'should not purport to deal with matters that fall entirely outside the range of the Court's decision, or of the decision's motivation'.[355] To be appropriate, individual opinions (including separate opinions) must be directed to the 'particular assigned reasons and on the ground' for which the Court's decision was arrived.[356]

For individual judges to give their views on matters 'quite outside the range of the Court's decision and on issues upon which the Court has made no findings of any kind' would, he considered, create 'inevitable confusion' that would or could be 'destructive of the authority of the Court'.[357] This, he opined, cannot be justified by 'any rational interpretation and application of Article 57'.[358] Quite apart from the practicalities of determining an objective understanding of what constitutes a suitably 'related' or 'relevant' opinion,[359] the view that there must exist some nexus between the content of the judgment and that of the individual opinions warrants closer attention. For Judge Spender, it was specifically the close relationship between the substantive content of the individual judicial opinion and the judgment that gives the former its judicial quality. On this reading, to be legitimate, additional opinions must be limited to addressing only the reasoning, grounds and decisions stated in the Court's judgment.[360] The reason for this, he explained, is that without

> the judgment (or opinion) there would, of course, be no relationship and nothing of a judicial character that could be said by any judge.

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[351] *South West Africa* n.264, Declaration of President Sir Percy Spender at para.7-11.
[352] Ibid. at para.22(b).
[353] Ibid. at para.222(a).
[354] Ibid. at para.22(b).
[355] Ibid. at para.22(c).
[356] Ibid. at para.27.
[357] Ibid. at para.20.
[358] Ibid.
[359] Hofmann and Laubner (2012) n.257 at 1391.
[360] *South West Africa* n.264, Declaration of President Sir Percy Spender at para.22(b).

> There is equally no relationship imparting judicial character to utterances about questions which the Court has not treated at all.[361]

This view that the judicial character of an additional opinion is dependent upon its substantive relationship to the Court's decision is at odds with the premise of this thesis, which sees the authority of a given act or expression a function of three criteria.[362] While it might be excessive to assert that the additional opinions are 'perfectly independent' from the decision to which they are attached,[363] the authority of an additional opinion *also* depends upon its author and its substantive content, in addition to the connection to the decision which may be a criteria for legitimacy held by a particular legitimacy-accepting audience.[364] Moreover, the judicial character of the opinion is a function not only of its *judicial author* (and the individual judicial authority of that author) and the fact that it is the product of the same judicial *process* as that out of which the Court's judgment is primary output.[365]

The effect of Judge Spender's restrictive theory of additional opinions would be to limit authors of such opinions to the 'framework of the majority opinion', which would in turn limit them to the same logical process adopted in the judgment to arrive at its conclusion.[366] This view that the intention behind the restrictive theory is to control the content of additional opinions has gained some support. For Hussain, the restrictive theory was invoked on behalf of the majority in order to 'forbid the minority from discussing the real problems of the merits',[367] and must be understood in the context of the struggle within the Court between judges seeking to preserve the classical positivist function of the Court and the judges seeking to reform the Court along lines influenced by natural law.[368] Where a judge's disagreement with the Court's judgment arises out of a fundamental disagreement with the logical process by which the Court arrived at its judgment, the restrictive approach would

[361] Ibid. at para.24.

[362] *South West Africa* n.264, Dissenting Opinion of Judge Tanaka at 262-263.

[363] Ibid. at 262. Indeed, former Judge, Robert Jennings, refutes any claim that additional opinions are independent of the Court's judgment or opinion. See Jennings (1989) n.268 at 346.

[364] See Chapter 2, Section 3.

[365] Also suggested by Hernández (2014) n.19 at 122.

[366] *Barcelona Traction* n.214, Separate Opinion of Judge Tanaka at 115.

[367] Hussain (1984) n.310, at 61.

[368] Ibid.; Elias (1974) n.38 at 24-26.

prevent the expression and explanation of that disagreement.[369] The importance of the ability of judges to write without such restrictions was explained by Judge Tanaka when justifying his comprehensive separate opinion in *Barcelona Traction*.[370] Here, he stated that 'I feel that I must follow a logical process of my own which, according to my conscience, I believe to be just'.[371]

5.2 Institutional Supervision of Additional Opinions

While it can be questioned whether the proper standard for assessing the legitimate usage of the Article 57 right is the opinion's parity with the judgment, Judge Spender has not been alone in expressing concern as to the length and breadth of individual opinions. Judge Elias, while reiterating his support for the right of dissenting judges to 'express themselves as freely and fully as possible' nevertheless observed the trend for dissenting opinions to be 'distressingly rendered at inordinate lengths'.[372] Judge Elias – writing extra-judicially – suggested that the President of the Court should be granted the 'right to refer an unduly expansive separate opinion back to its author for necessary curtailment, on pain of its being rejected for failure to comply'.[373] Similarly in 1950, former PCIJ judge, Manley Hudson, recommended the inauguration of a practice 'of subjecting each dissenting opinion to a careful scrutiny by the bench as a whole'.[374] This scrutiny was intended with a view to the possibility of intimating to the author the desirability of deleting any expression susceptible of being interpreted as critical of the views announced as those of the Court.[375]

It is necessary, in light of the discussion throughout this chapter, to consider whether it is possible to reconcile the power to review and restrict additional opinions with individual judicial independence. As has been expressed throughout this chapter, consistent with coordinately structured systems, the guarantee afforded by the wide entitlement of judges to issue additional opinions not only demonstrates their personal independence but also affirms the legitimacy (and thus authority) of the institution. This depends on both the actual and the perceived independence and

[369] For more on this, see Chapter 5.
[370] *Barcelona Traction* n.214, Separate Opinion of Judge Tanaka at 115.
[371] Ibid.
[372] Elias (1974) n.38 at 31.
[373] Ibid. at 30.
[374] M. Hudson, 'The Twenty-Eighth Year of the World Court' (1950) 44 *AJIL* 1 at 21. On Hudson's specific reference to expressions critical of the Court, see Chapter 5.
[375] Ibid.

impartiality of its individual members. That independence relates not only to independence vis-à-vis external actors but also independence internally, as between colleagues. Subjecting additional opinions to formal review (beyond the extent to which they are the subject to deliberation in the context of the internal deliberations for the purpose of the Court's decision-making) would be a serious affront to that independence.

5.3 Individual Judicial Authority as Self-Regulation

It is necessary to recall that an additional opinion is not only a vehicle for the expression of individual judicial authority with potential implications for institutional judicial authority. Once published, it becomes the basis upon which the authority of the individual judge can be assessed within the external deliberative sphere. This, explained at the outset of this section, is relative to the particular standards of legitimacy held by any given audience or actor. Accordingly, if a judge wishes to express *authority* within a given audience, then that judge must take cognisance of the relevant criteria for legitimacy with which they must comply in order to be accepted as bearing authority. However, the flipside to this is that, by conforming to one standard of legitimacy and authority, a judge may *delegitimise* their opinion in the eyes of another audience if the criteria for legitimacy held by that audience differs. If a judge establishes a *reputation* (either positive or negative) for a certain type or form of practice when issuing additional opinions, this may not only affect the relative authority of any given additional opinion that they author, but may also have wider-reaching implications for their *personal* or individual authority across all audiences.

An example of a current judge whose distinctive practice is the subject of critique is that of Judge Cançado Trindade. Sympathetic assessments of his characteristic style of opinion describe how '[e]ven without his name attached, it is always immediately apparent when one is reading an opinion by Judge Antonio Cançado Trindade. Awash with allusions to literature, philosophy and theology and infused with a deep and abiding sense of empathy'.[376] By not conforming to the language or rhetoric of law and legal validity, Judge Cançado Trindade – and other judges who make recourse to

[376] A. Drzemczewski, 'General Introduction' in A. Cançado Trindade, *Judge Antonio A. Cançado Trindade. The Construction of a Humanized International Law: A Collection of Individual Opinions (1991-2013)* (Brill 2015) at 1.

materials beyond that accepted by formalist or positivist legal doctrine –undermine both their individual judicial authority, and the authority of their opinions, at least from the perspective of those audiences who assess the legitimacy of contributions to the legal deliberative spheres by reference to fidelity to the 'accepted' modes of legal reasoning and judicial expression.[377] By way of illustration, in his critique of Judge Cançado Trindade's practice, Marko Milanovic has questioned the likelihood that the Judge's colleagues would read and engage with his separate opinions that 'engaged in extensive comparisons between the real and present victims of human rights violations to Sophocles' Antigone and Electra'.[378]

This raises the issue of effectiveness. One criticism of what is deemed unduly lengthy additional opinions (not just those that canvas unconventional sources) is not that they damage judicial authority (either institutional or individual) but rather that they become ineffective in influencing deliberations, whether in the internal or external sphere. Kolb, for example, has expressed concern at excessively lengthy opinions that dwarf the length of the decision to which they are appended.[379] He observed the 'explosion' in the production of international legal materials which face practitioners and scholars, and that such lengthy opinions risk obscurity if they are too cumbersome.[380] Similarly, reflecting specifically upon Judge Cançado Trindade's reputation – developed throughout his career both at the ICJ and the Inter-American

[377] Other judges whose judicial philosophies encouraged them to canvas a similarly diverse range of sources include Judge Weeramantry and Judge Ammoun – discussed in Section 2, above.

[378] Milanovic (2012) n.341 referring to Judge Cançado Trindade's Separate Opinion to the judgment of the Inter-American Court of Human Rights in the Case of *Ximenes-Lopes v. Brasil* (Merits, Reparations and Costs) Judgment of 04/07/2006, Separate Opinion of Judge Cançado Trindade at para.12. More recently, and before the ICJ, Judge Cançado Trindade has made similar references to the work of Sophocles in *Genocide Convention* (Merits) n.105, Separate Opinion of Judge Cançado Trindade at para.17, para.262 and para.361-365.

[379] Kolb (2013) n.273, at 1015. On the current Court, Judge Cançado Trindade's practice stands out as the strongest example of lengthy opinions. See e.g., his Dissenting Opinion in *Jurisdictional Immunities of the State* (Judgment) (Germany v Italy) [2012] ICJ Rep 99, which ran to 88 pages, in contrast to the length of the Court's judgment at 54 pages. Similarly, in *Questions Relating to the Obligation to Prosecute or Extradite* (Judgment) (Belgium v Senegal) [2012] ICJ Rep 422, Judge Cançado Trindade's Separate Opinion ran to 71 pages, whereas the Court's judgment was only 41 pages long. Most recently, Judge Cançado Trindade's Dissenting Opinion to *Genocide Convention* (Merits) n.105 ran to 142 pages, nearly matching the 153 pages of the Court's judgment.
However, Judge Cançado Trindade is not the only Judge to be known for lengthy opinions. Gleider Hernández (Hernández (2014) n.19 at 116) identifies other 'classic examples' of additional opinions exceeding the length of the Court's decision: Judge Schwebel's dissenting opinion in *Nicaragua* ran to 268 pages in comparison to the Court's judgment of 136 pages (*Nicaragua* (Merits) n.153). Judge Oda's dissenting opinion to the judgment in the *Continental Shelf* between Tunisia and Libya ran to 120 pages in comparison to the Court's 76-page judgment (*Continental Shelf* (Judgment) (Tunisia/Libyan Arab Jamahiriya) [1982] ICJ Rep 18). Finally, he points to two dissenting opinions by Judge Weermantry, the first delivered alongside the *East Timor* judgment which ran to 84 pages in comparison to the Court's 16 page judgment (*East Timor* (Judgment) (Portugal v Australia) [1995] ICJ Rep 90) and his dissenting opinion to the *Nuclear Weapons* advisory opinion which ran to 126 pages in comparison to the Court's 61-page advisory opinion (*Nuclear Weapons* n.106).

[380] Kolb (2013) n.273 at 1015.

Court of Human Rights – of issuing lengthy additional opinions, Milanovic has questioned how effective his contributions are to both the internal deliberative sphere and the external.[381] He asked whether both colleagues and those outside the Court (scholars, practitioners, students) read and engage with Judge Cançado Trindade's opinions in view of their length and density.[382]

Certainly, there is merit to both of these claims and this author would agree that the density and complexity of such additional opinions can discourage engagement with their substantive content by those seeking to understand the case, the Court's decision or the legal issues that the case raises. However, from the perspective of judicial authority, as ineffectual as such additional opinions may be within the relative deliberative spheres, they do not, as such affect the institution's authority. Indeed, by failing to communicate the individual judge's argument with clarity and thus making an inefficient and ineffective contribution to deliberations determining the parameters of the authority of the Court's decision, such opinions may not necessarily fulfil their systemic function of moderating institutional authority as argued in this chapter. However, from the perspective of those who seek to preserve the institution's authority, such opinions should not be concerning.

From the perspective of the authority of the individual judge, however, they may be problematic. An individual judge has to undertake a careful balancing act: the authority of their *opinion* is contingent (in part) upon the authority of its *author.* Yet, a judge can undermine that personal judicial authority by developing a practice with regard to additional opinions that is not consistent with the criteria for legitimacy for individual judicial authority. However, that balancing act is one to be undertaken by each individual judge, taking into consideration a complex range of factors. Those include, to summarise, their intended purpose, their intended audience(s), and the standards of legitimacy held by those (audiences) for the recognition of the legitimacy and thus authority of the opinion in question, aware of the consequences that conformity with the standards of one audience may have negative implications for the assessment of their personal authority in others.

[381] Milanovic (2012) n.341.
[382] Ibid.

6 Conclusion

This chapter has built a comprehensive understanding of the relationship between individual and institutional authority at the ICJ. On the basis of a survey of the structure and distribution of judicial authority within the ICJ system of international justice, it concluded that it tends closer to Damaška's coordinate idealtype of justice. In particular, over the course of the institution's lifespan (both in the form of the PCIJ and the ICJ), it traced the consolidation of a culture of transparency over secrecy as a means by which to both demonstrate and guarantee both institutional and individual judicial independence.

Consistent with the coordinate idealtype of justice, this chapter has demonstrated that the individual judge, and their individual authority, plays a central role in both reinforcing the legitimacy, and in turn the authority, of the institution. Moreover, from the perspective of the wider decentralised system of political and legal authority, additional opinions have an important systemic function in defining the legitimate parameters of institutional authority for the purposes of law development. Because of the particular authority of individual ICJ judges, by reason of by members of this particular institution, additional opinions also offer judges as individuals a privileged platform to contribute to deliberations outside the Court that are shaping the evolving international legal system.

This chapter has evaluated the validity of criticisms of judicial practice when issuing additional opinions; both those premised upon their perceived impact upon the authority of the institution and those based upon proposed criteria for their legitimate usage. It rejected those arguments premised upon hierarchical conceptions of judicial authority and which relied upon the logic of secrecy, neither of which being accurate reflections of the realities of the ICJ system of judicial authority. On the question of the legitimate use of additional opinions, in view of the different conceptions of legitimacy depending upon the particular audience and purpose attributed to a given additional opinion, concern was expressed at the appropriateness of attempts to prescribe formal limits upon additional opinions. It questioned whether the adoption of limitations upon the manner in which additional opinions can be used would be consistent with individual judicial independence. However, it noted that consistent with coordinately structured systems, the importance attached to the preservation and consolidation of individual judicial

authority is the principal legitimate means of controlling the use of additional opinions. Whereas when a judge through their additional opinion (as an expression of individual judicial authority) exceeds what is accepted as legitimate for discussion, does little to undermine *institutional* judicial authority, they can cause greater harm to their own.

Following the 20th Century trajectory identified by Resnik and Curtis – from the establishment of international courts aimed at preventing conflict to the establishment tribunals designed to hold accountable those who are responsible for the commission of atrocities in conflict – the next chapter will move to on to introduce the second, and perhaps currently more imposing, dimension of the project of international justice: international criminal justice.[383] It will compare how, within this nascent paradigm of international justice, the relationship between the authority of the individual judge and that of the institution is materialising and the influence of this relationship upon the how international justice by these institutions being conceived and pursued.

[383] J. Resnik and D. Curtis, *Representing Justice: Invention, Controversy and Rights in City States and Democratic Courtrooms* (YUP 2011) at 247.

4. Additional Opinions and International Criminal Justice

1 Introduction

The establishment of the Peace Palace paradigm of international justice represented a major concession to the primacy of State authority in international law, both by recognising the formal authority of a non-State institution (the ICJ) and also by granting greater recognition to the agency of individuals in the international sphere, in the capacity of the international judge. However, despite the incursions into the State-centric orthodoxy, within that paradigm, the primary unit of actors and action was – and continues to be – the State.[1]

During the 1990s, the UN – reinvigorated by the spirit of cooperation accompanying the end of the Cold War – proclaimed the decade the 'decade of international law'.[2] The 1990s witnessed the extraordinary proliferation in the number of international courts and tribunals, which – in comparison to the essentially consent-based and State-centric ICJ – represented a new era in the project of international justice. This era has been defined by the establishment of what has been termed as the 'new-style international courts', characterised by their broader mandates, increased compulsory jurisdiction, and increasing rights of access accorded to non-State actors.[3] One of the strongest trends within this era has been the development of the field of international criminal justice with the establishment of a number of international criminal courts and tribunals. Within this increasingly dominant paradigm of international justice,[4] the individual is constructed as the 'central unit of

[1] See Chapter 3.

[2] UN General Assembly, 'United Nations Decade of International Law' (09/12/1991) UN Doc A/Res/46/53.

[3] K. Alter, *The New Terrain of International Law* (PUP 2014) at 10, 18.

[4] M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* (OUP 2012) at 13. For example, when writing about ICrimJ, reference to the 'criminal' is now frequently omitted – see F. Mégret, 'The Politics of International Criminal Justice' (2002) 13 *EJIL* 1261 at 1264; W. Schabas,'The Banality of International Justice' (2013) 11 *JICJ* 545; K. Sikkink, *The Justice Cascade* (W. W. Norton & Co 2011).

action'.[5] International criminal justice is concerned with the imposition of *individual* criminal responsibility for violations of international criminal law.[6]

International criminal justice has multiple regulatory spheres that reach inside and beyond the State and claims objectives relating not only to the individuals accused,[7] but also victims (whether as individuals or as groups) and other domestic (non-State) constituencies.[8] Outlining the 'overabundance' of functions attributed to international criminal justice, Damaška has observed that further to the 'ordinary' criminal justice objectives underpinning the enforcement of international criminal law (retribution, deterrence, incapacitation and rehabilitation), further functions are attributed to the administration of justice by international criminal courts and tribunals.[9] Those include, the establishment of a historical record, providing voice to the victims of international crimes, to propagate human rights values, to develop international criminal law as well as to contribute to the maintenance and restoration of (international) peace and security.[10] From the perspective of authority, the basis for the legitimate exercise of institutional power also departs from traditional State-centric conceptions of consent. While consent is still often a *necessary* criterion for jurisdiction and legitimacy, it is no longer a *sufficient* basis upon which to hinge the legitimacy of the exercise of judicial power for all the purposes served, or purported to be served.

Chapter 5 will consider more specifically the imperative for strong mechanisms of accountability for the exercise of institutional authority generated by this more expansive range of functions implicated in the context of international criminal justice (both in comparison to ordinary domestic criminal justice and the Peace Palace paradigm of international justice). However, the purpose of this chapter is to take a more comprehensive appraisal of the structure of judicial authority in the

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[5] C. Gevers, 'International Criminal Law and Individualism: An African Perspective' in C. Schwöbel (Ed) *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014) at 221 citing M. Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) at 5.

[6] However, note the wider implications of findings of fact and legal determinations made when determining the criminal responsibility of a specific individual.See M. Damaška, 'Unacknowledged Presences in International Criminal Justice' (2012) 10 *JICJ* 1239.

[7] E. Van Sliedregt and S. Vasiliev (Eds) *Pluralism in International Criminal Law* (OUP 2015) at 6.

[8] J. Ohlin, 'Goals of International Criminal Justice and International Criminal Procedure', in G. Sluiter et al (Eds), *International Criminal Procedure: Principles and Rules* (OUP 2013).

[9] M. Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *CKLR* 329 at 33.

[10] Ibid.

context of international criminal justice. Its object is not only to ascertain the extent to which the conclusions reached in the previous chapter should be adjusted in order to account for the differences in the formal structure and organisation of official authority in the context of international criminal justice. Its object is also to ascertain how the greater sense of the individual, as well as the implications of the 'criminal justice' nature of proceedings, within international criminal justice affects our assessment of the role of the individual international judge in shaping how institutions of international criminal justice discharge their functions.

The emphasis of this chapter will be upon international criminal justice as pursued through two international criminal courts and tribunals: the International Criminal Court (ICC) and the *ad hoc* Tribunal established by the UN Security Council for the former Yugoslavia (ICTY).[11] Although some reference will be made to the ICTR, and while much of the analysis of the organisation of authority at the ICTY is of equal relevance to the ICTR, because of those similarities in the institutional design and systemic role of the two *ad hoc* Tribunals, this chapter will focus on just one of the *ad hoc* Tribunals by way of example, the ICTY. While the ICTY is drawing its activities to a close as it comes to complete its mandate,[12] it (along with the ICTR) are still of continuing relevance as we look to the future of international criminal justice. The *ad hoc* Tribunals have dominated international criminal justice, being the first tribunals since those established in the aftermath of the Second World War. Moreover, the number of cases completed during the two decades of activity of both institutions mean that they have had great influence in how contemporary international criminal justice is conceived today. Whereas this thesis focuses on the ICTY, both institutions have played a significant role in strengthening the norm of individual criminal accountability for violations of international criminal law, and were a significant factor in building impetus during the 1990s for the establishment of a permanent

[11] The position of the individual judge in the context of hybrid or internationalised criminal tribunals – such as the SCSL, the STL, The ECCC, the Iraqi High Tribunal, the Kosovo War Crimes Chambers, the Ugandan War Crimes Chambers, the War Crimes Chambers in the Courts of Bosnia-Herzegovina – would be especially worthy of examination given that they straddle domestic and international justice systems. However, given the complexity of the relationship between these institutions and their respective domestic systems of justice and the implications of this upon the characterisation of the organisation and structure of judicial authority therein, they are beyond the scope of this study.

[12] In this regard, see the UN Residual Mechanism for the International Criminal Tribunals (UNMICT) established by UN Security Council Resolution 1966 (2010) to 'continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR' (SC Res 1966 (2010) para. 4). On the functions of the UNMICT, see 'Second Annual Report of the International Residual Mechanism for Criminal Tribunals' (01/08/2014) UN Doc A/69/226-S/2014/555 at para. 1-4).

international criminal court.[13] However, for the purposes of this thesis, their greatest contribution takes the form of the dense body of substantive and procedural law and practice they have accumulated over the two decades of their activities.[14] Whereas the PCIJ and ICJ have been the primary contributors to the establishment of the 'international juridical field',[15] the ICTY and ICTR have been the principal laboratories wherein the culture and procedure of international criminal justice has been developed.[16] With personnel from the *ad hoc* Tribunals moving between institutions, to the ICC and to the hybrid and internationalised institutions,[17] the cross-fertilisation of practice and culture developed at the *ad hoc* Tribunals has been far-reaching.

Moving to the ICC, the first permanent treaty-based international court with jurisdiction over international crimes, it has joined the ICJ in the pantheon of international adjudication,[18] a totem of the wider system of international criminal justice and individual criminal accountability at which it sits at the centre.[19] At a procedural level, like the *ad hoc* Tribunals, the ICC is also a 'laboratory of creativity and experimentation' in the development of the legal and procedural framework of the ICC regime.[20] As Carsten Stahn and Göran Sluiter have observed, much of the litigation before the Court to date has involved the advocacy, testing and exploration of different procedural and methodological choices in order to determine the most

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[13] The International Law Commission had, since the early 1990s, been engaged in a process of developing a draft Statute for a permanent international court (For reference to its work, see Section 4.1.2). The contribution of the *ad hoc* Tribunals was to build political momentum in the run to and course of the 1998 Diplomatic Conference where the Rome Statute of the International Criminal Court was adopted. Generally on development of a trend in favour of the imposition of individual criminal responsibility for violations of international criminal law in the late 1980s and 1990s, see B. Schiff, *Building the International Criminal Court* (CUP 2008) at 37 *et seq*. See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) at 11-16.

[14] B. Swart, G. Sluiter and A. Zahar (Eds) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011).

[15] See Chapter 3, at Section 1.

[16] A. Whiting, 'The ICTY as a Laboratory for International Criminal Procedure' in Swart, Sluiter and Zahar (Eds) (2011) n.14 at 83; Shahabuddeen (2012) n.4 at 21.

[17] See above, n.11.

[18] See Chapter 3, at Section 1.

[19] In contrast to the ICJ and the *ad hoc* criminal Tribunals, the ICC is structurally independent from the UN. Whereas the ICJ is the 'principal judicial organ of the UN', and the *ad hoc* Tribunals are subsidiary judicial organs of the UN Security Council, the ICC is permanent treaty based body. However, while independent, there is a close working relationship between the two organisations. Moreover, the Court has the power to exercise jurisdiction over those situations that would otherwise fall outside its jurisdiction when that situation is referred to it by the UN Security Council pursuant to its mandate under Chapter VII of the UN Charter (Article 13(b) Rome Statute).

[20] C. Stahn and G. Sluiter, 'Introduction: From "Infancy" to Emancipation? – A Review of the Court's First Practice' in C. Stahn and G. Sluiter (Eds) *The Emerging Practice of the International Criminal Court* (MN 2009) at 2; C. Stahn and L. Van Den Herik, 'Future Perspectives on International Criminal Justice: Through the Looking Glass' in C. Stahn and L. Van Den Herik (Eds) *Future Perspectives on International Criminal Justice* (Asser Press 2010) at 1.

effective and efficient procedure through which the Court and its organs can pursue its mandate.[21] Given the high profile position of the ICC and its cases and investigations, the practice of its judges regarding additional opinions is also particularly high profile. Accordingly, judicial practice at the ICC constitutes an important subject of study when developing an understanding of how the expression of individual judicial authority through additional opinions shapes the manner in which international criminal justice is pursued by its institutions.

Section 2 will place international criminal justice as pursued by the ICTY and the ICC upon Damaška's coordinate-hierarchical spectrum. It will do so by taking as a starting point the characterisation of the Peace Palace system of judicial authority. It will consider the degree to which – on each of the three elements – these institutions of international criminal justice depart from the ICJ. William Burke-White has described the 'emerging system of international criminal justice' as 'a community of courts, a set of adjudicatory bodies in interdependent self-organizing relationships [that are] engaged in a common endeavor'.[22] Accordingly, rather than speaking of a single institution as is the case with the Peace Palace paradigm of international justice, this chapter is concerned with a 'universe of international criminal justice institutions,[23] and the implications of this upon first the structure of authority within international criminal justice, and second, attitudes towards additional opinions. It will conclude that despite certain traits that may point in the direction of greater hierarchical tendencies, international criminal justice still bears greater resemblance to the coordinate idealtype of authority than to the hierarchical. Moreover, it will be suggested that certain aspects of international criminal justice further demand the adoption of mechanisms of transparency – such as the publication of additional opinions – in order to strengthen the acceptance of their legitimacy and thus their capacity to effectively discharge their functions.

In light of this conclusion, like in the previous chapter, this chapter will examine how the interaction between institutional and individual judicial authority has shaped how the institutions of international criminal justice discharge their functions. In the

[21] Ibid.

[22] W. Burke-White, 'A Community of Courts: Towards a System of International Criminal Law Enforcement' (2002-2003) 24 *MJIL* 1 at 3.

[23] W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) at 7.

course of doing so, it will also critically reflect upon the attitudes that have been expressed in regards to additional opinions in the context of international criminal justice.

2 Organisation of Authority

As with the ICJ, the traditional classifications for the comparative analysis of domestic legal systems are inadequate to accurately describe and critique the procedure and practice of international criminal courts and tribunals. The procedures within the ICTY and the ICC are a *sui generis* blend of legal traditions, with identifiable traits from both common law and civil law jurisdictions and both inquisitorial and adversarial traditions.[24] The consequence of this, along with the fact that the 'elaborate and operational system of international criminal law' drew upon domestic criminal law, international human rights law and international humanitarian law,[25] is that international criminal justice has 'absorbed contradictory assumptions and methods of reasoning, which manifest in internal contradictions'.[26] The flexibility of Damaška's framework enables the appraisal of the structure of authority taken as a whole without being confined by the rigid categorisation along common law/civil law or inquisitorial/adversarial lines.[27]

2.1 Attributes of Judges

The first characteristic of the Peace Palace system of international justice that supported its characterisation as being of coordinate structure was the nature of its decision-makers.[28] Rather than a professionalised body of decision-makers, whose decision-making process is characterised by specialisation and routinisation, it was demonstrated that the ICJ judiciary is more accurately described in terms of the lay officials that are characteristic of coordinate systems of justice.

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[24] Whiting (2011) n.16 at 83; K. Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' (2003) 3 *ICLR* 1; P. Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11 *EJIL* 569; J. Jackson, 'Finding the Best Epistemic Fit for International Criminal Tribunals: Beyond the Adversarial-Inquisitorial Dichotomy' (2009) 7 *JCIJ* 17.

[25] D. Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 *LJIL* 925 at 925.

[26] Ibid.

[27] B. Swart, 'Damaška and the Faces of International Criminal Justice' (2008) 6 *JCIJ* 87 at 88-89. Generally, see H. van der Wilt, 'Why International Criminal Lawyers Should Read Mirjan Damaška' in Stahn and Van Den Herik (Eds) (2010) n.20.

[28] See Chapter 3, Section 2.1.

As at the ICJ, the diversity of the bench in the context of international criminal justice is both encouraged and emphasised. In addition to technical and professional competence, the statutes of the respective courts and tribunals also require the selection and appointment of judges to be representative of the principal legal systems of the world.[29] The Rome Statute of the ICC also requires that the judges be of equitable geographical distribution and reflect a fair gender balance.[30] Thus, similar to the ICJ, there is an open and explicit acceptance that the individual characteristics of those appointed to the institutions have a manifest effect upon the nature of the justice that the institutions deliver, consistent with coordinate systems of justice. As evidenced by the contentiousness of the detailed provisions relating to their selection and appointment,[31] the individual ICC judges and the process for their selection has been recognised as key to the 'ultimate conduct, effectiveness and legitimacy of the [Court]'.[32] This process, like at the ICJ, is a political process of nomination and election. While in the context of international criminal justice there are further professional qualities that must be satisfied by judicial candidates, such as competence in criminal law and procedure, candidates are nevertheless nominated and elected by States. Thus, the political nature of the process of the nomination and selection of judges is somewhat more apparent than would be in hierarchically organised domestic criminal justice systems,[33] with implications for attitudes towards judicial legitimacy.

The practical consequence of the political appointment of judges through the process of elections is the subject of some concern.[34] While the 'idealistic' or 'romantic' notions of judicial diversity and the richness and representativeness that this would bring is laudable,[35] in practice the political nature of appointments has led to the appointment of judges whose suitability for office can be questioned (and

[29] Article 13bis(1)(c) ICTY Statute, Article 37(8)(a)(i) ICC Statute.

[30] Article 36(8)(a)(ii) and (iii) Rome Statute. In fact, although the provisions for the election of permanent ICTY judges is silent of geographical distribution and gender balance, Article 13ter, addressing the selection and appointment of ad litem judges does require consideration of those factors. See Article 13ter(b) and (c).

[31] R. Mackenzie et al, *Selecting International Judges: Principles, Process, and Politics* (OUP 2010) at 21.

[32] Ibid.

[33] Ibid at 60.

[34] G. Boas, 'The Case for a New Appellate Jurisdiction for International Criminal Law' in G. Sluiter and S. Vasiliev (Eds) *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009) at 450-1; P. Murphy and L. Baddour, 'Evidence and Selection of Judges in International Criminal Tribunals: The Need for a Harmonized Approach' in Van Sliedregt and Vasiliev (Eds) (2015) n.7 at 368-369.

[35] Interview #03, Transcript of Interview with ICC Official, 25/05/2015, The Hague, on file with author.

indeed, is questioned even by their judicial colleagues).[36] There is no guarantee that the technical or specialist competence of individual judges will be the determinative factor in their appointment. Gideon Boas, when reflecting upon the implications of the political process of election upon the quality of the judges (determined by relevant qualification, competence and experience), referred to a number of statements made by ICTY judges that seriously cast doubt upon the integrity of the process of selection.[37] He referred to one anonymous statement by an ICTY judge who explained his experience when being elected for office.[38] He described how, out of over 30 diplomats he spoke to, 'only one asked me a question that was even remotely relevant to my capacity or suitability to be a judge of an international criminal tribunal'.[39] While these observations were made in the context of the ICTY, the election culture in the context of the appointment of ICC judges is much the same.[40] With many judges at the international criminal courts and tribunals having never had any practical juridical practice or whose academic expertise and experience may not be appropriate,[41] along with vote-trading and other diplomatic compromises tainting the selection process,[42] the 'lay' characterisation of ICC judges in particularly may not only be technical in the sense of Damaška's classification, but also in the literal sense.[43]

The following section will consider the implications of the chamber structure of international criminal courts and tribunals upon the appraisal of the distribution of institutional authority. However, it is also necessary to consider the chamber structure from the perspective of the attributes of the judges. It can be recalled that one of the attributes of the hierarchical idealtype is the specialisation and routinisation of decision-making.[44] The introduction of distinct judicial divisions to

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[36] Interview #02, Transcript of Interview with ICC Judge, 11/05/2015, The Hague, on file with author; Interview #03 n.35; Interview #05, Transcript of Interview with former ICC Judge, 26/05/2015, The Hague, on file with author.

[37] Boas (2009) n.34 at 450-451.

[38] Ibid. referring to L. Etter, 'Call for ICC to Learn ICTY Election Lessons', *Global Policy Forum* 26/11/2004 at https://www.globalpolicy.org/component/content/article/164/28481.html .

[39] Ibid.

[40] J. O'Donoghue, 'The ICC and the ASP' in C. Stahn (Ed) *The Law and Practice of the International Criminal Court* (OUP 2015) at 127-129; Mackenzie et al (2010) n.31 at 110-120 on the process of campaigning during the election period.

[41] Ibid. Interview #02 n.36, Interview #03 n.35, Interview #07, Fieldnotes of Interview with ICTY/ICTR Official, 27/05/2015, The Hague, on file with author; Boas (2009) n.34 at 450.

[42] Boas (2009) n.34 at 451; L. Etter, 'Call for ICC to Learn ICTY Election Lessons', *Global Policy Forum* 26/11/2004 at https://www.globalpolicy.org/component/content/article/164/28481.html .

[43] On the relationship between this and 'judicial dissent', see Chapter 5.

[44] Chapter 2, Section 5.1.1.

which judges are assigned – the Trial division and Appeals division, and at the ICC also the Pre-Trial division – each with clearly demarcated competences might suggest a tendency towards specialisation.[45] In principle, once serving within the division, judges within each division will be routinely required to make similar kinds of assessments and determinations, and in doing so develop a body of experience and expertise that in turn will facilitate routinisation and the expeditious handling of that stage of proceedings. However, the following factors make it unlikely in practice that a strong sense of specialisation and routinisation will take hold.

First, it is necessary to observe that the criteria for the selection and appointment of judges to the courts and tribunals are the same, irrespective of which judicial division they are ultimately assigned to.[46] Accordingly, all judges appointed to the respective courts and tribunals are, in theory, considered competent to sit within any of the divisions, suggesting the absence of a hierarchical dynamic.[47] As to how judges are appointed to their respective divisions, the process – while subject to more guidance at the ICC – is not wholly transparent at either of the institutions.[48] At the ICTY, the assignment of judges to the Appeals and Trial divisions is the responsibility of the President, to be undertaken in 'consultation' with the other permanent judges.[49] The presumption in favour of the equality of judges at the *ad hoc* Tribunals is reinforced by Rule 27A of the Rules of Procedure and Evidence which states that 'judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber'.[50] The justification offered for this by one former judge is that it permits the cross-fertilisation of judicial experience and expertise between chambers,[51] a benefit that would be lost if judges were exclusively assigned to one or the other chamber.[52] The ICTY has not followed a mandatory policy of requiring *all* judges to rotate between chambers, with there being 'extras' requirements for appointment to the Appeals

[45] For more on the chamber configuration of international criminal courts and tribunals, see Section 2.2.

[46] Boas (2009) n.34 at 451.

[47] On the ICTY, see Shahabuddeen (2012) n.4 at 46-47. On the ICC, see V. Nerlich, 'The Role of the Appeals Chamber' in Stahn (Ed) (2015) n.40 at 964.

[48] As observed by counsel before the ICJ when referring to the assignment of ICTY judges to the Appeals Chamber. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia) Verbatim Record of Public Sitting held on Friday 28/03/2014 at 3pm, at para.35.

[49] Article 14(3) ICTY Statute.

[50] Rule 27(A) ICTY Rules of Procedure and Evidence.

[51] Shahabuddeen (2012) n.4 at 47.

[52] Similarly, ICC judges are 'transferable' between chambers. See Article 39(3)(b) and (4) ICC Statute, discussed at Nerlich (2015) n.47 at 965.

Chamber on top of formal qualifications required by Statute.[53] Even in the absence of publically available knowledge as to what those 'extras' are, it is still reasonable to state that there is little to support any assertion that there is a hierarchical distribution of authority among the judges of the *ad hoc* Tribunals.

Turning to the ICC, Article 39(1) of the Rome Statute stipulates that the 'Court should organize itself into the divisions'.[54] This provision provides further guidance as to how the overall composition of each division should be constituted, in order to guide the allocation of judges to each division.[55] Over time, this may lead to specialisation if judges are selected and *appointed to the Court* taking into consideration the division that they are likely to be appointed to. However, this is not the case.[56] The politicised character of the process of appointment, and its consequences, has already been explained.[57] In view of the nature of this process of appointment, it is unlikely that consideration of which division judges are to be assigned if appointed would feature significantly – if at all – in that process.

It is also necessary to consider whether the expertise of those international judges with that experience developed within the context of ordinary domestic judicial procedure will translate to judicial specialisation for the purposes of *international* criminal justice.[58] While competence in the context of international law is one of the requisite criteria for appointment,[59] few judges appointed to the international criminal courts and tribunals have the experience of trying the kind of large scale and complex international crimes that come before them.[60] They may have experience dealing with similarly challenging cases, such as crimes concerning complex fraud, or trafficking, but particularly in the context of the early years of the work of the ICTY, the newness of international criminal law as an operational body of law precluded any sense of specialisation or routinisation. It may be argued that the increasing

[53] Ibid.
[54] Article 39(1) Rome Statute.
[55] Article 39(1).
[56] Nerlich (2015) n.47 at 964.
[57] See above.
[58] Murphy and Baddour (2014) n.34 at 370.
[59] Whereas 'due consideration' was given to experience in relevant areas of law, including international law, under the terms of the Statutes for the ICTY (Article 13) and ICTR (Article 12), in the context of the ICC stipulates that ICC judges must either have an established competence in criminal law or an established competence in a relevant area of international law (Article 36(3)(b)).
[60] Mackenzie (2010) n.32 at 54-56.

strength of the norm of criminal accountability for violations of international criminal law should lead to the development of a greater wealth of judicial experience and expertise to adjudicate these crimes. This is true both in the sense of an increase in domestic criminal proceedings and an increase in the cases being investigated and prosecuted at the international level. The ICJ system of international justice has the benefit of nearly a century of judicial practice – whether at the PCIJ or the ICJ – over which an institutional culture has emerged. The creation of an equivalent procedural and institutional culture at the ICC will similarly be a generational project.

Furthermore, it is necessary to consider the implications of the temporary nature of judicial appointments. Judges serve fixed terms of office – which, in the case of the ICC, are not renewable – in contrast to the ICJ.[61] Because of this and the length of criminal proceedings before international criminal courts and tribunals, the number of cases that an individual judge will sit on during their tenure at the ICC will always be limited, thereby undermining their ability to consolidate their experience into specialisation. Consequently, the primary source of consistency in jurisprudence and the accumulation of institutional expertise and specialisation is found in the strong cooperation between judges and their legal assistants or legal associates.[62] This is consistent with the trend within coordinately structured systems with their lay officials supported by a network of expert advisers.[63] At the same time it was observed in the course of interviews that the divisions evident between judges due to their professional and cultural backgrounds are also at play as between ICC legal officers and advisors.[64] Because of this, one interviewee questioned whether legal officers could provide the stabilising force that such actors play within coordinately structured systems.[65] It was explained that until international criminal justice is

[61] Article 36(9)(a) ICC Statute. Contrast with the ICTY where the re-election of judges was permitted. See Article 13bis(3) ICTY Statute. Whether judicial terms of office were renewable was a contentious issue during the negotiation of the Rome Statute. While some advocated for renewability, in line with the practice of other international courts and tribunals, such as the ICJ, ICTY and ICTR, the prevailing view was that due to the criminal nature of proceedings, uniqueness in composition was a preferable option. See M. Rwelamira, 'Composition and Administration of the Court' in R. Lee (Ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (MN 1999) at 156; Mackenzie (2010) n.32 at 20.

[62] N. Jørgensen and A. Zahar, 'Deliberation, Dissent, Judgment' in Sluiter et al (Eds) (2013) n.8 at 1168; M. Divac Öberg, 'Processing Evidence and Drafting Judgments in International Criminal Trial Chambers' (2013) 24 *CLF* 113 at 114; P. Wald, 'Running the Trial of the Century: The Nuremberg Legacy' (2006) 27 *Cardozo Law Review* 1159 at 1567-1570.

[63] See Chapter 2 at 5.2.1.

[64] Interview #03 n.35.

[65] Ibid.

administered by lawyers who have had their legal training and have served their entire careers within the system of international criminal justice, the strength of the influence of national domestic cultures will preclude the development of a common legal culture within international criminal justice.[66]

Even if, over time, specialisation is enhanced, it nevertheless remains open to question whether it will ever be possible for a routinised approach to judicial decision-making to take hold given the exceptionality of the kinds of crimes and the contexts within which they occur. After two decades of international judicial activity in the field of international criminal law, every case addressed by the international criminal courts and tribunals presents novel questions, requiring treatment on an individual rather a routinised basis. Before the ICTY, where the Tribunals' jurisdiction was limited to a specific conflict situation (and therefore all cases before the Tribunal arose out of the same situation), there was only limited routinisation where the same issues reoccurred by reason of the novelty of the legal and factual issues raised by every case. Consequently, the jurisprudence of the ICTY is devoid of the illusion of mechanical rule application that is strived for within hierarchically structured systems. Moving to the ICC, where prosecutorial strategy to date indicates that for each situation investigated only a handful of individual cases will be pursued,[67] the chambers will face a higher turnover of factually unique situations to address relating to a fewer number of cases, once again reducing the ability of routinisation to take hold. Moreover, the chamber system means that where similar issues do reoccur across cases – for example, procedural issues such as the disclosure of evidence or witness proofing – the approach taken in each decision on those issues is fragmented, with the approach taken by a particular chamber dependent upon its particular composition.[68] Against this backdrop, routinisation and stability of jurisprudence, at least in the present and for the near and medium future, is unlikely to take hold.[69]

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[66] Ibid.

[67] OTP, 'Report on the activities performed during the first three years (June 2003-June 2006)' 12/09/2006 at 7-8; OTP, 'OTP Strategic Plan 2012-2015' 11/10/2013 at para.22 and OTP, 'Strategic Plan 2016 – 2018' 06/07/2015 at para. 34-39.

[68] Interview #03 n.35; Interview #06, Transcript of Interview with ICC Judge, 27/05/2015, The Hague, on file with author; Van Sliedregt and Vasiliev (2015) n.7 at 5.

[69] Interview #03 n.35.

2.2 Distribution of Authority

The second defining characteristic of coordinately structured systems of justice is the distribution of official decision-making authority horizontally, rather than hierarchically.[70] As with general international law, the actors and institutions with authority to administer international criminal law are numerous and diffuse. These include the courts and tribunals of domestic legal systems with jurisdiction over international crimes, the 'fully international' criminal tribunals established to investigate and prosecute international crimes[71] and the hybrid or internationalised permutations that sit between domestic and the international.[72] For the purposes of international criminal justice, there is no system of hierarchy that governs the relationship between these institutions. Even with the establishment of the permanent ICC (which does not preclude the establishment of further *ad hoc* Tribunals or hybrid/internationalised arrangements), each forum for the pursuit of international criminal justice operates in parallel with the others, with no system of superior review existing as between those institutions. This suggests overall at least, international criminal justice bears resemblance to the coordinate structure of authority.[73]

This should not be confused with specific arrangements to determine when circumstances the fora of international criminal justice may exercise their jurisdiction and the order of priority when multiple fora claim jurisdiction over the same situation. The *ad hoc* Tribunals can claim primacy over the courts of all States, not just those of their respective the respective domestic jurisdictions, the former Yugoslav States and Rwanda,[74] and the ICC possesses subsidiary jurisdiction to domestic jurisdictions in accordance with the principle of complementarity.[75] However, this is not evidence of a hierarchical distribution of authority. While official authority for the purposes of advancing the objectives of international criminal

[70] Chapter 2, Section 5.2.2.

[71] Such as the ICC, the ICTY and the ICTR.

[72] See n.11.

[73] This conclusion is also arrived at by G. Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law' in A. Cassese (Ed) *The Oxford Companion to International Criminal Justice* (OUP 2009) at 110.

[74] Article 9(2) ICTY Statute, Article 8(2) ICTR Statute.

[75] However, when making determinations on questions of complementarity in order to determine whether the Court may exercise its jurisdiction, pre-trial chambers do have some power of review over domestic proceedings in order to determine the conformity of domestic proceedings (or the lack thereof) conforms with the requirements of complementarity. Article 17 and 18 ICC Statute.

justice is distributed horizontally as between those institutions responsible for the investigation and prosecution of international crimes, it is necessary to consider each specific institution and the manner in which authority is distributed *within* these institutions.

It should be recalled that in the overwhelming majority of cases, the ICJ sits in full plenary.[76] Therefore, it is characterised by a single body exercising institutional authority.[77] By contrast, institutional authority within the international criminal courts and tribunals is vested in chambers, composed of configurations of three or five judges.[78] The ICTY and the ICC both have two divisions of judges, the Trial and Appellate divisions, with Trial judges sitting in chambers of three and Appeals judges sitting in chambers of five. The ICC departs further from the ICJ judicial structure and that of the ICTY in its creation of a third judicial division, the Pre-Trial Division.

The following sub-section will consider the implications of the establishment of these divisions upon the degree of hierarchical distribution of authority within the institutions. Before doing so, it is worth considering the implications of the distribution of institutional authority across chambers upon the relative power of the individual judge. The chamber system means that in the *internal deliberative context*, individual judges possess considerable authority (or at least, power) to influence the manner in which the institutional power and authority of the court or tribunal is exercised in the *external* sphere. In a chamber comprised of three judges, where a decision is reached by a majority it takes just one change in the chamber's composition in a subsequent case or decision dealing with the same issue for the previously minority position to become the new majority.[79] A consequence of this, as will be demonstrated throughout this chapter, is a lack of stability in institutional jurisprudence due to the particular configuration of each decision-making chamber, the personality and ability of members of that chamber to assert their individual strength within the chamber and the relationship between those judges.[80] All of this is consistent with the coordinate idealtype of official authority. Despite this, the

[76] See Chapter 3, Section 2.2.

[77] Ibid.

[78] Institutional decision-making on certain issues is also undertaken by the plenary of judges in both the *ad hoc* Tribunals and the ICC, on particular administrative issues. Rule 24 ICTY RPE, Rules 4 and 29 ICC RPE.

[79] Interview #03 n.35.

[80] Ibid.

following sub-section will consider whether the possibility of appellate review of Trial Chamber (and at the ICC, Pre-Trial Chamber) decisions is evidence of greater hierarchical tendencies within the international criminal courts and tribunals.

2.2.1 Internal Distribution of Authority

Whereas at the ICJ, there is no general right to appeal,[81] all of the contemporary international criminal courts and tribunals have an appellate jurisdiction.[82] The post-Second World War international military tribunals did not provide for appellate review by an appellate Military Chamber of the Tribunal,[83] however by the 1990s, it was considered that the right of appeal constitutes 'a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the ICCPR [International Convention on Civil and Political Rights]' and was accordingly included in the Statutes of the ICTY and ICTR.[84]

The Appeals Chambers of the ICC and the ICTY have by definition have the power to review, revise or overturn the interlocutory decisions and trial judgments of Trial Chambers.[85] This may be used to support the claim that, in the context of international criminal justice, there is a hierarchical tendency, with appellate review being a form of superior review. However, whereas international and regional instruments refer to the right to appeal to a *higher* court or tribunal,[86] creating a stronger sense of hierarchisation within the judiciary, it has been suggested that in the context of international criminal justice, the Appeals Chambers of international criminal courts and tribunals should not be properly considered as 'higher' chambers.[87]

Qualitatively, there is little difference (at least formally) between the members of the Appeals division and members of the Trial and Pre-Trial divisions 'in terms of

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[81] See Chapter 3, Section 2.2.

[82] Articles 11(a) and 25 ICTY Statute and 81 ICC Statute. Nerlich (2015) n.47 at 963.

[83] Defendants did however unsuccessfully attempt an appeal to the US Supreme Court to challenge the constitutionality of the sentences imposed by the IMT. See *Hirota v MacArthur* 338 US 197 (27/06/1949).

[84] SG Report, UN Doc s/25704, 3/05/1993, para.116. Article 14(5) ICCPR. In addition, the right of appeal in criminal matters is recognised by regional human rights instruments, see Article2, Protocol 7 of ECHR (entered into force 1/11/1988); The AfCPHR recognises a right to appeal against acts that violate an individual's fundamental rights, Article 7(1)(a) AfCPHR; Article 8(2)(h) ACHR includes the right to appeal in criminal matters as a minimum guarantee as a component of the right to a fair trial.

[85] Article 25(2) ICTY Statute and Articles 83(2) and 84(1) ICC Statute.

[86] Article 14(5) ICCPR, Article 2, Protocol 7 ECHR, Article 8(2)(h) ACHR.

[87] S. Zappalà, 'Appeal', in Cassese (Ed) (2009) n.73 at 246.

qualification, experience, appointment and mandate'.[88] Indeed on the face of it, the most apparent difference between the Appeals Chambers and the Trial Chambers is the number of judges comprising Chambers within each division; whereas Trial Chambers are comprised of three judges,[89] the Appeals Chambers are comprised of five.[90] However, this too may point in the direction of greater hierarchisation, at least in the context of the ICC. In the case of the ICC, there is a single Appeals Chamber comprised of all five members of the appeals division (and thereby perhaps creating a stronger impression of convergence of authority to a single body).[91] By contrast, at the ICTY, the Appeals Chamber is comprised of five of the seven judges who comprise the division, thereby permitting the constitution of multiple differently-composed Chambers at any given time.[92] At the same time, intra-institutionally, the ICTY and ICTR both share the same single appeals division,[93] which may lend support to the argument not only of greater stronger hierarchical tendencies within the particular institutions, but also within international criminal justice, at least historically when the *ad hoc* Tribunals dominated the field.

A further factor which might lend support to the fact of greater hierarchisation is the power of Appeals Chambers of international criminal courts and tribunals to review the full findings of Trial Chambers. Appeals Chambers of the international criminal courts and tribunals have the authority to replace the latter's findings of fact with those of their own,[94] albeit only where a high threshold has been met, thus exhibiting a strong deference to the factual determinations of the Trial Chamber has been met.[95]

Ultimately however, the existence of a single level of review is insufficient to characterise the internal structure of international criminal courts and tribunals as being of hierarchical structure. Despite there being an appearance of convergence in

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[88] See Regulation 10(1), ICC Rules of Court, adopted on 26/05/2004 (ICC-BC-01/01/04). See above, Section 2.1.

[89] Article 12(2) ICTY Statute, Article 39(2)(b)(ii) Rome Statute.

[90] Article 12(3) ICTY Statute, Article 39(2)(b)(i) Rome Statute.

[91] Article 39(2)(b)(i) ICC Statute. However, see fn.99 below.

[92] Article 12(3) ICTY Statute,

[93] Article 13(4) ICTR Statute.

[94] Zappalà (2009) n.87 at 246. See *Gotovina and Markač* Judgment (Appeals Chamber) 16/11/2012 (IT-06-90-A) at para.10.

[95] *Gotovina* (Appeals Chamber) n.94 at para.10. At the ICC, see *Prosecutor v Lubanga*, 'Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction' (Appeals Chamber) 01/12/2014 (ICC-01/04-01/06-3121-Red) at para.16 *et seq*, discussed at Nerlich (2015) n.47 at 975. Generally, see G. Boas et al, 'Appeals, Reviews, and Reconsideration' in Sluiter et al (Eds) (2013) n.8 at 945.

authority at the Appeals Chamber in both the ICC and the *ad hoc* Tribunals, any hierarchisation in practice can only be seen in the jurisprudence of the *ad hoc* Tribunals. The development of the 'Aleksovski principle' by the Appeals Chamber of the *ad hoc* Tribunals, whereby 'the *ratio decidendi* of [Appeals Chamber] decisions are binding on Trial Chambers',[96] and the Appeals Chamber's willingness to issue broader decisions designed to provide guidance by developing and clarifying the law tend towards a degree of hierarchisation.[97] By contrast, no system of precedent akin to the Aleksovski principle has been established within the ICC jurisprudence.[98] This limits the role that the ICC Appeals Chamber can play in stabilising and harmonising the Court's jurisprudence in view of the divergence in the jurisprudence of individual trial and Pre-Trial Chambers.[99] Indeed, the 'minimalist' approach of judicial restraint adopted by the Appeals Chamber in terms of its reticence towards providing guidance to the trial and pre-trial divisions and not providing 'guidance' to those Chambers suggests that ICC judges do not perceive the Appeals Chamber to be a 'higher Chamber' in a hierarchical sense.[100]

On the question of internal structure, another issue is the distribution of authority among the legal officers that advise and support the judges within the *ad hoc* Tribunals and the ICC. Here, one interviewee identified a distinction between the *ad hoc* Tribunals and the ICC which had manifest consequences for the degree of consensus and divergence manifested in the Court's jurisprudence. It was explained that the institutional structure within the *ad hoc* Tribunals is more hierarchical, with a larger and stronger legal support team under the supervision of a senior that has greater detachment from the judges.[101] By contrast, the ICC was described as 'more judge-centric', with few legal officers under weaker supervision and who are directly accountable to the judges.[102] Consequently, it was considered that at the ICTY, the stronger hierarchy of authority within the legal team tended to encourage a stronger sense of institutional culture which resulted in a tendency towards achieving greater

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[96] *Prosecutor v Aleksovski* Judgement (Appeals Chamber) 24/03/2000 (IT-95-14/1) at para.113.

[97] Nerlich (2015) n.47 at 979.

[98] Ibid. at 980.

[99] This ability to provide stability in the Court's jurisprudence is further limited by the frequency by which the composition of the ICC Appeals Chamber changes, either due to the non-renewable terms of office for ICC judges and/or the transferability of judges. See above, Section 2.1 and Nerlich (2015) n.47 at 980.

[100] Ibid.

[101] Interview #03 n.35, Interview #07 n.41.

[102] Ibid.

consensus.[103] At the ICC, by contrast, with legal officers directly accountable to 'their' judge, the divisions between judges are mirrored and reinforced as between the legal officers.

2.3 Formal versus Substantive Justice

Chapter 3 observed the challenges inherent in any attempt to categorise Peace Palace decision-making on the basis of whether it emphasises formal or substantive justice.[104] It noted how the diversity of the bench and the diversity of the understandings of the role of the judge held by ICJ judges made it difficult to ascertain a single coherent methodology followed by the Court as an institution when deciding cases. Whereas some judges emphasised formal justice and the fidelity of the outcome to the positive law and procedure, other judges are more willing to consider the substantive consequences of the outcome of the application of formal methods of decision-making and factored into their decision-making considerations of substantive justice. This is made possible by the nature of the Court's jurisdiction and the generality with which applicable law is defined within the ICJ's Statute.

By contrast, the law applicable to and by the international criminal courts and tribunals is more restricted and restrictive. When discussing these institutions, it is necessary to distinguish between the ICTY on one hand, and the ICC on the other. All international criminal courts and tribunals are limited in their substantive jurisdiction over the crimes as defined in their Statutes.[105] The Statutes of both the ICTY and the ICC also identify a number of other principles, rules, rights and obligations that the judges must exercise their decision-making authority in accordance with. Fundamental principles of legality in the context of criminal law and criminal justice such as *nullum crimen sine lege* and *nulla poena sine lege* point in favour of formal justice.[106] However, there are key differences in the scope of the applicable law

[103] Ibid.

[104] Chapter 3, Section 2.3.

[105] Articles 5-8 ICC Statute, Articles 1-5 ICTY Statute.

[106] Articles 22 and 23 ICC Statute. Although the ICTY Statute does not make explicit reference to the principles, the importance of compliance with these general principles of criminal law was acknowledged and emphasised in the Report of the Secretary General on the draft statute of ICTY, and has also been reiterated in the Tribunals' jurisprudence. See, *Prosecutor Tadić* 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction' (Appeals Chamber) 02/10/1995 (IT-94-1) at para.143; *Prosecutor v Delalić, Mucić and Delić* Judgement (Trial Chamber) 16/11/1998 (IT-96-21-T) at 402, *Prosecutor v Kordić and Čerkez,* Judgement (Appeals Chamber) 17/12/2004 (IT-95-14/2-A) at para.41-46; *Prosecutor v Galić*, Judgment (Appeals Chamber) 30/11/2006 (IT-98-29-A) at paras.83 and 85.

within the ICTY and the ICC which have significant consequences upon the applicable standards and methodology when decision-making.

Beyond articulating the categories of crimes within the jurisdiction of the Tribunal, the ICTY Statute does not provide a comprehensive articulation of the crime and the laws of which each category is comprised. This has led to the ICTY as being desribed as a 'criminal court without a criminal code'.[107] It has been the task of the ICTY (and ICTR) judges to 'discover what the unwritten international law' held in store.[108] The contribution that the caselaw of both the ICTY and the ICTR has made to the development of substantive customary international criminal law and international humanitarian law has been widely lauded as some of their principal achievements.[109] Moreover, while the Tribunals have been bound by the fundamental principles of legality, even in the application of those principles the Tribunals' judges have been able to adopt 'liberal',[110] 'non-formalistic'[111] or 'fluid'[112] approaches. Indeed, the Appeals Chamber of the ICTY has itself stated that

> while recognising the need for certainty, stability and predictability in criminal law, [it] also recognises that there may be instances in which the strict, absolute application of that principle may lead to injustice…The principle of the continuity of judicial decisions must be balanced by a residual principle that justice is done in all cases.[113]

By contrast, the position vis-à-vis decision-making at the ICC may have stronger tendencies towards formal conceptions of justice. Unlike the ICTY Statute, the Rome

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[107] A. Zahar, 'Civilizing Civil War: Writing Morality as Law at the ICTY' in Swart, Sluiter and Zahar (Eds) (2011) n.14 at 469.

[108] Ibid.

[109] See A. Cassese, 'Presentation' in R. Badinter and S. Breyer (Eds) *Judges in Contemporary Democracy: An International Conversation* (NYU Press 2004) at 185-6; S. Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law* (CUP 2014) at 63. Generally, see S. Darcy and J. Powderley (Eds) *Judicial Creativity in the International Criminal Tribunals* (OUP 2010); L. Van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (MN 2005) at 261 *et seq.*

[110] W. Schabas, 'Retroactive Applications of the Genocide Convention' (2009) 4 *University of St. Thomas Journal of Law and Public Policy* 35 at 54-55.

[111] J. Nilsson, 'The Crime of Persecution in the ICTY Caselaw' in Swart, Sluiter and Zahar (Eds) (2011) n.14 at 226.

[112] J. Powderly, 'Distinguishing Creativity from Activism: International Criminal Law and the 'Legitimacy' of Judicial Development of the Law' in W. Schabas, N. Hayes and Y. McDermott (Eds) *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Ashgate 2013) at 226-7.

[113] *Aleksovski* n.96 at para.101-102. Incidentally, in support of this claim, the Chamber cited an extensive passage from the Separate Opinion of Judge Tanaka in the *Barcelona Traction* (Preliminary Objections) case before the ICJ (*Barcelona Traction, Light and Power Company Limited* (Preliminary Objections) (Belgium v Spain) [1964] ICJ Rep 6, Separate Opinion of Judge Tanaka at 65).

Statute has been described as providing a 'criminal code'.[114] It establishes a closed list of crimes that fall within the Court's jurisdiction, a list that may only be added to by way of amendment to the Statute.[115] The more exhaustive provisions of the Statute are supplemented by the Elements of Crimes, which elaborate further upon the definitions of the crimes within the Court's jurisdiction.[116] While this may limit the possibility for the judges of the ICC to play an as influential role in the development of customary international law of general applicability beyond the purposes of the ICC, the Rome Statute does contain a provision which may open the door to the application of standards and principles consistent with substantive conceptions of justice by ICC judges. Article 21 of the ICC Statute articulates the law applicable by the Court:

1. The Court shall apply:
    a. In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
    b. In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
    c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statue and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.

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[114] Zahar (2011) n.107 at 470.

[115] For example, see the amendments to the Statute adopted by the Assembly of States Parties at the Kampala Review Conference, expanding the list of crimes that constitute war crimes within the Court's jurisdiction (Article 8, Rome Statute (amended by ICC-ASP resolution RC/Res.5 of 11 June 2010, adding paragraphs 2(e)(xiii) to 2(e)(xv))) and the adoption of the definition of the crime of aggression for the purposes of the Court's jurisdiction (Article 8*bis* Rome Statute, as amended by resolution RC/Res.6 of 11/06/2010).

[116] Elements of Crimes, adopted by the Assembly of States Parties to the Rome Statute, in accordance with Article 51 of the Rome Statute, ICC Official Records ICC-ASP/1/3 (Part II-A).

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, [and applied without distinction or discrimination].[117]

While, like the ICJ, the ICC is permitted to apply 'general principles of law' as standards in its decision- making, it can do only as a measure of last resort, having exhausted the sources outlined in Article 21(1) (a) and (b).[118] While sub-section (b) opens some flexibility in the applicable standards to which recourse may be made, the primacy of the Statute confirmed in sub-section (a) grants little room for the consideration of standards and principles extraneous to the Statute in practice.[119] Nevertheless, as one ICC legal officer observed, while Article 21 offers little discretion to ICC judges in the law and standards that they may apply, in practice, the influence domestic legal cultures upon judges and legal officers means that divergence upon the interpretation of Article 21 is deeply held.[120] Judges from civil or code-based jurisdictions are more likely to place greater emphasis upon Article 21, and thereby prioritise the application of the Rome Statute.[121] By contrast, judges more familiar with common law judicial cultures and those who prefer to see a continuity in 'international criminal law' jurisprudence across the *ad hoc* Tribunals and the ICC emphasise the greater relevance of the jurisprudence of the *ad hoc* Tribunals to the identification of international criminal law rather than the Statute, which is viewed as a political compromise.[122] As such, like at the ICJ, it is not possible to identify a clear tendency towards the either the coordinate or hierarchical idealtype from the perspective of the standards of decisional legitimacy.

To conclude, while there are appreciable differences between the structure of judicial authority within the Peace Palace paradigm of international justice and international criminal justice, with the latter possessing greater hierarchical traits, taken as a whole, international criminal justice still bears greater resemblance to the

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[117] Article 21, ICC Statute. For commentary, see G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the treatment of sources of law in the jurisprudence of the ICC' in Stahn and Sluiter (Eds) (2009) n.20.

[118] Bitti (2009) n.117 at 289 *et seq* on the hierarchy (and, at 290, the 'hierarchy within the hierarchy') of sources under Article 21. See also G. Bitti, 'Article 21 and the Hierarchy of Sources of Law Before the ICC' in C. Stahn (Ed) *The Law and Practice of the International Criminal Court* (OUP 2015).

[119] Ibid.

[120] Interview #03 n.35.

[121] Ibid.

[122] Ibid. On the role of the jurisprudence of the *ad hoc* Tribunals within ICC decision-making, see V. Nerlich, 'The Status of ICTY and ICTR Jurisprudence on Proceedings Before the ICC' in Stahn and Sluiter (Eds) (2009) n.20.

coordinate idealtype of justice.[123] The Peace Palace model of international justice may be considered an extreme example of a coordinately structured system of justice,[124] at the far end of the coordinate-hierarchical spectrum. Accordingly, even adjusting for the greater hierarchical tendencies (greater specialisation and stronger respect for formal requirements), international criminal justice still substantially tends towards the coordinate idealtype.

The strong sense of the judge as an individual within the institution is manifested within judicial attitudes towards additional opinions, at least at the ICC among those judges interviewed.[125] The lack of institutional judicial culture, common judicial professional background and the strength of the influence of strong national criminal judicial cultures means that judges of the international criminal courts and tribunals retain a strong sense of their individual judicial authority. Consistent with coordinately structured systems of justice, there is a sense of the inextricable link between the professional and personal in terms of judicial integrity.[126] The ICC judges interviewed for the purposes of this research justified their own practice by reference to their need to respect their personal integrity and conscience,[127] with one judge speaking of the 'need' to dissent when their 'inner conviction on the principles [have been] violated by the majority'.[128] That judge continued to describe their motivation to dissent as being 'because I have my own good name to preserve'.[129] Similarly, a former judge described the purpose of additional opinions as being to 'reflect the intimate conviction of a judge'.[130]

[123] See Chapter 2, Section 5.

[124] Chapter 3, Section 2.4.

[125] This section has emphasised the diversity of the judicial bench and culture. Therefore, the views of these judges clearly should not be taken as indicative of a generally held consensus within the Court. Indeed, there is the possibility that of the judges approached for interview, those who agreed to speak on this topic were precisely those who place greater value upon judicial individuality and the expression of their personal views. It may be the case that those judges who place greater priority upon the institutional image of the Court may be less inclined to share their personal views, even in the form of anonymised interviews. Consequently, it would be desirable to conduct further research to investigate whether this hypothesis is correct.

[126] Chapter 2, Section 5.2.1.

[127] Interview #02 n.36; Interview #05 n.36; Interview #06 n.68.

[128] Interview #02 n.36.

[129] Ibid.

[130] Interview #05 n.36. This judge also referring to the 'fundamental principle of intimate conviction to be reflected in the decision to be taken by the chamber', one might deduce was referring to the principle of intimate conviction within Romano-Germanic legal systems as the standard of proof in criminal proceedings. See D. Jacobs, 'Standard of Proof and Burden of Proof' in Sluiter et al (Eds) (2013) n.8 at 1146.

The practical realities of the composition of the bench and the apparent insurmountability of cultural differences between 'civil law' judges and 'common law' judges mean that international criminal justice, especially as pursued through the ICC, bears greater similarity to the coordinate idealtype than the hierarchical.

3 Organisation of Authority: The International and the Domestic

It can be recalled that the 'acceptance' of legitimacy and thus authority is contingent upon three factors; the attributes and identity of the actor claiming authority, the substantive content of that claim, and the criteria or standards for legitimacy held by the 'accepting' actor.[131] Not only does international criminal justice involve the determination of the criminal responsibility of *individuals*, but there are also domestically-oriented purposes attributed to the criminal justice process. Through discharging the various functions outlined at the outset of this chapter – whether that be pursuing the 'ordinary' criminal justice objectives or whether that be the extraordinary criminal justice objectives – international criminal justice is considered to contribute to the process of transitional justice within the societies affected by the violence within which international crimes occurred. Transitional justice denotes the policies and mechanisms adopted by a society in response to its illiberal, violent or repressive past.[132] It is not just about understanding of a society's violent and repressive past, but it is also about cultivating a new social, political and legal order defined by its difference from the old order and involves the process of facilitating the change from the old order to the new.[133]

Consequently, it is appropriate to recall the observations made in Chapter 2 regarding the need for legal transplants to be considered for their 'fit' within the extant national system of justice in order to effectively procure the objectives sought.[134] In view of this,[135] in order to appraise the appropriateness of additional opinions in the context of international criminal justice, it might be necessary to

[131] Chapter 2, Section 3.

[132] R. Teitel, *Transitional Justice* (OUP 2000) at 6.

[133] Ibid.

[134] Chapter 2, Section 5.3.

[135] Although the international criminal courts and tribunals under consideration in this thesis are structurally distinct from domestic justice systems, in contrast to the hybrid or internationalised courts and tribunals.

consider the structure of authority within the context of the particular domestic systems implicated in the proceedings of international criminal courts and tribunals and the 'fit' of additional opinions within that context. Indeed, Damaška has observed that in view of the domestically-oriented purposes of international criminal justice and in order to effectively procure the domestically-oriented didactic functions of international criminal justice, it would be ideal for international criminal courts and tribunals to 'appear in various garbs. In order to command "thick acceptance," it would be adapted to local legal culture, the contours of communal experiences, and local moral sensibilities'.[136]

This is because the domestic conceptions of judicial legitimacy and authority familiar to individuals and domestic audiences will be the dominant criteria applied by those audiences when appraising the legitimacy of expressions of international judicial power (both institutional and individual). Whereas the expression of individual judicial authority through additional opinions might be consistent with the co-ordinately structured system of international criminal justice, it might be inconsistent with the nature of judicial authority with the domestic sphere. This section explains that while domestic perceptions of justice and judicial authority will inevitably affect how the international judicial authority is appraised, incongruity between the organisation of judicial authority between the domestic and the international does not undermine the appropriateness of critiquing the practice of issuing additional opinions by reference to the coordinate idealtype of authority from the perpsective of the advancement of the project of international justice.

First, this thesis concerns justice and judicial authority from a traditionally western perspective. The majority of the domestic legal systems of those countries that have been subject to intervention by contemporary international criminal justice (whether in the form of international criminal courts and tribunals or internationalised arrangements) have a tradition of legal pluralism which sees domestic justice systems incorporate multiple paradigms of justice and official authority. Typically these are forms of religious, customary, traditional or local law, all of which have their own structures of authority and conceptions of justice. In some of these legal systems, these latter paradigms of justice dominate over the justice systems familiar

[136] Damaška (2008) n.9 at 349. He does however conclude that this would come with its own challenges.

to western conceptions of justice. In these situations, the appropriateness of additional opinions is eclipsed by a more fundamental question as to the appropriateness of recourse to the western structures of justice oriented around the individual in order to achieve the intended objectives. Second, looking specifically at domestic legal systems, the degree to which there is an informed perception regarding the nature of judicial authority and justice (and therefore, also additional opinions) within the affected community depends upon how widely the decisions of domestic courts are disseminated, in what manner, and to which audiences. If there is poor dissemination of judicial decisions, both domestic decisions and those of international tribunals, then it is necessary to question the actual power of additional opinions in the external domestic deliberative spheres and their impact upon the perception of judicial authority. Indeed, questioned upon how additional opinions at the ICC affect how the institution's authority is perceived within affected communities, one ICC judge observed that many of the situations before the ICC are those where the proceedings of international tribunals are at the periphery, if not totally absent, from the considerations of the vast majority of individuals within the affected societies. It was stated: 'frankly, they have other problems, more pressing problems' than to consider the dissenting opinions of ICC judges.[137]

Third, the very situations that fall within the purview of international criminal justice are often those societies undergoing a period of transition, where there is a shift in the political order from that which resulted (and ended) in the violence and conflict and that which replaces it. As Ruti Teitel has observed, political transitions imply 'paradigm shifts in the conception of justice'.[138] Accordingly it may not be appropriate to extend assumptions regarding the nature and perception of a given justice system or structure of authority valid in ordinary periods to the *extra*ordinary transitional context.[139] Therefore, in many cases an assumption in favour of contiguity between the structure of justice in international tribunals and domestic systems is misguided, precisely because the domestic situation is itself in a period of change rather than continuity. Rather, in such transitional contexts, it can be the case that 'the ordinary intuitions and predicates about law simply do not apply. In

[137] Interview #02 n.36.

[138] Teitel (2000) n.133 at 6.

[139] The extraordinariness of international crimes is at the core of their conception. See Drumbl (2007) n.5 at 3-6.

dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law'.[140]

Indeed, when recourse is made to international criminal justice from the perspective of the pursuit of transitional justice,[141] the difference of the international legal system is seen as a virtue.[142] Those dilemmas presented by the domestic transitional context appear to fall away when the comparatively neutral and apolitical international mechanisms of justice are invoked.[143] The shift towards local justice, whether it be through the emphasis upon the primacy of domestic jurisdictions, or the establishment of internationalised and hybrid institutions, has seen the role of international criminal courts and tribunals reconceived as measures of last resort. The principle of complementarity at the ICC embodies this, whereby the competence of the ICC is only activated where States are unwilling or unable to conduct genuine investigations and prosecutions themselves.[144] Accordingly, international criminal courts and tribunals – and, looking to the future, specifically the ICC – are unlikely to be involved in those situations where there is a stable and functioning justice system which would require contiguity in the process and structure of authority. Where such stability and capacity exists, then it is likely that domestic proceedings or internationalised or hybrid arrangements will be the preferred course of action.[145]

For these reasons, it is concluded that a lack of consistency between the structure of judicial authority within the context of international criminal justice and national criminal justice systems is not necessarily problematic to this analysis. This is so at least from the perspective of the appraisal of the relationship between institutional and individual judicial authority in order to assess the desirability of permitting additional opinions.

Using Damaška's framework for analysing the structure and organisation of judicial authority, it is now clear that, like in the context of the Peace Palace paradigm of

[140] Teitel (2000) n.133 at 6.

[141] See Section 1 for more details.

[142] R. Teitel, *Globalizing Transitional Justice* (OUP 2014) at 97.

[143] Ibid.

[144] 10th Preambular paragraph, Article 1 and Article 17 ICC Statute.

[145] However, it is acknowledged that in such instances, where the domestic system has the capacity to undertake genuine investigations and prosecutions, but it unwilling to do so, it is unlikely to provide the cooperation required either to the ICC in order enable it to undertake investigations and prosecutions or the cooperation necessary to establish a hybrid or internationalised arrangement.

international justice, views upon the impact of additional opinions upon judicial authority and independence predicated upon hierarchical conceptions of judicial authority are not well-founded when made in the context of international criminal justice. Section 5 will consider the manner which individual judicial authority has and can be expressed in the context of international criminal justice and, from the perspective of its impact upon institutional authority, to what effect. However, before doing so, Section 4 will explain the formal bases for the entitlement to issue additional opinions at the ICTY and the ICC respectively, subjecting them to a literal textual interpretation. Contrasting the statutory provisions against the established practice that has emerged, Section 4 will provide a quantitative sense of the prevalence of the recourse to additional opinions by judges of the international criminal courts and tribunals.

4 Additional Opinions and International Criminal Tribunals

4.1 Statutory Provisions

4.1.1 ICTY

The ICTY Statute was drafted by a working group established within the UN Office of Legal Affairs, a group dominated by lawyers of the common law tradition.[146] Whereas in the context of the PCIJ, ICJ and the ICC there are records of the deliberations of the drafters that provide an insight into the considerations and intentions of the drafters, that resource is not available in the context of the ICTY.

The principal textual provision governing additional opinions in the context of the ICTY is Article 23(2) of the ICTY Statute. It reads:

> The judgement shall be rendered by a majority of judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It

[146] V. Tochilovsky, 'The Nature and Evolution of the Rules of Procedure and Evidence' in K. Khan, C. Buisman, and C. Gosnell (Eds) *Principles of Evidence in International Criminal Justice* (OUP 2010) at 158. V. Morris and M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* Volume 1(Transnational Publishers 1995) at 31-32, fn.117; M. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Carolina Academic Press 1996) at 56. Interview #03 n.35.

> shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.[147]

There are no express provisions of the Statute that address the permissibility of publishing additional opinions in the course of appellate proceedings. However, this is remedied by Rule 117(B) (ICTY) of the Rules of Procedure and Evidence (drafted by the Tribunal's judges), which stipulate that the judgment of the Appeals Chamber 'shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.'[148]

4.1.2 ICC

Unlike the ICTY Statute, the Rome Statute as a multilateral treaty was drafted in a multilateral process over the course of five years. Attitudes towards the additional opinions among those participating in that process varied,[149] and shifted over time. Therefore, the final provisions of the Rome Statute relating to additional opinions – like all of its provisions – reflect a negotiated compromise.[150] From the perspective of additional opinions, the result of that process of negotiation was an attempt to obtain the benefits claimed of additional opinions from the perspective of appellate proceedings and the development of the law, while at the same time taking heed of the concerns expressed by those in favour of prohibiting their publication.[151]

The Rome Statute contains distinct provisions to regulate the delivery and content of the judgments of the Trial Chambers and those of the Appeals Chamber. In 1994, the International Law Commission (ILC) concluded that the procedure regarding additional opinions during the trial and appellate stages should be treated the same.[152] However, delegates at the Rome Conference adopted different provisions

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[147] Article 23(2) ICTY Statute.

[148] Rule 117(B) ICTY RPE.

[149] For example, to take just 4 participating states (of whom, only two are currently states parties) Whereas Austria, Switzerland and Singapore were opposed to the expression of individual views or dissenting opinions, Canada, Russia, Chile, Malaysia and China were in favour. ICC Preparatory Committee, *Press Release L/2801* (36th Meeting (PM) 19/08/1996). The Philippines was also in favour of publication, see *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (15/06/1998-17/07/1998) Volume III (UN Doc. A/Conf.183/13 (Vol. III)) at 323.

[150] S. de Smet, 'A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact-Finding Procedure of the ICC' in Stahn and Sluiter (Eds) (2009) n.20 at 407 on the recourse to what Claus Kress described as the technique of 'constructive ambiguity' deployed by the Rome Statute's drafters in order to secure its adoption. See C. Kress, 'The Procedural Law of the International Criminal Court in Outline: An Anatomy of a Compromise' (2003) 1 *JCIJ* 603 at 605.

[151] Interview #03 n.35.

[152] ILC, 'Report of the International Law Commission on the Work of its Forty-Sixth Session' (02/05/1994-22/06/1994) UN Doc, A/49/10 at 127.

concerning the matter of making public the existence and nature of disagreement between the judges, depending upon whether the judgment being rendered was by the Trial Chamber and the Appeals Chamber. Opinion is split as to whether this was intentional. Some ICC judges, when asked of this point, attributed the adoption of different statutory language to the possibility that each of the provisions may have been drafted by different drafting committees, and hence the inconsistent approach adopted.[153] Others, including those involved in the drafting of the provisions in question, confirmed that the distinction was a deliberate choice; a compromise between those who sought to deprive or limit judges of a right to issue additional opinions and those who sought to grant such a right.[154]

Article 74 of the Rome Statute deals with the requirements of the trial judgment, stipulating the degree of participation in proceedings required of all judges responsible for the judgment; the basis upon which the Chamber is to make its judgment;[155] the preference for unanimity in decision-making;[156] the operation of secrecy as it applies to the internal deliberations of the Chamber[157] and the requirements relating to the delivery of the judgment. Taken as a whole, Article 74 has been described as enabling Trial Chamber decision-making upon the guilt of the accused to be more intelligible and transparent,[158] which in turn has been described as 'essential to the quality of justice'.[159]

Article 74(5), addressing the delivery of the trial decision reads:

> The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on evidence and conclusions. The Trial Chamber shall issue one decision. Where there is no unanimity, the Trial Chamber's decision shall contain the views

[153] Interview #02 n.36; Interview #05 n.36.

[154] Interview #03 n.35; O. Triffterer, 'Article 74: Requirements for the decision' in O. Triffterer (Ed) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd Ed Hart Publishing 2008) at 1398.

[155] Article 74(2).

[156] Article 74(3).

[157] Article 74(4).

[158] B. Nignan, 'Article 74: Conditions Requisess Pour la Décision' in J. Fernandez and X. Pacreau (Eds) *Commentaire article par article du Statut de Rome de la CPI* Volume II (Pedone 2012) at 1639.

[159] P. Robert, 'La Procedure du Jugement en Droit International' in H. Ascenscio, E. Decaux and A. Pellet (Eds) *Droit Penal International* (2nd rev Ed Pedone 2012) at 893.

> of the majority and the minority. The decision or a summary thereof shall be delivered in open court.[160]

Viewed in isolation, there is sufficient ambiguity in the language of Article 74(5) to allow judges a discretion to determine how 'shall contain the views' should be interpreted. The language can be read to permit the practice of referring to minority *within the text* of the Chamber's decision or the practice of issuing distinct minority opinions separate from the body of the Chamber's decision. However, when contrasted against the language adopted in regards to the judgment of the Appeals Chamber it might seem that this interpretive discretion may be limited. As Article 83(4) of the Statute provides:

> The judgement of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgement shall state the reasons on which it is based. Where there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.[161]

By explicitly differentiating between the expression of minority views and the delivery of a separate or dissenting opinion in the context of the appeals judgment but not in the context of the trial decision, it would seem that the intention of the drafters was to deprive Trial Chamber judges of the entitlement to publish distinct 'opinions', and rather to limit the expression of minority views to the body of the Trial Chamber's decision.[162]

Furthermore, the entitlement to deliver an additional opinion ostensibly enjoyed only by Appeals Chamber judges appears to be limited to questions of law. Article 83(4) indicates that minority views on determinations of fact should be confined to expression within the body of the Chamber's judgment. The implications of this, and

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[160] Article 74(5) ICC Statute.

[161] Article 83(4) ICC Statute.

[162] This interpretation of Article 74(5) was shared by F. Terrier, 'The Procedure before the Trial Chamber' in A. Cassese, P. Gaeta and J. Jones (Eds) *The Rome Statute of the International Criminal Court: A Commentary* Volume II (OUP 2002) at 1314 and also by J. Vailhe, 'Les Opinions Individuelles des Juges Devant les Tribunaux Interntionales' in M. Delmas-Marty, E. Fronza and E. Lambert-Abdelgawad, *Les Sources du Droit International Pénal: L'Expérience des Tribunaux Pénaux Internationaux et le Statut de la Cour Pénale Internationale* (Société de Législation Comparée 2004) at 444, Triffterer (2008) n.154 at 1398 and in Interview #03 n.35.

how it has been interpreted by the ICC judges, will be considered in Section 6.3.1 below. Like the ICTY Statute, the Rome Statute is silent on the permissibility of additional opinions in interlocutory decisions, and makes no explicit reference to the permissibility of either joint opinions of any kind, or declarations.

4.2 Judicial Practice

Broadly speaking, irrespective of the text of the Statutes, ICTY and ICC judges have adopted a wide discretion in the use of additional opinions.

4.2.1 ICTY

From the outset, judges at the ICTY embraced the practice of writing and publishing additional opinions. Despite the silence of the Statute on the permissibility of additional opinions to interlocutory decisions of either Chamber, ICTY judges have published additional opinions, both individually and jointly alongside interlocutory decisions. In addition to separate opinions and dissenting opinions, which are explicitly provided for in the statutory provisions, judges have also utilised additional opinions in the form of the declaration.[163] In contrast to the practice of judges at the Peace Palace, some ICTY judges have developed the practice of publishing 'dissenting and separate opinions',[164] or of indicating the degree of the disagreement with the judgment or decision of the Chamber in the label for the additional opinion. For example, labels for additional opinions have included 'separate and partially dissenting opinion',[165] 'partially dissenting opinion and declaration',[166] or even 'partially dissenting and separate opinion and declaration'.[167] This heightened degree

[163] For criticisms of this practice, see below at Section 6.2.

[164] In the Trial Chamber, examples include *Prosecutor v Tadić* Judgment (Trial Chamber) 07/05/1997 (IT-94-1-T), Separate and Dissenting Opinion of Judge McDonald, and the dissenting and separate opinions of Judges Antonetti and Treschsel in *Prosecutor v Prlić* Judgment (Trial Chamber) 20/05/2013 (IT-04-74-T). For examples of such in the Appeals Chamber, three judges (Judges Cassese (Presiding), Li, and Stephen) in *Erdemović* appended individual separate and dissenting opinions. In that case, the other two judges, Judges McDonald and Vohrah also published a joint separate opinion, such that all five members of the Court participated in an additional opinion in that case. See *Prosecutor v Erdemović* Judgment (Appeals Chamber) 07/10/1997 (IT-96-22-A). There is one example of a joint separate and dissenting opinion, that being of Judges Hunt and Bennouna in *Prosecutor v Mucić* Judgment (Appeals Chamber) 20/11/2001 (IT-96-21-A).

[165] Examples in the Trial Chamber include, *Prosecutor v Simić et al* Judgment (Trial Chamber) 17/10/2003 (IT-95-9-T), Separate and Partially Dissenting Opinion of Judge Lindholm; *Prosecutor v Galić* Judgment (Trial Chamber) 03/12/2003 (IT-98-29-T), Separate and Partially Dissenting Opinion of Judge Nieto-Navia. In the Appeals Chamber examples include the separate and partially dissenting opinions of Judges Meron and Schomburg in *Galić* (Appeals Chamber) n.106 and *Prosecutor v Lukić* et al Judgment (Appeals Chamber) 04/12/2012 (IT-98-32/1-A).

[166] *Prosecutor v Orić*, Judgment (Appeals Chamber) 03/07/2008 (IT-03-68-A), Partially Dissenting Opinion and Declaration of Judge Lui.

[167] *Prosecutor v Limaj, Bala, and Musliu* Judgment (Appeals Chamber) 27/09/2007 (IT-03-66-A), Partially Dissenting and Separate opinion and declaration of Judge Schomburg.

of specificity, and the use of multiple labels to describe additional opinions, suggests that at some judges at the *ad hoc* Tribunals did clearly attach greater substantive distinction between the different types as well as a greater degree of importance attached to the label used to describe their opinion. However, this practice of greater specificity is by no means uniform, with only a few judges having utilised this practice;[168] for the remaining judges, the singular 'dissenting' or 'separate' label has been preferred to describe the entire content of the additional opinion.

Like at the Peace Palace, additional opinions have been a familiar aspect of the ICTY's case law. Taking the judgments of the Tribunal, as of 16th June 2015, the 42 Trial Chamber judgments issuing verdicts against the accused were accompanied by 24 additional opinions (23 individual and 1 joint).[169] The 38 judgments of the Appeals Chamber were accompanied by 84 additional opinions (76 individual and 8 joint).[170] As such, the incidence of additional opinions in the Appeals Chamber has been much higher; whereas the average number of additional opinions per judgment in the Trial Chamber was 0.57, in the Appeals Chamber that average rose to 2.21 – that is, over four times the rate in the Trial Chambers.[171]

Although 66 judges have participated in Trial Chamber judgments of the ICTY, only 21 judges were responsible for the 24 additional opinions.[172] Judge Moloto was responsible for 3 dissenting opinions (2 of which he attached to the same trial judgment),[173] and Judges Nieto-Navia and Robinson were each responsible for 2 additional opinions.[174] All other judges who did participate in an additional opinion only participated in 1.[175] By contrast, in the Appeals Chamber, of the 33 judges to have participated in Appeals Judgments, only 6 have *not* issued a single additional

[168] Appendix 7.
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.. *Prosecutor v Delić* Judgment (Trial Chamber) 19/09/2008 (IT-04-83-T), Dissenting Opinion of Judge Moloto. Judge Moloto issued two distinct dissenting opinions in *Prosecutor v Perišić* Judgment (Trial Chamber) 06/09/2011 (IT-04-81-T).
[174] Appendix 7. *Prosecutor v Aleksovski* Judgment (Trial Chamber) 26/06/1999 (IT-95-14/1-T), Joint Opinion of Judges Vohrah and Nieto-Navia and *Galić* (Trial Chamber) n. 165, Separate and partially dissenting opinion of Judge Nieto-Navia. Judge Robinson delivered his two separate opinions alongside the same judgment in *Prosecutor v Lukić and Lukić* Judgment (Trial Chamber) 20/07/2009 (IT-98-32/1-T).
[175] Appendix 7.

opinion.[176] 20 judges have issued between 1 and 3 additional opinions and 5 have issued between 4 and 7 additional opinions.[177] Two judges participated in over 7 additional opinions; Judge Schomburg in 12 and Judge Shahabuddeen in 18.[178]

4.2.2 ICC

Irrespective of the legislative history of the statutory provisions discussed above, judicial practice concerning additional opinions at the ICC has largely followed that of the judges at the *ad hoc* Tribunals. Judges within all three divisions have issued distinct additional opinions alongside the decisions of the respective Chamber. Some early ICC decisions appeared to conform to the text of the Statute, by referencing the views of minority judges within the body of the decision.[179] However, it appears that this practice was soon abandoned in favour of the publication of distinct opinions – typically invoking the language of 'separate' and 'dissenting' in their label to denote the nature of their contents.[180] Rarely the more Statute-compliant language of 'minority opinion' has been used.[181] While the statutory provisions relating to additional opinions concern the judgments upon the innocence or guilt of the accused, additional opinions have been published alongside interlocutory decisions, as well as alongside the decisions on the confirmation of charges,[182] on which the Statute is silent in regards to additional opinions. Furthermore, although the Statute is silent on the admissibility of joint additional opinions, ICC judges have published joint opinions, both in the Appeals Chamber and the Trial Chamber.[183]

When asked about the apparent divergence between the Statute and judicial practice, responses among those interviewed for this research were mixed. A

[176] Ibid.

[177] Ibid.

[178] Ibid.

[179] *Prosecutor v Lubanga*, 'Reasons for 'Decision of the Appeals Chamber on the Defence Application "Demande de Suspension de Toute Action ou Procedure Afin de Permettre la Designation d'un Nouveau Conseil de la Défense" Filed on 20 February 2007, issued on 23 February 2007' (Appeals Chamber) 09/03/2007 (ICC-01/04-01/06 OA8).

[180] For example, in the first judgment to be delivered by a Trial Chamber of the ICC, Judge Fulford (presiding) issued a separate opinion and Judge Odio-Benito issued a separate and dissenting opinion. See *Prosecutor v Lubanga*, 'Judgment Pursuant to Article 74 of the Statute' (Trial Chamber I) 14/03/ 2012 (ICC-01/04-01/06-2842).

[181] *Prosecutor v Katanga*, Jugement Rendu en Application de l'Article 74 du Statut' (Trial Chamber II) 08/03/2014 (ICC-01/04-01/07-3436), Minority Opinion of Judge van den Wyngaert.

[182] *Prosecutor v Kenyatta*, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute' (Pre-Trial Chamber II) 23/01/2012 (ICC-01/09-01/11-373), Dissenting Opinion of Judge Kaul.

[183] In the Trial Chamber, see for example *Katanga* n.181, Joint Separate Opinion of Judges Cotte and Diarra. In the Appeals Chamber, *Prosecutor v Ngudjolo Chui*, 'Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II entitled "Judgment Pursuant to Article 74 of the Statute" (Appeals Chamber) 27 Februrary 2015 (ICC-01/04-02/12-271), Joint Dissenting Opinion of Judge Trendafilova and Judge Tarfusser. Both these, along with Judge van den Wyngaert's Dissenting Opinion in *Katanga* n.181 are discussed in more depth in Chapter 5, Section 4.3.

number referred simply to the 'established practice' of the Court irrespective of the statutory wording, acceptance of which (or at least lack of objection thereto) has legitimised it.[184] As a testament to the strength of this 'established practice', one ICC judge was not aware of the difference in the Statutory language between Article 74(5) and 84(3) until raised in the interview.[185] When asked to rationalise the difference between the Statute and practice, the judge referred to the drafting process of the Statute and speculated that the provisions had been drafted by different committees.[186] The judge continued to explain that it is the responsibility of the judges to turn the Statute – a political and often inconsistent or unworkable compromise – into an operational regime of law.[187] This interpretation was shared by a former judge.[188] Whereas one ICC legal officer stated that the judges have quite simply disregarded the Statute on this point,[189] another maintained that judicial practice has been consistent with the Statute.[190] This officer, after also noting the possibility that the Statutory provisions may have been drafted by different committees, pointed to statutory provisions indicating the quorum for decision-making – or the sufficiency of a majority – as an implied acknowledgement of the entitlement for minority judges to issue additional opinions notwithstanding the specific provisions on additional opinions.[191]

As such, it would appear that notwithstanding strong reason to suggest intent on the part of the Statute's drafters to restrict the practice of issuing additional opinions, ICC judges have preferred to follow the practice established within those judicial institutions that pre-dated the Court. Section 6 will consider whether a practice in conformity with respective Statutes would be feasible and desirable, by reference to the impact of that practice upon institutional judicial authority.

[184] Interview #02 n.36; Interview #03 n.35; Interview #05 n.36.
[185] Interview #02 n.36.
[186] Ibid.
[187] Ibid.
[188] Interview #05 n.36.
[189] Interview #03 n.35.
[190] Interview #04, Transcript of Interview with ICC Official, 25/05/2015, The Hague, on file with author.
[191] Ibid.

5 Attitudes towards Additional Opinions

5.1 Independence

Chapters 2 and 3 demonstrated how one consideration driving the attitude towards the systemic implications of admitting additional opinions is their impact have upon judicial independence and impartiality, both that of the institution and that of individual judges.[192] This observation is equally relevant in the context of international criminal justice. Once again, while the importance of individual judicial independence from the perspective of institutional legitimacy is not disputed, the disagreement lies in the most appropriate means by which independence (both individual and institutional) could be preserved. Whereas secrecy (and thus, the suppression of additional opinions) was favoured by some,[193] transparency (and thus, permitting additional opinions) has been favoured by others.[194]

Before exploring in more detail the viewpoints and appraising their merits in view of the characterisation of international criminal justice as substantially coordinate in character, it is helpful to recall some of the characteristics of international criminal justice that make independence – both institutional and individual – a particularly sensitive issue.

5.1.1 Challenges to Independence

The 'international' character of international criminal justice is a double-edged sword for international criminal justice.

From the national perspective, the international character of judicial proceedings of international criminal courts and tribunals is often viewed as a guarantor of the independence of the judicial decision-makers in contrast to the domestic alternatives. Where mass atrocities occur, they often do so in societies in which there has been a breakdown of official authority, the collapse of law and order or the rule of law,[195] or there has been a systematic abuse of official authority, often with

[192] Chapter 2, Section 5 and Chapter 3 Section 4.1.
[193] Section 5.1.2.
[194] Section 5.1.3.
[195] L. Grenfell, *Promoting the Rule of Law in Post Conflict States* (CUP 2013) at 4-5.

the complicity of the judiciary.[196] International crimes occur in circumstances of societal *dys*function; in this context, the judiciary may lack the capacity to function, or may lack the capacity to do independently from the interests and influences of other branches of government or other influential social actors.[197] Moreover, international crimes often occur in the context of political violence involving the breakdown of society along sectarian lines,[198] for example religious, ethnic, political or tribal grounds.[199] In such societies where there has been a systematic abuse of official power, including by the judiciary,[200] there may be a deep distrust or suspicion of the exercise of official power. In these circumstances, whether or not an individual chooses to take a side, the identity politics that drove the conflict or violence will make it difficult – if not impossible – for individuals to prevent *others* from attributing a side to that individual. Where this occurs, national judges, even if able to decide cases independently and impartially, may be unable to convince a deeply divided and distrustful society of that fact of *their* impartiality. Against this backdrop, compared to domestic counterparts, international judges may be perceived to have a greater measure of independence and stronger capacity to discharge their functions impartially.

Whereas the 'international' attribute of *individual* international judges can be a legitimating factor, the international attribute of the international criminal judicial *institution* can be a source for mistrust or scepticism, weakening the acceptance of the legitimacy of international criminal justice proceedings. The source of this mistrust derives from the State-driven nature of international criminal justice and the interests that motivate advocates and supporters of international criminal justice to participate in the establishment of those institutions and whose cooperation and

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[196] OHCHR, *Rule of Law Tools for Post Conflict States: Mapping the Justice Sector* (HR/PUB/06/2 2006) at 6-12; M. Osiel, *Making Sense of Mass Atrocity* (CUP 2009) at 22-23; Drumbl (2007) n.5.

[197] The doctrine of complementarity at the ICC takes this into consideration when determining in what circumstances the ICC has competence to exercise its jurisdiction. Factors taken into consideration include the independence and impartiality of any judicial or investigative proceedings being undertaken at the domestic level, or whether the proceedings had been undertaken with intent to shield individuals from prosecution for crimes within the Court's jurisdiction. Rome Statute, Article 17(2)(c) and (a).

[198] C. Moser and F. Clark, *Victims, Perpetrators, or Actors? Gendered Armed Conflict and Political Violence* (St Martin's Press 2001) at 36, cited in J. Darby, 'Political Violence: An Overview' in M. Breen-Smyth (Ed) *Ashgate Research Companion to Political Violence* (Ashgate 2012) at 21, defines 'political violence' as 'the commission of violent acts motivated by a desire, conscious or unconscious, to obtain or maintain political power'.

[199] Drumbl (2007) n.5 at 4.

[200] See, above, n.196.

support facilitate their operation.[201] More specifically, it relates to the perceived and actual capacity of international judicial institutions to decide cases independently of the interests of those States and other actors upon whose financial assistance and technical and political cooperation they rely. It finds expression in those allegations, for example, that the ICC is an instrument of western imperialism against Africa to assert power over African States,[202] or that the ICTY was the European tool to punish the Serbs.[203]

Many challenges to the legitimacy of international criminal courts and tribunals arise out of *prosecutorial* strategy and the challenges of selectivity,[204] rather than distrust in the activity of judges. Despite the independence and autonomy of the prosecutorial and judicial branches of the international criminal courts and tribunals in practice, the fact that they are part of the same institution (itself labelled a 'court' or 'tribunal') is liable to give rise to misperceptions. Against this backdrop, not only is there a need to strengthen understanding of the structure of the criminal justice systems within each international criminal tribunal but in particular to emphasise the independence and impartiality of the judicial branch of the institution.

In this section, a theme has emerged. The reasons both in favour of the legitimacy of an 'international' judicial body and against its legitimacy both involve *distrust*. Given the particular social and political contexts within which international crimes are committed, domestic officials – including judges – can be the subject of distrust. For this reason, the comparative independence of international judges is considered to grant them greater legitimacy. At the same time, distrust besets the international judiciary by reasons of the nature of the international political sphere; the predominance of the State-centric world and the reliance upon international criminal courts and tribunals upon states for cooperation and financial support draws into

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[201] See W. Schabas. 'Independence and Impartiality of the International Judiciary: Some Lessons Learned, and Some Ignored' in W. Schabas, E. Hughes, and R. Thakur (Eds) *Atrocities and International Accountability: Beyond Transitional Justice* (UNUP 2007) at 202.

[202] Who Pays for the ICC' African Business available at http://www.africanbusinessmagazine.com/special-reports/sector-reports/icc-vs-africa/who-pays-for-the-icc; D. Hoile, Is the ICC Fit for Purpose?, 1/03/2012, New African Magazine, at http://www.newafricanmagazine.com/special-reports/sector-reports/icc-vs-africa/is-the-icc-fit-for-purpose ; M. Kimenyi , Can the International Criminal Court Play Fair in Africa?, 17/10/2013, Africa in Focus Blog of the Brookings Institute at http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africainternational-criminal-court-kimenyi .

[203] J. Natalya Clark, *International Trials and Reconciliation: Assessing the Impact of the International Criminal Tribunal for the former Yugoslavia* (Roughtledge 2014) at 157.

[204] R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (CUP 2005).

question their independence and capacity to function impartially. Against this backdrop of distrust, both from the national perspective and the international, it is now necessary to reflect upon the arguments advanced in favour of the adoption of secrecy and transparency.

5.1.2 Independence and Secrecy

During the ILC's drafting of a Statute for a permanent international criminal court, which formed the basis of formal negotiations at Rome, the matter of individual judicial independence was raised in connection to the discussions as to whether to permit additional opinions.

The 1993 ILC draft Statute prohibited the publication of additional opinions.[205] One justification offered for this prohibition focused upon the serious nature of the crimes involved and the potential danger to the safety of judges responsible for deciding cases should their identity and opinions be made known.[206] This echoes the justifications for adherence to strict secrecy within hierarchically-oriented systems, namely that secrecy ensures that judges can decide upon the case freely and independently without fear of personal repercussion should their identity be made public.[207]

However, the suggestion made before the ILC that 'judges might hesitate to issue such opinions as a result of concerns for their personal safety given the serious nature of the crimes referred to in the Statute' is no reason in itself to deprive them of the option to exercise their entitlement if they wish.[208] Moreover, taken on its own, without implementing the strong principle of secrecy throughout the whole process of decision-making, it is unclear how the prohibition of additional opinions would be sufficient to address the concerns in question. For example, the disclosure of the identities of the judges who sit on the Court and are responsible for deciding cases would be sufficient to subject them to the risks envisaged by this consideration, irrespective if reasoned additional opinions were permitted or not. To

[205] ILC, 'Report of the International Law Commission on the Work of its Forty-Fifth Session' (03/05/1993-23/07/1993) UN Doc. A/48/10,
Commentary to Draft Article 51 at 124 (para.4).
[206] Ibid.
[207] See Chapter 2, at Sections 5.1.4 and 6.2.
[208] ILC Draft Statute (1993) n.205, Commentary to Draft Article 51, at para.4.

be effective in regard to this particular concern, the suppression of additional opinions would have to be complemented with the full implementation of the principle of secrecy, requiring total anonymity of the judges – not only those sitting in the particular Chambers deciding the particular case, but all judges sitting on the Court.

As a starting premise, in view of the coordinate characteristics of the organisation of judicial authority in the context of the international criminal justice institutions, such a robust conception of secrecy – if feasible to implement – would be inconsistent with the characteristics of both institutional and individual authority. Given the political nature of the election of judges (with the electorate being States), secrecy would exacerbate the scepticism surrounding the independence of the international criminal courts and tribunals from the interests of States. Moreover, from a practical perspective, the high public profile of the international criminal courts and tribunals and their proceedings would render it impossible to implement the requisite total anonymity of international judges for secrecy to operate as a plausible mechanism of preserving the independence of judges. Furthermore, any attempt to implement such a robust conception of secrecy would be inconsistent with didactic or pedagogical functions attributed to international criminal proceedings which rely upon the publicity of proceedings in order to pursue their transitional justice objectives.[209]

5.1.3 Independence and Transparency

By contrast, as with international justice as pursued by the Peace Palace institutions – and consistent with the logic of coordinately structured systems of justice – transparency would seem a more practicable solution to the challenge of preserving the independence and impartiality of judges. Where *institutional* independence is subject to such suspicion as explained in Section 5.1.1, institutional authority bears greater reliance upon the individual independence of its judges as a source for legitimacy. In view of the degree of distrust surrounding the institutions, institutions have to demonstrate their independence and, from this perspective, the individual independence of their judges are one of their strongest assets. In this regard,

[209] G. Simpson, 'Didactic and Dissident Histories in War Crimes Trials' (1996-1997) 60 *ALR* 801; Damaška (2008) n.9 at 343 *et seq*.

reference may be made to the consideration of the relative merits of transparency over secrecy at the Peace Palace in the previous chapter.[210]

However, before turning to address how the interplay between individual and institutional judicial authority has shaped and continues to shape how the international criminal justice is pursued by international criminal courts and tribunals, it is necessary to consider the recent affirmation by ICC judges of the importance of additional opinions as expressions of individual judicial independence. Although only one decision, the fact that the decision – on the point under discussion – commanded the unanimous support of 13 of the Court's judges marks it out as a significant institutional endorsement of additional opinions.

In 2014, a Plenary of ICC judges was asked to consider whether the expression of individual views by a dissenting judge in connection to decisions issued by Trial Chamber II in *Katanga* prejudiced that judge's impartiality in subsequent decisions in the same case, giving rise to a reasonable apprehension of bias that would justify their disqualification proceedings in that case.[211] The Plenary decision (hereafter '*Katanga* Plenary Decision (2014)') rejected the application – made by the victims' representative – to have Judge van den Wyngaert disqualified from the proceedings concerning the determination of reparation on the basis of the applicant's lack of standing to bring the request.[212]

However, the 13 ICC judges comprising the plenary took the opportunity to consider in *obiter* the relationship between the expression of individual judicial views by way of additional opinions and individual judicial independence and impartiality.[213] When doing so, they unanimously affirmed the right of individual judges to issue additional opinions, and the importance of the ability of judges to exercise that right as a manifestation of individual judicial independence.[214] The judges unequivocally defended the entitlement of judges to publish minority opinions as a 'bastion of

[210] Chapter 3, Section 4.1.2.

[211] *Prosecutor v Katanga*, 'Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the Disqualification of Judge Christine van den Wyngaert from the Case The Prosecutor v Germain Katanga' (Decision of the Plenary) 22/07/2014 (ICC-01/04-01/07-3504-Anx). The impugned dissenting opinions were: *Katanga*, n.181, Minority Opinion of Judge van den Wyngaert; *Prosecutor v Katanga*, 'Décision relative à la peine (article 76 du Statut)' 23/05/2014 (ICC-01/04-01/07-3484), Dissenting Opinion of Judge van den Wyngaert.

[212] *Katanga* Plenary Decision (2014) n.211 at para.41-48.

[213] Ibid. at para.51-52.

[214] Ibid. at para.51.

judicial independence', and explained the importance both of external independence and internal independence, the latter being autonomy in decision-making from other members of the bench.[215] Their emphasis upon independence in the internal deliberative sphere (identifying the need to permit 'judges to maintain their intellectual integrity' and to preserve their 'autonomy from other members of the bench' and the importance of guarding against the threat of 'the influence of forced unanimity')[216] marks this statement out from the discussion hitherto in this chapter and in Chapter 3, where the focus has been upon independence vis-à-vis external actors.[217]

This emphasis upon the individual independence and autonomy of judges within the internal deliberative sphere lends support to the attribution of coordinate characterisation to international criminal justice, given the evident prioritisation upon the individual integrity and independence of judges, rather than their institutional or collective identity.[218] Combined with the manner in which judges both at the ICTY and the ICC have embraced additional opinions, as evidenced from the statistical overview of their practice, it appears that transparency and the right of judges to assert their individuality through additional opinions is an established part of the emerging culture of judicial procedure in international criminal justice. The following section will explore the consequences of this culture of asserting individual judicial authority upon the manner in which institutional authority is discharged.

5.2 Authority

One argument advanced in favour of the prohibition of the publication of additional opinions is that in breaching the confidentiality of deliberations, they 'weaken the administration of justice, the authority of the Court, and the authority that should attach to its judgments'.[219] While this thesis argues that such a robust observation of secrecy is not appropriate for international criminal justice in light of its characteristics as a coordinately structured system, the following sections will

[215] Ibid.
[216] Ibid.
[217] See Chapter 3, Section 4.1.
[218] See Chapter 2, Section 5.2.4.
[219] Terrier (2002) n.162 at 1315.

address the more specific concerns regarding the nature of the impact of additional opinions upon institutional authority.

5.2.1 Standards of Proof

One criterion for the legitimate exercise of institutional judicial power when making a determination of guilt is that the 'beyond reasonable doubt' standard of proof has been met.[220] It has been argued that additional opinions alongside a court or tribunal's judgment, particularly dissenting opinions, risk giving the impression that the requisite standard of proof was not met when the Court arrived at its verdict.[221] If a judge when issuing an additional opinion doubts the findings of fact and determinations of law upon which the guilt of the accused is determined by the majority, then it can be questioned whether guilt was indeed established beyond reasonable doubt.[222] As Christoph Safferling has explained, unless a dissenting judge's opinion – and the doubts contained therein – are deemed 'unreasonable', then this would throw into doubt the propriety of the Court's finding.[223] On this basis, Safferling concludes against additional opinions in the context of Trial Chamber decisions.[224]

In response, it may be submitted that the issue underlying this concern is not the publication of expressions of judicial disagreement, but rather the quorum of decision-making used by international criminal courts and tribunals to arrive at their verdicts.[225] So long as judgments are determined on the basis of a majority vote (as opposed to requiring unanimity),[226] knowledge of the bare fact that one third of a chamber disagreed with the verdict can sow the seeds of reasonable doubt. Furthermore, even if the publication of the outcome of the vote was prohibited,

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[220] Article 66(3) ICC Statute, ICTY RPE Rule 87(A).

[221] C. Safferling et al, *International Criminal Procedure* (OUP 2012) at 526; Triffterer (2008) n.162 at 1398.

[222] Ibid.

[223] Safferling (2012) n.221 at 526.

[224] Ibid. at 527. Others have taken a less absolute position. While welcoming the permissibility of the publication of minority opinions as 'logical' from the perspective of their utility for future proceedings and for the development of the law, that support is qualified such that they are desirable only insofar as they arguments of fact and law of the majority are indeed proved beyond reasonable doubt. See Nignan (2012) n.158 at 1649.

[225] R. Pruitt, 'Guilt by Majority in the International Criminal Tribunal for the Former Yugoslavia: Does This Meet the Standard of Proof "Beyond Reasonable Doubt"?' (1997) 10 *LJIL* 557. On the distinction between actual unanimity and appearance of unanimity, see Jørgensen and Zahar (2013) n.62 at 1192-1193.

[226] In the 1996 Preparatory Committee, Canada offered a justification for the sufficiency of majority decisions to convict. It explained that 'unanimity on the part of jurors was required because juries only determine facts. Judges make determinations of both fact and law, and could reasonably be expected to disagree over legal interpretations'. ICC Preparatory Committee, *Proposal Submitted by Canada for Article 45* (A/AC.249/WP.21) 21/08/1996.

knowledge of the *possibility* that the decision could have been rendered by a majority may give rise to suspicion of reasonable doubt in every decision.[227] Put differently, the principle of secrecy, including its implementation through the prohibition of additional opinions, does not itself guarantee that determinations of guilt are made beyond reasonable doubt.

More widely, a number of delegations during the negotiation of the ICC Statute justified their calls for the prohibition of additional opinions upon basis of the need for unanimity in the ICC's decision-making in view of the international character of the Court and the extreme gravity of the crimes concerned.[228] Nina Jørgensen and Alexander Zahar have observed how '[t]he preference for unanimity is closely linked to the authoritativeness of decisions'.[229] However, while knowledge of the unanimity of judges in arriving at their decision might strengthen the persuasive authority of a chamber's decision or judgment,[230] the desire for, and pursuit of, unanimity should not be confused with the creation of a fiction of unanimity through the adherence to a strong conception of secrecy. To shroud majority-determined decisions with the cloak of unanimity in order to bestow upon it the authoritativeness of actual consensus is simply misleading. In view of the emphasis placed upon the diversity of the judges and their personal attributes (and the legitimising effect of that diversity),[231] it does not seem that univocality giving rise to the appearance of unanimity is a characteristic of institutional charismatic authority. Furthermore, to do so risks undermining the force of actual unanimity where it does exist. To this effect, it has been suggested that 'while true unanimity might be expected to enhance the institution's authority, true unanimity by definition must allow dissent'.[232]

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[227] As was argued in 1941 by the Inter-Allied Committee on the draft statute of a possible replacement to the PCIJ. See Chapter 3, Section 4.3.1.

[228] Nignan (2012) n.158 at 1641; R. Roth and M. Henzelin, 'The Appeals Procedure of the ICC' in A. Cassese, P. Gaeta and J. Jones (Eds) *The Rome Statute of the International Criminal Court: A Commentary* Volume II (OUP 2002) at 1557.

[229] Jørgensen and Zahar (2013) n.62 at 1186. However the apparent presumption in favour of unanimity might be challenged. As one interview participant noted, requiring unanimity in decision-making grants any individual judge the power of veto over a decision to convict or acquit. Interview #03 n.35.

[230] To this effect, Article 74(3) of the Rome Statute for the ICC encourages the judges to attempt to seek unanimity where possible.

[231] See Section 2.1.

[232] Jørgensen and Zahar (2013) n.62 at 1187.

Suppressing the publication of *reasoned* additional opinions deprives actors of the opportunity to determine whether the doubts held by an individual judge were in fact unreasonable. Without this opportunity, it would always be open to speculation whether the doubts of the individual judge were in fact reasonable. But, it must be conceded that if an additional opinion does suggest that the 'beyond reasonable doubt' threshold was not met in the Trial Chamber's decision, the consequences of this are uncertain. The standard of review applied by the Appeals Chamber to determinations of fact is one of reasonableness, which the ICTY Appeals Chamber has indicated means that it 'will only substitute its own findings for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision',[233] or when 'no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt'.[234] A similar standard is applied at the ICC, with the ICC Appeals Chamber having stated that it will only 'interfere' the findings of fact by a pre-trial or Trial Chamber 'where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it'.[235] Accordingly, provided that the majority verdict of a Trial Chamber was reasonable, even if there were reasonable alternatives presented in a dissenting opinion, the verdict of the Trial Chamber remains valid. Therefore, the actual utility of additional opinions to the defence from the perspective of successfully challenging the verdict of the Trial Chamber might be limited. However, while this may be the case, this does not discount the utility of additional opinions to appellants from a wider perspective, as will be discussed in the following sections.

Finally, while the 'beyond reasonable doubt' standard applies to the trial verdict, other decisions of the international criminal courts and tribunals both by Trial Chambers and the Appeals Chamber, and in the case of the ICC the Pre-Trial Chambers, are subject to a variety of different (and lower) standards of proof, such as the balance of probabilities,[236] or 'reasonable basis to proceed'.[237] Therefore, the

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[233] *Gotovina* (Appeals Chamber) n.94 at para. 13.

[234] *Prosecutor v Kordić et al* Judgment (Trial Chamber) 26/02/2001 (IT-95-14/2-T) at para.288.

[235] *Lubanga* (Appeals Chamber) n.95 at para.22 citing *Prosecutor v Ruto*, 'Judgment on the appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30/05/2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute"' (Appeals Chamber) 30/08/2011 (ICC-01/09-01/11-307) at para.56.

[236] See Schabas (2006) n.23 at 465.

objection to additional opinions on the basis of the 'beyond reasonable doubt' standard of proof are not valid in the context of other proceedings.

In sum, additional opinions that explain the views of minority judges contribute to deliberations within the external sphere upon whether the criteria for the legitimate exercise of institutional power had been satisfied by the Chamber in the decision it rendered. In the absence of such reasoned additional opinions, the legitimacy of the exercise of judicial power is open to contestation, particularly when a decision requiring the satisfaction of the 'beyond reasonable doubt' threshold is taken by a majority.

5.2.2 Acceptance of the Court's Verdict

Göran Sluiter has suggested that knowledge that some judges were sympathetic with views of the accused would make it difficult for the accused to accept the judgment made against them, thereby weakening the decisional authority of the institution.[238] On this view, a 'convicted person might find it deeply disturbing to know that a minority of judges saw merit in a (partial) acquittal or lower sentence'.[239] An ICC judge also explained how – when previously serving as a judge at the ICTY – they were 'of the view that it was not conducive to international criminal justice to dissent [because] it would be very unfortunate for the accused person to find that had there been just one judge going in the other direction, he would not have been convicted or acquitted'.[240]

In response, it is necessary to consider the objectives of the international criminal trial and final judgments relating thereto. Is it as is perceived in inquisitorial systems – to find the truth – or is it less ambitious, simply to adjudicate the 'conflict', as in

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[237] Article 15(4) ICC Statute. See also Article 58(1)(a) ICC Statute which requires 'reasonable grounds' to authorise the issue of an arrest warrant for an accused, and 'substantial grounds' for the purposes of confirming the charges against the accused (Article 61(5) ICC Statute).

[238] G. Sluiter, 'Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY' in Swart, Sluiter and Zahar (Eds) (2011) n.14 at 198. An example of where dissenting opinions issued alongside a judgment of the Appeals Chamber of the ICTY has been used to challenge the decisional authority of the ICTY in another fora – the ICJ – can be found in the submissions of Serbia in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Merits) (Croatia v Serbia) Judgment of 03/02/2015. Here, Serbia relied upon the two dissenting opinions issued in *Gotovina* (Appeals Chamber) n.94 (Dissenting Opinions of Judges Pocar and Agius) to argue that the ICJ should place greater weight upon the Trial Chamber judgment in *Gotovina* (*Gotovina and Markač* Judgement (Trial Chamber) 15/04/2011 (IT-06-90-A)) rather than the Appeals Chamber judgment. The ICJ rejected this challenge (*Genocide Convention* at para.471-472). For the nature of Serbia's claim in this regard, see *Genocide Convention* (Verbatim Record) n.48 at para.36.

[239] Ibid. at 198.

[240] Interview #06 n.68.

adversarial systems?[241] If 'acceptance' of a court's decision rests upon the acceptance of the correctness of the judgment as representative of the truth, then it can be asked if it is ever possible for the decisions of international criminal courts and tribunals to be accepted. Given the contentiousness of facts, it is unlikely that a judgment by an international criminal court or tribunal, irrespective of the strength of that reasoning, is of itself going to persuade individuals, communities and societies of the prevailing correctness of the facts as determined by the judges over their appreciation of the facts, an appreciation on the basis of which conflicts were fought and atrocities committed. To this effect, one judge opined that additional opinions have no appreciable impact upon the acceptance of the Court's verdict.[242] This is because those accused and convicted by these institutions reject the legitimacy of the entirety of the Court's proceedings against them and not just the verdict as the product of that process.[243] On this view, additional opinions that present an alternative interpretation of the applicable law, or arrive at different findings of fact might be considered unlikely to affect the perceived 'truth' in the judgment or decision of the Court.

5.2.3 Rights of the Accused

The expression of individual judicial authority in the form of additional opinions can assist the determination of the formal authority of Trial Chamber decisions – and at the ICC, decisions of Pre-Trial Chambers – by empowering parties in their appeals against those decisions. During the drafting of the ICC Statute, for some members of the ILC, additional opinions would be 'extremely important to the defendant who chose to appeal a conviction and might also be of interest to the Appeals Chamber in deciding whether to overturn the conviction'.[244]

Since then, the requirement that additional opinions be translated into a language understood by the accused in addition to the judgment or decisions of the Court has been rationalised in terms of observing the rights of the accused.[245] To suppress

[241] Interview #03 n.35.

[242] Interview #02 n.36.

[243] Ibid.

[244] ILC Draft Statute (1993) n.205, Commentary to Draft Article 51 at para.4.

[245] See, *Prosecutor v Katanga*, 'Defence Application Regarding the Translation and Notification of the Article 74 Decision or, Alternatively, for an Extension of the Time Limit to File an Appeal' (Appeals Chamber) 14/03/2014 (ICC-01/04-01/07-3440) at para.8; *Prosecutor v Katanga*, 'Decision on the Requests of Mr Germain Katanga and the

additional opinions may discourage the pursuit of appellate proceedings, or may deprive the defendant of knowledge of the grounds upon which to challenge the trial decision, with the result that there is a greater possibility that individuals may be wrongly convicted. In addition to empowering parties when pursuing their appellate rights, additional opinions may also strengthen the effectiveness with which a court fulfils the defendant and the Prosecutor's right to a reasoned judgment.[246] As discussed in the context of additional opinions at the ICJ, the prospect of the publication of additional opinions that challenge the correctness of a court judgment can operate to induce the composition of a stronger judgment designed to pre-empt the challenges presented in the additional opinions.[247]

5.2.4 Law Determination

During the drafting of the Rome Statute, the most dominating rationale advanced for permitting additional opinions was their value to the development of an operational body of substantive and procedural international criminal law. Although the ILC favoured the prohibition of additional opinions, its reports noted that advocates of their publication observed that additional opinions are 'essential with respect to appellate decisions which deal with important questions of substantive and procedural law'.[248] The utility of additional opinions in appellate proceedings was affirmed by supporters of permitting their publication in the commentary to the 1994 ILC draft Statute,[249] while the debate within the General Assembly Sixth Committee of the 1994 affirmed the utility of additional opinions from the law-clarification and law-development perspective. Here it was remarked that:

> since the Court would have available to it limited case-law and precedent in international criminal law, it was surely important, for the sake of consistency and for the purposes of appeal, to allow for dissenting decisions, particularly at trial level. The remark was made in this connection that if the Appeals Chamber was given the

Prosecutor Relating to the Time Limits for their Filings on Appeal' (Appeals Chamber) 04/04/2014 (ICC-01/04-01/07-3454) at para.18. Nignan (2012) n.158 at 1639.

[246] Sluiter (2011) n.238 at 196.

[247] Ibid. See also Chapter 3, at 4.3.1.

[248] ILC Draft Statute (1993) n.205, Commentary to Draft Article 56.

[249] ILC, 'Report of the International Law Commission on the Work of its Forty-Sixth Session' (02/05/1994-22/06/1994) UN Doc, A/49/10, Commentary to Draft Article 45 at 122.

> opportunity to review the case fully, looking at it from the perspectives of both the majority and the minority of the judges of the Trial Chamber, it would have available to it all the argument presented in the lower court.[250]

Furthermore, addressing delegates during the Rome Conference for the International Criminal Court in 1998, Gabrielle Kirk MacDonald, then President of the ICTY, gave a statement calling for a 'full debate on that matter' and 'earnest consideration of the bracketed proposal to permit dissenting opinions.[251] Citing the experience of the ICTY, she claimed that '[t]he Tribunal's rules allowing for separate and dissenting opinions had proved highly beneficial to the development of international criminal law, and the availability of differing interpretations of that embryonic body of law had contributed to its maturation'.[252] The utility of additional opinions by Trial judges to the work of the Appeals Chamber has been explained in terms of informing the deliberations of the Appeals Chamber and thereby enhancing the quality of its decisions, which will be binding on the Trial Chambers.[253]

Chapter 3 observed the ICJ's practice of not making reference to additional opinions in its decisions.[254] By contrast, it noted that the ICTY has made reference to additional opinions issued by ICJ judges in their jurisprudence.[255] As the following discussion will illustrate, not only have judges of international criminal tribunals (both in their own additional opinions and in the judgments and decision of the institution) been willing to reference additional opinions issued in *other* courts, but are also willing to be explicit in their engagement with additional opinions issued in the same court or tribunal. Consequently, in the context of international criminal justice, it is easier for external observers to see when and how the expression of individual judicial authority in the form of additional opinions has actually contributed to the development of the law by the court in subsequent decisions – both in regards to the same case and in other cases.

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[250] UNGA, Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Forty-Ninth Session Prepared by the Secretariat' (22/02/1995) UN Doc A/CN.4.464/Add.1 at 38 (para.166).

[251] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (15/06/1998-17/07/1998) Volume II (UN Doc. A/Conf.183/13 (Vol. II)) at 79.

[252] Ibid.

[253] Jørgensen and Zahar (2013) n.62 at 1191.

[254] See Chapter 3, at Section 4.3.2.

[255] Ibid.

The early jurisprudence of the ICTY is replete with examples of judicial referencing of additional opinions, including in endorsement, both by individual judges and by Chambers in their decisions and judgments. To take one prominent example, it is possible to identify how the views expressed by Judge Li on the relative gravity of crimes against humanity and war crimes in his separate and dissenting opinion to the Appeals Chamber judgment in *Erdemović*,[256] gained traction among his fellow judges who endorsed his views in their own additional opinions, before they were finally endorsed by the Appeals Chamber in its sentencing judgment in *Tadić*.[257] In his separate opinion to the Trial Chamber judgment in *Tadić*, Judge Robinson endorsed Judge Li's *Erdemović* opinion.[258] The Trial Chamber, being bound by the Appeals Chamber judgment in *Erdemović* under the *Aleksovski* principle,[259] applied the *Erdemović* hierarchy. Judge Robinson, explaining that he voted in favour of the Trial Chamber's judgment in acceptance of the binding precedent established in *Erdemović*, used his separate opinion to explain why he nevertheless considered this to be an incorrect point of law.[260]

In 2001, when the *Tadić* sentencing judgment was heard on appeal, the appellant *inter alia* relied upon Judge Robinson's separate opinion to the Trial Chamber judgment to argue that there is no hierarchy in gravity between crimes against humanity and war crimes such that the Trial Chamber erred in applying a differential approach.[261] The Appeals Chamber did not explicitly endorse the views expressed by individual judges in their additional opinions, stating only that it 'has taken account of the arguments of the parties *and the authorities to which they refer*, inclusive of previous judgments of the Trial Chamber and Appeals Chamber of the International Tribunal'.[262] By accepting the appellant's arguments to conclude that there was 'no basis' for the distinction in gravity between crimes against humanity and war crimes,[263] the Chamber implicitly endorsed the views expressed by Judge Robinson

[256] *Erdemović*, n.164 at para.18-26.

[257] *Prosecutor v Tadić*, Sentencing (Appeals Chamber) 26/01/2000 (IT-94-1-A and IT-94-1-Abis).

[258] *Prosecutor v Tadić*, Sentencing (Trial Chamber) 11/11/1999 (IT-94-1-Tbis-R117) Separate Opinion of Judge Robinson at 3 *et seq*.

[259] *Aleksovski* n.96 at para.113, for elaboration, see discussion above, Section 2.2.1.

[260] *Tadić* n.258, Separate Opinion of Judge Robinson.

[261] *Prosecutor v Tadić*, 'Appellant's Brief Against Sentencing Judgment of 11 November 1999' at 19-20 (para.16) referencing *Tadić* n.257, Separate Opinion of Judge Robinson at para.65.

[262] *Tadić* (Sentencing Appeals) n.257 at para.69 (emphasis added).

[263] Ibid.

and Judge Li in their additional opinions. While the Chamber's judgment did not explicitly endorse the additional opinions of Judges Li and Robinson, Judge Shahabuddeen, elaborating upon the Appeals Chamber judgment by way of separate opinion, did.[264]

Similarly, at the ICC,[265] it is possible to identify situations where a dissenting opinion has informed changes in the Court's jurisprudence. An example of where the views expressed in a dissenting opinion to a decision of the Trial Chamber have been adopted by the Appeals Chamber upon appeal from that decision can be found in the *Bemba* case.[266] In 2010 Trial Chamber III, by majority, adopted a decision that permitted the wholescale admission of documents submitted by the Prosecution as evidence for the purposes of trial without prior evaluation of the admissibility of the evidence on a piece by piece basis.[267] The consequence of this would have been that all written documents would be admitted as evidence on the *prima facie* assumption of it's authenticity, relevance and probative value. It would be only once the Trial Chamber had retired to deliberate after trial proceedings had concluded that the Chamber would assess the authenticity, relevance and probative value of that evidence as a matter of fact. Judge Ozaki issued a powerful dissenting opinion,[268] explaining that the Majority's decision *inter alia* had no basis in the Statute and violated fundamental principles enshrined in the Statute, including the principle of orality, rights of the accused, and the principle of publicity of proceedings.[269]

A comparison between the Chamber's decision and Judge Ozaki's dissenting opinion highlights the fundamental difference in the conception of the judicial function and the purposes of the trial proceedings upon which the differing approaches are predicated. The Chamber's decision, influenced by inquisitorial procedural regimes, was designed with a clear view to expediting proceedings; a legitimate objective in of

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[264] *Tadić* (Sentencing Appeals) n.257, Separate Opinion of Judge Shahabuddeen at 35 *et seq*, and specifically at 48: 'I agree with Judge Li and Judge Robinson'.

[265] An example of when an individual judge has identified when the additional opinion of another judge in a previous case has influenced their views on a particular question can be found in Judge van den Wyngaert's Concurring Opinion in *Ngudjolo* where she endorsed the views expressed by Judge Fulford in *Lubanga*. See *Prosecutor v Ngudjolo Chui*, 'Judgment Pursuant to Article 74 of the Statute (Trial Chamber II) 18/12/2012 (ICC-01/04-02/12-4) Concurring Opinion of Judge van den Wyngaert at para.5 *et seq* referring to *Lubanga* n.180, Separate Opinion of Judge Fulford.

[266] *Prosecutor v Bemba*, 'Decision on the Admission into Evidence of Material Contained in the Prosecution's List of Evidence' (Trial Chamber III) 19/11/2010 (ICC-01/05-01/08-1022).

[267] Ibid.

[268] *Bemba* n.266, Dissenting Opinion of Judge Ozaki (ICC-01/05-01/08-1028).

[269] Ibid.

itself but also pursuant to the right of the accused to an expeditious trial.[270] However, in her itemisation of the problems that she perceived with the Decision, both as a matter of law and crucially also as a matter of practice, Judge Ozaki demonstrated the importance of considering the implications of introducing procedural modalities into an extant procedural regime and the consequences of the proposed modality and its interaction with that regime and the nature of international criminal justice proceedings.[271] Both the Prosecutor and the Defence appealed the Trial Chamber's Decision, and when doing so, both relied heavily upon Judge Ozaki's dissenting opinion to support their claims.[272]

The Appeals Chamber unanimously upheld the Appeal, reversing the Trial Chamber's decision.[273] Although the Appeal's Chamber largely rejected the grounds for appeal based upon the rights of the accused,[274] the Chamber endorsed the submission that the Decision violated the principle of the orality enshrined in Article 69(2) of the Statute.[275] While the Appeals Chamber did not explicitly endorse Judge Ozaki's dissenting opinion, by reason of endorsing the parties' submissions, which *did* rely extensively upon Judge Ozaki's analysis, a clear link between the additional opinion in this case and the Appeals Chamber Decision can be established.

This example is particularly illuminating as it illustrates the issues at stake when considering the importance of the ability of individual judges to assert their individual authority against that of the institution. It demonstrates the *sui generis* nature of the procedural regime at the ICC. Where such novel issues are at stake and where appreciation of the true nature of that procedural regime in practice is still to be realised, additional opinions – particularly dissenting opinions – can help to illuminate that process and to highlight the range of issues and implications that procedural choices can have for the administration of justice as a whole. Here, rather

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[270] *Bemba* n.266 at para.23.

[271] *Prosecutor v Bemba,* 'Defence Appeal Against the "Decision on the Admission into Evidence of Material Contained in the Prosecution's List of Evidence" of 19 November 2010' (Trial Chamber III) 07/02/2011 (ICC-01/05-01/08-1191).

[272] Ibid. at paras.3-5, 16, 38, 41, 44, and 56; *Prosecutor v Bemba*, 'Prosecution's Application for Leave to Appeal "Decision on the Admission into Evidence of Material Contained in the Prosecution's List of Evidence" (Trial Chamber III) 29/11/2010 (ICC-01/05-01/08-1059) at paras.3, 12, 17, 19-20.

[273] *Prosecutor v Bemba,* 'Judgment on the Appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor Against the Decision of Trial Chamber III Entitled "Decision on the Admission into Evidence of Materials Contained in the Prosecution's List of Evidence"' (Appeals Chamber) 3/05/2011 (ICC-01/05-01/08-1386).

[274] Ibid. at 61-73.

[275] Ibid. at para.74-781.

than providing the basis for *changes* in the law, the dissenting opinion operated to stave off a change in the direction of the jurisprudence of the Court. As Judge Ozaki noted, the decision of the Trial Chamber marked a departure from the approach adopted by Trial Chambers I and II on the same issue.[276] Consequently, Judge Ozaki's additional opinion contributed to determining whether the exercise of institutional judicial authority by the Trial Chamber in the manner it did, i.e. to change the direction of the jurisprudence on this particular manner, was legitimate and thus authoritative.

An example of the potential function that additional opinions can make *to changing* the direction of the Court's jurisprudence (rather than preventing a change) is found in a recent Decision of the Appeals Chamber in the *Kenyatta* case.[277] The Decision itself does not depart from the Court's previous jurisprudence along the lines advocated in the dissenting opinions attached to decisions that established the existing jurisprudence. However, the Chamber explicitly referred to seven additional opinions by Judge Sang-Hyun Song (including one joint opinion co-authored with Judge van den Wyngaert) when noting 'that differing opinions have been expressed in the past as to whether it is necessary for victims to file an application in order to participate in interlocutory appeals'.[278] It continued to explain that it considered it inappropriate to revisit the jurisprudence at the present, and instead decided to apply the Court's existing jurisprudence. However, it concluded on the point by stating that it followed the existing jurisprudence 'without prejudice to the Appeals Chamber revisiting this jurisprudence in the future'.[279] Accordingly, not only did the Appeals Chamber explicitly declare an intention to revise its jurisprudence, but did so explicitly in light of the views of individual judges expressed in their additional opinions.[280] Given the reticence of international judges to refer to additional opinions – whether in their own additional opinions or in the decisions of the

[276] *Bemba* n.266 Dissenting Opinion of Judge Ozaki (ICC-01/05-01/08-1028) at para.31.

[277] *Prosecutor v Kenyatta*, 'Decision on the Victims' Request to Participate in the Appeal Proceedings' (Appeals Chamber) 24/04/2015 (ICC-01/90-02/11-1015).

[278] Ibid. at para.7.

[279] Ibid. at para.8.

[280] Interview #03 n.35.

institution – this short passage by the ICC Appeals Chamber appears all the more remarkable.[281]

The Court's jurisprudence demonstrates how additional opinions can leave the door open to changes in the jurisprudence by preventing a Chamber's interpretation of a point of law from assuming the authority of settled practice.[282] In its authorisation to open an investigation into the situation in Côte d'Ivoire, Pre-Trial Chamber III noted the disagreement within the Court as to the criteria required for a group for the purposes of its qualification as an 'organisation' pursuant to Article 7 (crimes against humanity).[283] As evidence of the lack of agreement, it pointed to Judge Kaul's dissenting opinion on the matter in Pre-Trial Chamber II in the situation concerning Kenya.[284] Pre-Trial Chamber III did not address the substance of the disagreement, finding on the facts that it was not necessary for the purposes of the decision at hand.[285] The Chamber decided that it was unnecessary for it to consider the substance of the disagreement by reason of its irrelevance for the purposes of the Decision, yet it evidently still believed it necessary and appropriate to acknowledge that such disagreement exists. This tends to imply that Judge Kaul had successfully invoked his individual judicial authority through his dissenting opinion in order to prevent Pre-Trial Chamber II's jurisprudence on the issue from becoming settled jurisprudence without further judicial consideration of the issue.[286] When the issue as to the definition of 'organisation' arose before the Trial Chamber II in its Judgment in *Katanga*, the Chamber also acknowledged the divergent views embodied by PTC II's authorisation decision and the attached dissenting opinion by Judge Kaul, although ultimately rejecting Judge Kaul's view.[287]

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[281] One legal officer referred to this decision as the first example of where it is clear that a dissenting opinion has 'opened the way for a change in the jurisprudence'. Interview #03 n.35.

[282] Ibid.

[283] *Situation in the Republic of Côte d'Ivoire*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire' (Pre-Trial Chamber III) 03/10/2011 (ICC-02/11-14) at para.99.

[284] Ibid. at footnote 155, referring to *Situation in the Republic of Kenya*, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' (Pre-Trial Chamber II) 31/03/2010 (ICC-01/09-11-Corr),
Dissenting Opinion of Judge Hans-Peter Kaul.

[285] *Côte d'Ivoire* Authorisation n.283 at para.99.

[286] Interview #04 n.190.

[287] *Prosecutor v Katanga*, 'Judgment Pursuant to Article 74 of the Statute' (Trial Chamber II) 07/03/2014 (ICC-01/04-01/07-3436-tENG), at para.1118. Judge Kaul's views articulated on the gravity threshold also informed the reasoning of Judge Kovács, dissenting from the Decision of Pre-Trial Chamber I to request the Prosecutor to reconsider initiating

5.2.5 Summary

As at the ICJ, the expression of individual judicial authority through additional opinions assists in the determination of the parameters of institutional authority. They contribute to deliberative processes in the external sphere that assess the decisional legitimacy of the expression of institutional power through the decisions and judgments of Chambers. They do so by informing observers' assessments as to the conformity of the decision with the Statute. This is especially important within the context of the international criminal courts and tribunals given either the inherent ambiguity in the Statute (in the case of the ICC) and/or inchoate nature of the Statute of the ICTY. Additional opinions are important for their contribution to the identification of what the law is as well as whether institutional authority has been exercised in conformity with that law. The importance of additional opinions to assist the interpretive communities of international criminal justice – those who's acceptance of the legitimacy of decision-making determines judicial authority – is especially important given the volume of jurisprudence and the pace of law-development by the international criminal courts and tribunals.[288] Having explained the inevitability of judicial law-making and development in the context of international criminal law,[289] Joseph Powderly has observed that as the number of international criminal courts and tribunals have increased and their workload has expanded, the quality of reasoning and the decisional legitimacy of judicial decisions has depreciated.[290] One factor he identified as contributing to this process of depreciation in quality was the inability of the interpretive communities of international criminal justice to execute effectively their responsibility to monitor judicial decision-making and to hold institutional judicial decision-makers accountable in the exercise of their legislative power.[291] He also attributed this to the proliferation of institutions and the volume of jurisprudence emanating from those institutions.[292] Against this backdrop, additional opinions are especially important in

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an investigation into the Comoros situation. See, *Situation in the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia* 'Decision on the Requesting of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation' (Pre-Trial Chamber I) 16/07/2015 (ICC-01/13-34) Dissenting Opinion of Judge Kovács (ICC-01/13/-34-Anx) at para.19 (fn.25).

[288] Powderly (2013) n.112.

[289] Ibid. at 223-226.

[290] Ibid. at 226-227.

[291] Ibid.

[292] Ibid.

assisting and encouraging these interpretive communities in discharging their functions by highlighting those areas in institutional decision-making that require closer scrutiny.

Unlike the ICJ with its general jurisdiction and the ICTY and its jurisdiction over customary international law,[293] the ICC is confined in its applicable law to that articulated in its Statute.[294] Accordingly, the potential authority of the pronouncements of the ICC as articulations of customary international law is inherently more confined than that of the ICJ. Therefore, the importance of additional opinions in the context of the ICC as a mechanism of establishing the interpretive authority of the institution from the perspective of customary international law is more limited. Yet, the more generalised articulation of that purpose, that additional opinions allow individual judges to constrain the law-making power of the institution in accordance with the distribution of legislative or law-making authority within international law, remains valid.

At the same time, because the interpretive or semantic authority of the ICC as an institution is weaker within this external deliberative sphere for the purposes of the articulation and development of customary international law, the difference between individual and institutional judicial authority for these purposes is smaller. Whereas it was observed that there is little evidence of additional opinions before the ICJ influencing the development of international law along the lines proposed in the additional opinion, it is possible to identify how the content of additional opinions before the ICC is contributing to current discussions regarding a proposed international convention on crimes against humanity. One ICC official pointed to the discussions of the ILC on a potential draft international convention on crimes against humanity, where the dissenting opinion of Judge Kaul from the authorisation decision of Pre-Trial Chamber II of the ICC was considered.[295] This ICC official also pointed to the prominence of Judge Kaul's dissenting opinions in scholarly writings on crimes against humanity,[296] illustrating how individual ICC judges have

[293] See the limits upon the applicable law within the Court's jurisdiction at Section 2.3.

[294] Contrast Article 381(1) ICJ Statute with Article 21 ICC Statute.

[295] Interview #04 n.190, referring to ILC, 'First Report on Crimes Against Humanity' (17/02/2015) A/CN.4./680 at paras.142 and 149.

[296] Interview #04 n.190. Consideration of Judge Kaul's dissenting opinion is extensive, notable examples include: C. Kress, 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement:

contributed to deliberations within the external sphere beyond the context of the ICC regime.

As with the ICJ, critiques of additional opinions can be split into two categories. The first, as discussed in this section, is the desirability of permitting additional opinions as a matter of principle for reasons based on their impact upon the authority of the institution. The second category of criticisms concerning additional opinions involve objections to the manner in which additional opinions are used by judges in practice. The following section will turn to address these, and in doing so consider whether it is possible to identify criteria according to which the legitimacy of the use of additional opinions as a vehicle for individual judicial power can be ascertained.

6 Legitimate Use of Additional Opinions

To the extent that there is critique of judicial practice on the issue of additional opinions in international criminal justice, that criticism has largely focused upon the conformity of that practice with the governing Statutes of the institution in question. Accordingly, as in the instance of the ICJ, the main criteria according to which the legitimacy of the exercise of individual judicial power through the use of additional opinions has been appraised has been the formal criteria.

The practice of judges at both ICTY and at the ICC to deliver dissenting and separate opinions in the course of interlocutory proceedings and also the publication of to deliver declarations have attracted concern. There has not (yet) been any criticism of the practice of ICC judges to author additional opinions, rather than have their views represented within the body of the judgment or decision. The following three sub-sections will consider, first, the matter of interlocutory additional opinions and, second, the use of declarations. Although judicial practice at the ICC has followed the practice of judges within other international courts and tribunals rather than the Statute,[297] the final section will critically assess the viability of the statutory provisions and will consider whether conformity with the Statute would enhance the legitimacy of the expression of individual authority at the ICC.

Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *LJIL* 855; M. Bergsmo and Song T. (eds) *On the Proposed Crimes Against Humanity Convention* (Torkel Opsahl Academic EPublisher 2014).

[297] See Section 4.2.2.

6.1 Interlocutory Proceedings

Absent an explicit prohibition on additional opinions in interlocutory phases, the ICTY judges appeared to have taken the permissive attitude towards additional opinions in Article 23(2) of the ICTY Statute as an indication of the acceptance of additional opinions as a general principle.[298] The same too can be said for the ICC judges. While the Rome Statute is silent on the admissibility of additional opinions in the context of interlocutory decisions of the Trial Chambers and the Appeals Chamber, as well as being silent upon the admissibility of additional opinions in the context of Pre-Trial Chamber decisions, judges do publish additional opinions in the context of the full range of decisions made by Chambers of the Court.[299]

The practice of permitting additional opinions in interlocutory decisions has been described as unlawful given the absence of an explicit statutory basis, and second, undesirable in view of the need to expedite proceedings.[300] Expeditiousness, along with fairness, of proceedings have been described as the 'pillars of criminal justice'.[301] The pursuit of justice within a reasonable time respects the rights of the accused, is crucial to the case of the Prosecutor, best serves the interests of the victims and observes the public interest in the timely prosecution of crimes with the jurisdiction [of international criminal courts and tribunals]'.[302] The right to be tried without undue or unreasonable delay is a long-established human right, recognised in all the major international and regional human rights instruments,[303] and the obligation upon Trial Chambers to ensure the expeditiousness of proceedings is enshrined within the governing Statutes of all international and internationalised/hybrid criminal courts and tribunals.[304]

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[298] See above, at 4.2.1.

[299] See above, at 4.2.2.

[300] Sluiter (2011) n.238 at 209-210.

[301] E. Trendafilova, 'Fairness and Expeditiousness in the International Criminal Court's Pre-Trial Proceedings' in Stahn and Sluiter (Eds) (2009) n.20 at 441.

[302] Ibid.

[303] Article 14(3)(c) ICCPR, Article 6(1) ECHR. Article 7(1)(d) African Charter on Peoples' and Human Rights, and Article 8(1) American Convention on Human Rights.

[304] Article 20(1) ICTY Statute and Article 64(2) ICC Statute. The right of the accused to be tried without undue delay is enshrined in Article 67(1)(c) of the ICC Statute and Article 21(4)(c) of the ICTY Statute.

Observance of the need to expedite international criminal procedure has become trite;[305] not only do the protracted proceedings, often over a course of a decade,[306] threaten the rights of the accused (who invariably during that period are held in detention, deprived of their liberty while still be subject to the presumption of innocence), but they also significantly increase the costs of proceedings and damage the perceived legitimacy of the institutions and their proceedings.[307] Accordingly, the concern regarding the need to expedite proceedings is a legitimate one; the question remains whether the curtailment in the practice of the publication of additional opinions by judges is the appropriate antidote.

The length of international criminal proceedings is often attributed to a number of factors.[308] First is the complexity and contentiousness of the factual context within which international crimes occur. The scale and gravity of those crimes, the territorial expanse over which such crimes take place and the number of individuals involved (both as victims and perpetrators) and the challenges inherent in securing the necessary cooperation by States to enable the Prosecutor to investigate, collect evidence and to secure the execution of arrest warrants all elongate proceedings.[309] Add also the complexity of the law and the elements of crimes required to be established by the prosecution (in addition to the duty upon the Prosecutor to establish the truth under Article 54(1)(a) ICC Statute),[310] and the volume of information and evidence presented during pre-trial and trial proceedings and to be

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[305] The criticisms of the Court's efficiency and effectiveness is acknowledged by the Court. See President Silvia Fernández Gurmendi, 'Remarks to the 25th Diplomatic Briefing' 26/03/2015, at http://www.icc-cpi.int/iccdocs/db/25DB-Pres-Eng.pdf at 2-3. Generally, see R. Heinsch, 'How to Achieve fair and Expeditious Trial Proceedings before the ICC: Is it time for a more judge-dominated approach?' in Stahn and Sluiter (Eds) (2009) n.20.

[306] For example, the case concerning Thomas Lubanga Dyilo, the first individual to be arrested pursuant to an ICC arrest warrant, tried and convicted, lasted 6 years from the date of his arrest and surrender to the Court (16th-17th March 2006) to his conviction by Trial Chamber in its decision issued on 14/03/2012. See *Prosecutor v Lubanga* 'Decision on the Confirmation of Charges' (Pre-Trial Chamber I) 29/01/2007 ICC-01/04-01/06-803-tEN, at para. 16, and *Lubanga* (Judgment) n.180.
Similarly, for Germain Katanga, the second individual to be convicted by the ICC, proceedings between his arrest and surrender (17/10/2007) and his conviction (07/03/2014) lasted 6 ½ years (see *Prosecutor v Katanga,* 'Decision on the Confirmation of Charges' (Pre-Trial Chamber I) 01/10/2008 (ICC-01/04-01/07-717) at para. 42 and *Katanga* (Judgment) n.287.
The first individual to be acquitted of all charges, Mathieu Ngudjolo Chui, was detained by the Court for nearly 5 years between his arrest on 06/02/2008 (*Ngudjolo Chui* n.265 at para.6) and his acquittal by the Trial Chamber on 18/12/2012 (*Ngudjolo Chui* n.265).

[307] See criticisms referred to in Robinson (2000) n.24 at 570; Heinsch (2009) n.305; W. Schabas, 'First Prosecutions at the International Criminal Court' (2000) 27 *HRLJ* 25 at 40.

[308] Divac Öberg (2013) n.62.

[309] Heinsch (2009) n.305 at 482. The Office of the Prosecutor has repeatedly explained the reasons for the length of investigations and proceedings. See OTP, 'Strategic Plan 2016 – 2018' 06/07/2015 at para. 22-30; OTP, 'OTP Strategic Plan 2012-2015' 11/10/2013 at para.19.

[310] Heinsch (2009) n.305 at 482.

digested by the judges. In this context, it needs to be questioned to what extent the process of formulating, deliberating and publishing additional opinions contributes to this pace of justice.

Placing additional opinions in the context of a wider phenomenon of the judicial practice, one ICC official spoke of 'a luxury of paper' by reason of the comparative lack of cases.[311] It was remarked that 'there is a production of paper in this Court which I have not seen in my life, and that's because if you have just one case, you can dispute on everything [sic]. When you have six or seven you have to move'.[312] More substantively, it was explained that the lengthy decisions issued by Chambers,[313] not only their principal decisions but also interlocutory decisions, are motivated by the desire or sense of obligation to 'demonstrate what we are doing and what they are thinking [sic]'.[314] Contrasted with domestic legal systems, where a system of justice and body of jurisprudence is developed over decades and centuries and hundreds of thousands of cases, ICC judges are developing the ICC system of criminal justice and jurisprudence over a handful of cases.[315] Given the rate at which this jurisprudence is being developed, the production of lengthy and exhaustively justified opinions, which may well be facilitated by a luxury of time, suggests a judiciary that perceives the need to justify itself and its actions through opening its decision-making up to scrutiny.

In the view of one former ICTY and ICTR Appeals Judge, a frequent author of additional opinions,[316] the drafting of additional opinions has not been the cause of delay in the length of the Tribunal's proceedings.[317] All ICC judges interviewed were similarly confident in their assertion that additional opinions did not slow down proceedings in any way.[318] This view was supported by an ICC official,[319] and was

[311] Interview #03 n.35.

[312] Ibid.

[313] See below, at Section 5.3.1.

[314] Interview #03 n.35

[315] Ibid.

[316] In the 34 judgments he participated in as a member of the Appeals Chamber for the ICTY and ICTR (that is, 21 ICTY judgments and 18 ICTR judgments), Judge Shahabuddeen was responsible for a total of 27 additional opinions (18 in ICTY judgments and 9 in ICTR judgments). Judge Shahabuddeen participated in one Trial judgment of the ICTY, that being *Prosecutor v Blaškić* Judgment (Trial Chamber) 03/03/2000 (IT-95-14-T), to which he appended a declaration.

[317] Shahabuddeen (2012) n.4 at 81.

[318] Interview #02 n.36; Interview #05 n.36; Interview #06 n.68. Note however that all of those judges interviewed for this research are judges who have engaged in the practice of issuing additional opinions. Further investigation is

supplemented by the observation that it is possible for additional opinions to be delivered at a later date to the decision of the Chamber, so their production should not act as an impediment to the progression of proceedings.[320]

However, where the process of drafting additional opinions has had the effect of slowing down proceedings, it is appropriate to consider the reasons why this occurred and whether it is symptomatic of some underlying issue. The idea that additional opinions, particularly dissenting opinions, may be indicative of more latent dysfunction, has been used to question the appropriateness of permitting additional opinions.[321] On this view, 'dissenting practices risk exposing internal divisions that go beyond differences in judicial opinion'.[322] In response, it can be asked whether latent dysfunction that disrupts the working procedure of the international criminal courts and tribunals *should* be left unexposed. Understandably, it is not appropriate for all divisions to be aired in public; however, if those divisions have developed to a degree of dysfunction which is detrimental to the conduct of proceedings at international criminal courts and tribunals, and where judges are themselves unable to resolve those differences, then it might be asked whether at some point it is necessary for questions to be raised by external actors as to why such dysfunction is occurring. This question is addressed in more detail by Chapter 5.[323]

Moving to the utility and appropriateness of additional opinions in the course of interlocutory opinions: is their publication in relation to issues concerning 'witnesses, admissibility of evidence, disclosure etc' as unnecessary as has been claimed?[324] Whereas those concerned by the publication of additional opinions in the course of interlocutory proceedings concede that some interlocutory matters (such as those relating to jurisdiction) are important enough to justify the publication of additional opinions, the criteria for establishing 'importance' are unclear.[325] A theme throughout this thesis is the significance of procedural design and practice upon the

required to determine whether this view is shared by the wider college of judges, including those who do not engage in the practice.

[319] Interview #04 n.190.

[320] Interview #05 n.36; Interview #06 n.68.

[321] Jørgensen and Zahar (2013) n.62 at 1187.

[322] Ibid.

[323] See Chapter 5, Section 4.3.

[324] Sluiter (2011) n.238 at 209.

[325] Ibid.

nature and quality of the international justice pursued by international criminal courts and tribunals. While it is true that judgments upon the verdict against the accused are ultimately the most important decisions to be rendered,[326] questions of procedure – for example, such as those relating to witness testimony or the admissibility of evidence – can have important substantive implications for the administration of justice and have a direct bearing upon issues such as who can participate in proceedings, how, and to what effect. Such decisions on matters of procedure directly affect *how* international criminal courts and tribunals pursue the range of functions attributed to the process of international criminal justice, and how it pursues them effectively. Indeed, Göran Sluiter laments the lack of attention paid to questions of procedure given how 'the organization and nature of decision[-]making is at the heart of the quality of the administration of justice'.[327] Therefore, care must be taken not to underestimate the consequences of such decisions, particularly given the rate at which the criminal procedure of the respective tribunals has been, and continues to be, developed.

6.2 Declarations

Judges of the international criminal courts and tribunals have also adopted the practice of publishing declarations – again in the course of all proceedings – and in the absence of any expression authorisation for their use in the language of the Statutes. To take individually-authored declarations delivered alongside the judgment of the Trial Chamber and the Appeals Chamber (therefore, excluding all interlocutory decisions) up until 16 June 2015, 14 declarations have been issued by ICTY judges. That breaks down to 1 individual declaration to a Trial Chamber Judgment[328] and 13 individual declarations to Appeals Chamber Judgments.[329] Of the 14 declarations issued in at the ICTY, 6 of those were by Judge Shahabuddeen,[330] a Judge who had formerly served at the ICJ where – as discussed in Chapter 3 – additional opinions in the form of the 'declaration' are granted statutory recognition in the Rules of Court.[331] Additional opinions under the rubric of 'declaration' at the

[326] Jørgensen and Zahar (2013) n.62 at 1152.
[327] Sluiter (2011) n.238 at 216.
[328] See Appendix 7.
[329] Ibid.
[330] Ibid.
[331] See Chapter 2, Section 4.1 and Chapter 3, Section 3.

ICC appear to be rarer; from the sample of 33 decisions and judgments surveyed for the purposes of this thesis,[332] only one declaration has been issued. That was by Judge van den Wyngaert,[333] a judge who, like Judge Shahabuddeen at the ICTY has had prior experience both at the ICJ and the ICTY where declarations were more familiar practice.[334]

Absent an explicit and 'clear empowering mandate in the Statute' to publish declarations,[335] the legality, necessity, desirability and utility of declarations have been called into question.[336] On this view, one critic has advocated for their prohibition.[337] In the context of the ICJ it can be recalled that the distinction between types of additional opinion is blurred, with emphasis instead being placed upon the content of additional opinions rather than the label attached to them.[338] By contrast, writing in the context of the *ad hoc* Tribunals, Sluiter had suggested that each form of additional opinion is itself a conceptually distinct 'instrument of expression'.[339] To that effect, he has opined that judges must 'confine themselves to the instruments of expression explicitly provided for in the law'.[340] The flexibility in labels adopted at the ICJ may find greater accommodation in the Statute of the ICJ, with the Statute referring simply to the permissibility of the publication of 'individual opinions'.[341] However, unlike the Statutes and Rules of the international criminal courts and tribunals, which are silent on the permissibility of declarations, the ICJ's Rules of Court do explicitly provide for the use of declarations in order to make a bare statement of disagreement.[342] By contrast, the ICTY Statute and the ICC Statute eschew the catch-all term of individual opinions, with the ICTY Statute using the term

[332] See Chapter 1, Section 3.2.1.1.2 on the sampling method adopted for the ICC.
[333] *Prosecutor v Al Senussi*, 'Decision on the Admissibility of the Case against Abdullah Al-Senussi' (Pre-Trial Chamber I) 11/10/2013 (ICC-01/11-01/11-466-Red), Declaration of Judge van den Wyngaert.
[334] Chapter 2, Section 4.1.
[335] Sluiter (2011) n.238 at 208.
[336] Ibid. at 208-9. See also G. Sluiter, 'Separate and Dissenting Opinions' in Cassese (Ed) (2009) n.73 at 511.
[337] Ibid.
[338] Chapter 2, Section 4.1
[339] Sluiter (2011) n.238 at 216.
[340] Ibid.
[341] Article 57 ICJ Statute.
[342] Article 107(3) ICJ Rules of Court.

'dissenting and separate opinions' and the ICC Statute referring either to the views of the minority or 'dissenting opinion'.[343]

The difference in language between the ICTY STatute and the ICJ may be viewed as a deliberate expression of an intent to depart from the practice in regards to additional opinions adopted at the ICJ. However, if the intention was to move away from the established practice of the ICJ, then the choice of the language of 'dissenting and separate opinions' in the ICTY Statute seems anomalous. After all, in practice the language of 'dissenting and separate opinions' is what would be associated with ICJ judicial practice – with judges of the ICJ having overwhelmingly rejected the statutory language of 'individual opinion' in favour of 'dissenting and separate opinion'.[344]

Moving away from the propriety of the adoption of labels not explicitly envisaged by the Statutes, it is necessary to consider how the declarations have been used. As Sluiter himself observes, in the context of the *ad hoc* Tribunals, declarations are used in order to provide an opinion on matters not directly related to the substantive decision or reasoning contained in the judgment.[345] Declarations are used not to make bare statements of disagreement or concurrence, but to provide reasoned opinions on matters of general concern relating to criminal procedure and the judicial process which – although raised by the case at hand – are not germane to the Chamber's disposition of the case or issue at hand. For example, in the *Furundžija* Appeals Chamber Judgment,[346] three individual declarations were attached to the judgment of the Chamber. Judge Shahabuddeen addressed the principle of judicial impartiality, its basis and how it works;[347] Judge Vohrah explained his view as to a hierarchy in gravity between crimes against humanity and war crimes – with the seriousness of the former being greater and thus requiring reflection in sentencing decisions[348] whereas Judge Robinson addressed the 'methodology and technique for

[343] Article 74(5) and Article 83(4) ICC Statute.
[344] There has not been a single additional opinion at the ICJ labelled as an 'individual opinion'.
[345] See Sluiter (2011) n.238 at 208-9.
[346] *Prosecutor v Furundžija* 'Judgment' (Appeals Chamber) 21/07/2000 (IT-95-17/1).
[347] Ibid., Declaration of Judge Shahabuddeen at para.255.
[348] Ibid., Declaration of Judge Vohrah.

the interpretation and application of the Tribunal's Statute and Rules', particularly in relation to the principle of impartiality.[349]

It therefore seems that 'declarations' are used by judges of the international criminal courts and tribunals to describe what at the ICJ might be considered a sub-category of the separate opinion. The use by these judges of 'declaration' is to denote when they are writing exclusively on ancillary matters. Therefore they reserve the title of 'separate opinion' to matters relating the substance questions of fact and law raised by the case and the implications of those questions upon the findings of the Court. This distinction, in the absence of any indication provided by the drafters of the Statutes of the *ad hoc* Tribunals as to what separate opinions should entail, reinforces the view that the appropriate use of separate opinions is to address matters specifically relating to the judgment or decision at hand.

Recalling the previously mentioned recommendation that judges confine themselves to 'instruments of expression explicitly provided for in the law',[350] ICTY judges *could* have done so, by labelling what they have termed 'declarations' as 'separate opinions'. Therefore, the question can be expressed another way: is the concern expressed by Sluiter merely one of form or label which would be remedied by requiring judges to label declarations as separate opinions? Or, is it a substantive objection to the content of declarations? If it is the latter, then even though not explicitly provided for in the Statutes or Rules of the Courts, there seems little principled objection to them; they do not risk weakening the authority of the Chamber's judgment, nor do they speak to the individual accused's right to a reasoned judgment. However, the matters they address are relevant to the procedure followed by the respective courts and tribunals in their administration of justice, and can potentially address matters that have a significant impact on the nature of the justice pursued and delivered by those institutions and their proceedings.

While the matters of additional opinions in the course of interlocutory proceedings and the publication of additional opinions under the rubric of 'declaration' are of relevance to both the ICTY and the ICC, the following section will turn specifically to

[349] Ibid., at paras.270 and 282-291.
[350] Above, n.339.

address the specific issues that arise out of the provisions negotiated and adopted by the drafters of the Rome Statute in regard to the ICC.

6.3 The Rome Statute Compromise

Outlining the provisions of the Rome Statute regarding additional opinions, Section 4.1.2 highlighted how the drafters of the Statute introduced a number of qualifications to the entitlement to publish additional opinions that are novel to international justice. The provisions sought to reconcile the negotiating positions of those States that wanted the outright prohibition of additional opinions with those that advocated for their permissibility. Despite the specific intentions of the drafters to limit the availability of the entitlement of judges to issue additional opinions in order to restrict practice, Section 4.2.2 observed that judicial practice has disregarded the Statutory provisions, following instead the expansive practice established within other international courts and tribunals.

This Section will consider the merits both in principle and in practice of the Rome Statute provisions, and their feasibility. Although to date there has been no critique of judicial practice at the ICC on the basis that it does not conform to the language of the Statute, this Section will consider whether conformity with the textual provisions of the Statute would grant the exercise of individual judicial authority through additional opinions with greater legitimacy.

6.3.1 Incorporation of Minority Views in the Judgment

Article 74(5) of the Rome Statute makes the inclusion of minority views compulsory ("*shall* contain") within the body of the judgment. At the same time, the anonymity of the minority judges is preserved by way of the inclusion of those minority views within the body of the single decision. Foremostly, the consequence of this provision – if applied as such – is to place a responsibility upon the Trial Chamber, when exercising institutional authority, to explain in the course of its reasoning the views of the minority judge. There are two implications of this. First, on this account, a criterion for the legitimacy of the exercise of *institutional* power would include the responsibility to articulate the minority viewpoints within the Chamber's decision. A failure to do so would undermine the authority of the decision on the basis of its failure to conform with the formal requirements of the Statute.

In this regard, on a literal reading of the Statute the drafters of the Rome Statute went further in the direction of transparency than the drafters of the PCIJ and ICJ

Statute and their Rules of Court.[351] Statutes that grant individual judges the *entitlement* to issue additional opinions – an entitlement that they may exercise at their discretion – only embrace transparency to the degree that the modalities of transparency are actually utilised by individual judges. However, the Rome Statute, by stipulating that the decision of the Chamber *shall* include the views of the minority, might in fact be interpreted as making the public disclosure of minority views compulsory.

The second implication of the text adopted at Rome is that by placing the responsibility upon the Chamber – acting in the name of the institution – to explain the minority viewpoint(s), this deprives individual judges of the platform upon which to express their individual judicial authority as distinct from that of the institution. Although the viewpoints attributed to judges in the minority by the Chamber's decision will bear some individual judicial authority by reason of the identity of the actor who holds those views, it deprives the individual judges of much of their individual power and authority in the external sphere.

Additional opinions are a particularly effective platform for the expression of individual judicial power and authority because they permit the full expression of the independence of the individual judge.[352] It is this attribute – the independence of the individual judge – that grants the expression of individual judicial views with such legitimacy and force. Additional opinions, separate but attached to the Court's decision, give their authors the full freedom to express what they wish and in the manner that they wish to do so. It is this freedom of expression afforded by additional opinions combined with the independence of the individual judge that makes them such an effective institutionalised mechanism of accountability or constraint on the exercise of institutional power and authority. If the views of an individual judge were reported by the institution in the Chamber's decision, the independence guaranteed by the additional opinion would no longer be guaranteed in a decision that integrates both minority and majority views. This is because it would be the Chamber – acting on behalf of the institution – that would enjoy control over what is expressed and the manner in which it is expressed.

[351] Chapter 3, Section 4.2.
[352] Chapter 2, Section 6.1.

Recall those arguments made in the context of the ICJ that the publication of distinct additional opinions allows for the coherent and comprehensive presentation of the individual judge's opinion.[353] This permits the formulation and presentation of a more coherent argument than that embodied by the composite and collegiately drafted judgment of the Court.[354] By requiring that minority views are 'reflected' in the Trial Chamber's judgment, this would deprive minority judges of the opportunity to present their views in this coherent and comprehensive manner. Further, it would limit the matters on which the views of the minority are reflected. This would be because only those minority views that bear directly upon the Chamber's judgment and 'fit' within the logic and structure of the Chamber's decision could be incorporated. Its effect might thus have been similar to those of envisaged by President Spender's recommendations in his declaration attached to the ICJ's *South West Africa (Second Phase)* judgment.[355] The net effect of this would be – according to traditional accounts for and against additional opinions – to deprive additional opinions of the persuasive force that a single coherent opinion would bear, in comparison to the fragmented reflection of their views inserted into relevant sections of the Chamber's judgment.

However, by extinguishing the 'sting' of the expression of minority views in the form of additional opinions, this also deprives the expression of minority views with efficacy for the purposes sought. If the objective sought is to contribute to deliberations within the external sphere on the development of the law, then the fact that distinct additional opinions afford individual judges the space to comprehensively explain their position is their greatest asset when making a valuable and effective contribution to that sphere of deliberation.

While the integrated approach embodied by the Rome Statute may allay fears that distinct additional opinions with their own persuasive force may threaten the persuasive force and authority of the Chamber's decision, it may nevertheless result in the very same consequences that it seeks to avoid. By including minority views within the Chamber's decision, this also breaks up the continuity and coherence of *the Chamber's* analysis and reasoning, interspersing it with the expression of the

[353] Chapter 3, Section 5.1.
[354] Ibid.
[355] Chapter 2, Section 5.1.

views of the minority judges. Not only would this break the flow of the decision, but it would remind readers at every turn of the existence and nature of potentially opposing viewpoints. In contrast, distinct opinions permit the Chamber's decision to be considered in isolation and on its own merits, with the minority views subject to separate consideration, should the reader choose.

Finally, decisions of international criminal courts and tribunals are necessarily lengthy given the scale, complexity and gravity of the alleged crimes, the factual context concerned and the law involved. However, some have regretted how the ICC has apparently 'followed the trend of the other international criminal courts and tribunals in issuing these excessively long decisions'.[356] The length and complexity of such judgments may reduce the accessibility and comprehensibility of the decision, which will impact upon the effective dissemination, understanding and critique of the decision.[357] If, however, the views of minority judges were also included in the decision of the Chamber, then this would inevitably lead to further extending the length and complexity of the decision.

On a practical level, a number of those interviewed with experience in the ICC deliberation and drafting process suggested that such an integrated approach would not be feasible in practice, and if anything, would obstruct the efficient conduct of judicial proceedings.[358] It was observed that judges decide to write separately once it has become clear that deliberations have failed to reach a consensus or unanimity within the Chamber and the continuing deliberations would not serve any valuable purpose.[359] Although Article 74(3) of the Statute, which obliges judges to strive to achieve unanimity in their decision-making, has been described as 'purely hortatory',[360] all judges and legal officers interviewed for this research were at pains to emphasise the importance attached to this Statutory directive in the course of

[356] D. Akande, 'ICC Delivers its First Judgment: The Lubanga Case and the Classification of Conflicts in Situations of Occupation' *EJIL:Talk! Blog of the EJIL* (16/03/2012) at http://www.ejiltalk.org/icc-delivers-its-first-judgment-the-lubanga-case/. See also, D. Jacobs, 'First Judgment at the ICC: Some Random Thoughts on the Lubanga Verdict (Part 1)' *Spreading the Jam* Blog (14/03/2012) at http://dovjacobs.com/2012/03/14/first-judgment-at-the-icc-some-random-thoughts-on-the-lubanga-verdict-part-1/.

[357] Ibid.

[358] Interview #02 n.36, Interview #03 n.35, Interview #05 n.36.

[359] Ibid.

[360] Schabas (2010) n.13, at 876.

deliberations.[361] Indeed, the length of deliberations and the drafting period was attributed by some to the seriousness attached to this obligation to seek a unanimous decision, where possible.[362] Some discussed additional opinions in terms of a refusal to compromise on the part of the individual judge, or alternatively, where the limits of tolerable compromise had been reached.[363] In such situations, where there is a majority position, by 'allowing' the minority judge to commit their views to an additional opinion, majority judges calculate that this will permit them to 'get on' with writing the Chamber's decision.[364] If Chambers were required to comply with the integrated approach against the apparent culture of deliberations and drafting, this would only serve to perpetuate the disagreement between the majority and minority. It is possible to envisage the emergence of further grounds for disagreement, for example, over the manner in which minority views should be presented within the Chamber's decision. Moreover, the integrated approach would require a level a certain level of collegiality and cooperation that, as Chapter 5 will demonstrate,[365] is unfortunately not always present.

Consequently both as a matter of principle and in practice the Rome Statute 'integrated approach' towards the expression of minority and majority views is unfounded and impracticable. It is premised upon a misinterpretation of the nature of institutional authority and the relationship between that and individual judicial authority. Even on its own terms, it does not withstand scrutiny. The following section will discuss the second characteristic of the Rome Statute compromise, the distinction between disagreements on points of law and questions of fact found in Article 83(4).

6.3.2 Disagreement on Points of Law and Fact

Article 83(4) of the Rome Statute stipulates that additional opinions are limited to questions of law, implicitly suggesting that additional opinions on questions of fact are not envisaged by the Statute. Accordingly, any minority views on the facts must be expressed in the body of the Chamber's decision or judgment. For Frank Terrier,

[361] Interview #02 n.36, Interview #03 n.35, Interview #04 n.190, Interview #05 n.36, Interview #06 n.68.
[362] Interview #03 n.35, Interview #04 n.190, Interview #05 n.36
[363] Interview #02 n.36, Interview #03 n.35, Interview #05 n.36, Interview #06 n.68.
[364] Ibid.
[365] Chapter 5, Section 4.3.

the publication of dissenting opinions on questions of fact 'can only weaken the administration of justice, the authority of the Court and the authority that should attach to its decisions'.[366] For those who adhere to the inquisitorial conception of the judicial function, that is to determine the truth, additional opinions which express disagreement with the factual findings of the Court quite clearly place strain upon the claim to representing the truth made by the judgment or decision of the Court.

When asked about this distinction between questions of law and questions of fact, ICC judges maintained the impossibility in practice of distinguishing between the two.[367] Disagreements over points of law can have substantive implications upon the interpretation and appreciation of the facts. As such, questions of law and questions of fact are inextricably linked.[368] Disagreements on questions of fact at the ICC especially arise out of fundamental differences in the conception of the judicial function with regard to fact-finding, which in turn informs the methodology for handling and interpreting evidence adopted by the judges. Judge van den Wyngaert's dissenting opinion from the Appeals Chamber judgment in *Katanga* and the Joint dissenting opinion of Judges Tarfusser and Trendafilova in the Appeals Chamber judgment confirming the acquittal of *Ngudjolo Chui,* both discussed in Chapter 5, demonstrate the fundamentally different bases upon which individual judges assess evidence and arrive at their personal views. Here, disagreements between judges on the questions of law regarding the powers of the Chamber in regards to the handling of evidence and the charges has manifest outcomes for how judges assess the 'facts'. These two examples provide a clear illustration of what Chapter 5 will conceive as judicial dissent.

7 Conclusion

The ten year anniversary of the entry into force of the ICC Statute in 2012 provided an appropriate point of reflection for many working in the field of international criminal justice to review the activities of the ICC to date and to consider more broadly upon the state of international criminal justice both theoretically and in practice. In this reflective moment, references to the end of the era of the

[366] Terrier (2002) n.162 at 1315.
[367] Interview #05 n.36, Interview #06 n.68, Interview #07 n.41.
[368] Ibid.

'romanticization' of international criminal justice regarding the 'projection of exaggerated normative fantasies' and the 'grafting of idyllic rule of law conceptions on to the grim realities of societies emerging from mass atrocities',[369] and critiques of the 'messianic thinking' sometimes associated with more utopian ambitions for international criminal justice were abound.[370] While the objectives underpinning the project of international justice as pursued by international criminal courts and tribunals may have been moderated, this chapter has demonstrated that additional opinions have played – and will continue to play – an important role in shaping the manner in which those objectives are pursued.

This chapter has examined how individual judicial authority affects the manner in which the international criminal courts and tribunals have developed their respective justice regimes. Contrasted with the ICJ, any given individual judge has significant potential influence over the manner in which justice is pursued and delivered by the judicial Chambers. Within the internal and external deliberative spheres, individual judges have considerable power to influence outcomes. By reason of the diversity of the bench and the fact that the courts and tribunals sit in chambers when exercising institutional authority, the potential for a single judge's view to significantly change the outcome of the deliberative process is extremely high. One consequence of this is instability and fragmentation in the institutions' jurisprudence; *how* the institutional authority of a court will be exercised will depend very much upon *who* sits on the particular Chamber.

Moving to the external deliberative sphere, *without* the transparency provided by additional opinions, serious reservations may be raised against the legitimacy of the exercise of institutional power and even the law itself by reason of this instability, unpredictability and fragmentation. Additional opinions provide a degree of predictability to the manner in which institutional judicial authority will be exercised and why. Systemically, they reveal the importance of the individual judge in the internal deliberative sphere, demonstrating why divergent approaches between chambers occur. But specifically, additional opinions reveal the stance of the individual judge on the particular issue that forms the subject of the opinions in

[369] P. Akhavan, 'The Rise, and Fall, and Rise, of International Criminal Justice' (2013) 11 *JCIJ* 527 at 529.

[370] D. Luban, 'After the Honeymoon: Reflections on the Current State of International Criminal Justice' (2013) 11 *JICJ* 505 at 508.

question. Knowledge of the individual views of each of the judges within a chamber enhances the predictability of outcomes and permits parties to plan their cases accordingly. At the same time, additional opinions within Trial Chambers (and in the case of the ICC, also Pre-Trial Chambers) can also mitigate fragmentation. They encourage and empower parties – both the Prosecution and the Defence – to appeal decisions and to obtain clarification in the law from the Appeals Chamber.[371]

Focusing upon the ICC, additional opinions have accentuated many of the fundamental contradictions and tensions within the Rome Statute, which, while perhaps a necessary compromise at the time of drafting to secure its adoption, are impossible to implement and reconcile in practice. Some of these additional opinions have been extremely fierce in their criticisms of the chamber's decision and the individual judges responsible for the chamber's decision. This phenomenon, referred to in the next chapter as 'judicial dissent', can also be witnessed within the jurisprudence of the ICJ and the ICTY and has elicited the strongest criticisms in view of their perceived impact upon the judicial authority (both individual and institutional) within the external sphere. Chaper 5 will examine this particularly controversial form of expression of individual judicial authority and will consider what purposes it serves, and whether those purposes are welcome.

[371] However, as discussed in Section 2.2.1, to date the ICC Appeals Chamber has exercised restraint in its decisions, refraining from providing a general guidance or clarification beyond that which is necessary for the purposes of the immediate decision.

5. Judicial Dissent and Judicial Authority

1 Introduction

Chapter 4 introduced the expanded range of social and political functions acknowledged as being served – or least perceived to be served – by the expression of judicial authority in the context of international criminal justice. Normative questions as to whether recourse *should* be made to the international criminal justice process in order to, for example, construct a historical account of conflict and violence or in order to restore or maintain peace and security, mean that the legitimacy of the exercise of judicial power pursuant to these purposes is more highly contested. Putting aside empirical questions as to whether international criminal justice *can* effectively discharge those functions in practice, if it is accepted that international criminal justice institutions do possess authority for these purposes, the legitimacy of the *manner* in which they exercise those powers to those ends and the *degree* of authority that they possess for those purposes is equally contested.

Against this backdrop, contributions to deliberations within both the internal and external deliberative spheres that encourage and enhance deliberations over the criteria for the legitimate exercise of judicial power in order to establish the parameters of judicial authority for these purposes become especially important. As will become clear later in this chapter, judges at the international criminal courts and tribunals, in acknowledging the wider array of consequences flowing from the exercise of judicial authority, have been particularly forceful in their assertion of their individual judicial authority through additional opinions. This practice involves the use of additional opinions by international judges to criticise a court or its chambers, as opposed to simply expressing the existence and nature of disagreement. Typically, objections to such practice are characterised by a focus upon rhetoric deployed by individual judges to convey their criticisms of the court's decision. This form of additional opinion not only involves criticism of the institutional exercise of authority, but frequently also reaches behind the institution and criticises the conduct of the *individual judges* whose views form the decision-making majority. Some of these additional opinions – in view of the nature of the

disagreement or allegations against the Chamber and the strength with which those views are expressed – are examples of what this chapter identifies as judicial dissent.

So far, this thesis has argued that in view of the structure of judicial authority in the context of international justice – whether considered from the perspective of the ICJ or international criminal justice – the expression of individual authority is not only consistent with institutional judicial authority, but in fact serves as a legitimating factor. Judicial dissent, by contrast, does risk undermining judicial authority. Judicial dissent is by no means unique to international criminal justice. As with the wider culture of expressing individual judicial authority in the form of issuing additional opinions, the culture of judicial dissent has been forged by the judges of the Peace Palace institutions, particularly the ICJ.

Section 2 describes in more detail what judicial dissent is, why it has been labelled as such and the nature of the objections to that practice. When doing so, it will draw upon examples of judicial dissent from both the ICJ and international criminal tribunals to illustrate how and why judicial dissent undermines institutional authority and its significance from the perspective of the project of international justice. One of the key characteristics of judicial dissent – and one which has attracted particular criticism – is the language of dissent. Section 3 explains why the use of certain language or rhetoric can weaken judicial authority. When such language is deployed, not only does it endanger institutional judicial authority, but it quite equally – if not more so – destabilises the individual judicial authority of the authoring judge.

Whereas this chapter concurs with those assessments that judicial dissent and the rhetoric of dissent undermines judicial authority, it departs from those existing assessments since it does not prescribe its prohibition or elimination. Because of its potential to challenge judicial authority, judicial dissent is the most powerful mechanism available to judges as individuals to hold to account the exercise of institutional judicial power. Judicial dissent is unique – and effective but, also, potentially damaging – because of *who* it holds the exercise of judicial power accountable to. The rhetoric of dissent engages lay audiences, the subjects of judicial authority upon whose acceptance of the legitimacy of judicial authority rests. Whereas Chapter 3 and 4 explained how additional opinions contribute to both the internal and external deliberative spheres, judicial dissent is an appeal by judges specifically to the external deliberative sphere. This reference to judicial dissent as an

appeal to the external deliberative sphere is key to understanding how judicial dissent can serve a constructive rather than destructive function. From this perspective, the utility of dissent from the perspective of the project of international justice and the determination of the legitimate scope of the social and political functions of the project start to become clearer.

Aware of the power of judicial dissent, Section 4 will consider some recent examples of judicial dissent in international criminal justice. It will look beyond the surface of dissent – that is, the rhetoric or language of dissent – in order to identify why the authoring judge made recourse to such rhetoric. Judges are aware that the use of such rhetoric risks the authority of the institution, their own individual authority and strains collegiality. Nevertheless, they elect to do so. This section thus seeks to understand the causes of judicial dissent and to demonstrate its constructive potential.

2 Additional Opinions and Judicial Dissent

Chapter 2 explained why, for the purposes of those previous chapters unless greater specificity was required, the label 'additional opinions' was used as a generic term to refer to dissenting opinions, separate opinion and declarations.[1] This chapter introduces a particular type of expression that can be found within additional opinions, that of 'judicial dissent'. Before elaborating upon what constitutes 'judicial dissent', it is first necessary to clarify the meaning and significance of the concept of 'dissent' itself.

2.1 Judicial Dissent

The meaning of a word, it has been said, 'is a function of how that word is used in various activities' and that the different ways in which a word is used is determinative of its meaning.[2] The objective of this thesis is, it will be recalled, to develop an understanding of the implications of additional opinions and judicial dissent upon the authority of courts and tribunals and the thus the manner in which those institutions discharge their functions *within society*.[3] As such, any definition of

[1] Chapter 2, at 4.1.

[2] D. Patterson, *Law and Truth* (OUP 1996) at 105.

[3] Chapter 1.

judicial dissent cannot rely purely upon the formal usage of the language of dissent within legal discourse to the exclusion of the wider meaning and significance of dissent within society. This is especially the case when the arguments in favour and against permitting additional opinions focus upon how the publication of judicial disagreement affects the manner in which the law and judicial authority is perceived by those who are subject to it.[4]

Dissent and authority are inextricably linked. Dictionary definitions of dissent refer to its signification of the expression of disagreement with the official position or authoritative views.[5] Most commonly it is associated with the expression of views at variance with those widely held by a majority or the consensus view, particularly in those contexts where authority is vested in the position of the majority.[6] Dissent, by definition is a challenge to authority; dissenters, it has been explained, do so in order to challenge the prevailing norms, perceptions, and truths, in order to change them.[7] Considering the function and stature of judges within society (as 'authorities') the idea of *judicial* dissent becomes even more powerful. From this wider sociological perspective, the identity of the judicial dissenter gains particular significance. As Marie-Claire Belleau and Rebecca Johnson have observed,

> [w]ords of dissent are words uttered by a judge *acting in the capacity* of judge; those words remain enrobed with the authority of judicial office. This makes a dissenting opinion significantly different from other attempts to persuade or convince.[8]

This is particularly so when the word or concept in question is something as controversial as 'dissent', which evokes strong political and sociological connotations.[9] As alluded to above, dissent suggests ideas of confrontation or antagonism. Indeed, even in liberal societies, those ostensibly based on ideals of

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[4] Chapter 2 at Sections 3 and 5, Chapter 3 Sections 4.3 and Chapter 4 at Section 5.2.

[5] Dissent [Def.1] in *Oxford Dictionaries Online,* Retrieved 15 April 2015, from http://www.oxforddictionaries.com/definition/english/dissent; Dissent [Def.2] in *Merriam Webster Online,* Retrieved 15 April 2015, from http://www.merriam-webster.com/dictionary/dissent.

[6] Dissent [Def.1] in *Oxford Dictionaries Online* n.5.

[7] D. Packer, 'A Normative Conflict Model of Dissent in Social Groups' (2008) 12 *PSPR* 50 at 50.

[8] M-C Belleau and R. Johnson, 'I Beg to Differ: Interdisciplinary Questions About Law, Language and Dissent' in L. Atkinson and D. Majury (Eds) *Law, Mystery and the Humanities: Collected Essays* (University of Toronto 2008) at 177.

[9] J. Jetten and M. Hornsey (Eds) *Rebels in Groups: Dissent, Deviance, Difference, and Defiance* (Blackwell Publishing 2011); C. Sunstein, *Why Societies Need Dissent* (HUP 2003).

social diversity and tolerance and which profess that 'diversity of opinions and habits is not only to be endured but to be cherished and encouraged',[10] dissenters are often the subject of derision as 'attention seeking, rogues and rebels'.[11] Frequently, dissenters are viewed as 'annoying, wrong, and unpredictable'; they are not 'team players' or are disloyal,[12] they create instability and disharmony, and are implicitly a threat to societal and community cohesion.[13] As Chapters 2-4 have argued, the relationship between additional opinions and institutional authority is symbiotic. Consequently, this chapter has reserved the label 'dissent' for those particular expressions contained within additional opinions that might be properly associated with those conflictual or antagonistic connotations.

2.2 Distinguishing Judicial Dissent from Additional Opinions

Judicial dissent occurs when judges use their additional opinions not merely to express disagreement with the manner in which institutional authority has been exercised by a court or chamber, but to *criticise* that court or chamber. In the abstract, the distinction between criticism and disagreement is clear; to disagree is to simply state that one would have decided in a different manner without opining upon the merits of a court's decision, whereas to criticise is to articulate an opinion upon the court's decision – to state that the court was 'wrong' or 'incorrect' in arriving at the decision that it did, or the manner in it did so. Since the PCIJ, the distinction between disagreement (valid) and criticism (not valid) has been observed in principle. The words of Judge Anzilotti ('a dissenting opinion should not be a criticism of that which the Court has seen fit to say, but rather an exposition of the views of the writer')[14] have been a common standard against which judicial practice at the PCIJ and ICJ is critiqued.[15] Before the ICJ, judges have similarly indicated that to criticise the reasoning adopted by the Court in its decision 'would be to go beyond the bounds within which an individual opinion ought … to be kept'.[16] It will be

[10] J. Shklar, *Legalism* (HUP 1964) at 5.

[11] C. Nemeth and J. Goncalo, 'Finding Value in Dissent' in Jetten and Hornsey (Eds) (2011) n.9 at 22 and 28.

[12] Ibid. at 29.

[13] Sunstein (2003) n.9 at 12.

[14] *Free City of Danzig and ILO* (Advisory Opinion) [1930] PCIJ Series B.18, Individual Opinion of Judge Anzilotti at 18.

[15] See M. Hudson, 'The Twenty-Eighth Year of the World Court' (1950) 44 *AJIL* 1 at 20; I. Hussain, *Dissenting and Separate Opinions at the World Court* (MN 1984) at 53.

[16] *Minquiers and Ecrehos* (France/United Kingdom) [1953] ICJ Rep 47, Individual Opinion of Judge Basdevant, at 74 and *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa* (Advisory Opinion) [1955] ICJ Rep 67, Separate Opinion of Judge Basdevant, at 80.

explained why this distinction between criticism and disagreement can be difficult to apply in practice, but first examples of judicial dissent will be provided in order to assist the identification of further characteristics of dissentient expressions.

The idea encapsulated by 'judicial dissent' embraces the kind of practice that Ijaz Hussain described as undermining the 'moral authority of the Court'; that is, the 'dignity and prestige of the Court which could be diminished by polemics and recriminations raised by the publication of individual opinions'.[17] The practice was historically associated by some with a perceived decline in courtesy and good manners due to the use of certain language used by judges to in their additional opinions.[18] Such language has been described as 'not worthy of members of the highest international judicial tribunals'.[19] Former PCIJ judge Manley Hudson identified an increasing tendency of judges at the ICJ to use expressions such as 'as the Court has rightly said',[20] 'the majority of the Court ... has not borne in mind',[21] or 'the conclusions which the judgment draws ... seem to be ill-founded'.[22] He opined that this tendency risked the materialisation of 'disastrous consequences [that] might follow for a high judicial institution which can command observance of its judgment and opinions only by its prestige and by the persuasion which the statement of its conclusions imparts'.[23] Hussain – addressing specifically the dissentient jurisprudence of the 1960s and 1970s – surveyed the range of 'attacks' against the Court, which he described as going 'beyond all bounds of moderation and sobriety'.[24] He provided numerous examples of such language,[25] which included:

- 'Here the fallacy, based on yet another unsubstantiated assumption underlying the whole Opinion';[26]

[17] Hussain (1984) n.15 at 40.

[18] E. Hambro, 'Dissenting and Individual Opinion in the International Court of Justice' (1956-7) 17 *HJIL* 230 at 244.

[19] Hussain (1984) n.17 at 49.

[20] Hudson (1950) n.15 at 20, referring to *Corfu Channel* (Merits) (UK v Albania) [1949] ICJ Rep 4, Dissenting Opinion of Judge Winiarski at 49 and 53.

[21] Hudson (1950) n.15 at 20, referring to *Reparations for Injuries Suffered While in the Service of the UN* (Advisory Opinion) [1949] ICJ Rep 174, Dissenting Opinion of Judge Krylov at 219.

[22] Hudson (1950) n.15 at 20, referring to *Corfu Channel* (Merits) n.20, Dissenting Opinion of Judge *ad hoc* Ečer at 122.

[23] Hudson (1950) n.15 at 20-21.

[24] Hussain (1984) n.15 at 51.

[25] Ibid. at 50.

[26] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (Advisory Opinion) [1971] ICJ Rep 16, Dissenting Opinion of Judge Fitzmaurice at 223.

- 'The *non sequitur* – the absences of any *nexus* is apparent, and the gap cannot be bridged in the way the Court seeks to do'[27] and
- 'Having very great respect for the Court, it is for me a matter of profound regret to find it necessary to record the fact that I consider the Judgment which the Court has just rendered ... *completely unfounded in law*'.[28]

Critics of the use of such language feared that this would damage the persuasive quality of the Court's decision, and in turn, compliance with the Court's decision.[29] In the context of international criminal justice, the use of 'harsh language' by the authors of additional opinions has also been the object of criticism. At the ICC, legal officials interviewed criticised the 'toughness' or 'aggression' exhibited in the additional opinions of ICC judges and directed towards their colleagues who formed the majority.[30] It was explained that additional opinions that 'personally attack the majority judges give a very bad image to the outside word, and is really not good in front of the accused. It is not good to reveal the problems within the Chamber to the public'.[31]

As will be argued in Section 3, while language is part of judicial dissent and is relevant to judicial authority, the key to judicial dissent lies in the nature of the criticisms that the language is used to express. In order to illustrate how the content of criticisms can constitute judicial dissent, it is useful here to consider one example of dissent at the ICTY. Judge Hunt's explanation of his reasons for disagreeing with the majority in a decision in *Milošević* has been identified as one objectionable expression of criticism of the judges responsible for the institutional decision at the ICTY.[32] Judge Hunt explained that his inability to agree with the majority arose out of his belief that if he did agree he would not be 'performing [his] duties 'honourably, faithfully,

[27] Ibid. at 236. Emphasis added.

[28] *South West Africa* (Second Phase) (Ethiopia, Liberia v South Africa) [1966] ICJ Rep 6, Dissenting Opinion of Judge Jessup at 325.

[29] Hudson (1950) n.15 at 20.

[30] Interview #03, Transcript of Interview with ICC Official, 25/05/2015, The Hague, on file with author; Interview #04, Transcript of Interview with ICC Official, 25/05/2015, The Hague, on file with author.

[31] Interview #04 n.30.

[32] *Prosecutor v Milošević*, 'Admissibility of Evidence-In-Chief in the Form of Written Statements' (Appeals Chamber) 21/10/2003 (IT-02-54-AR73.4), Dissenting Opinion of Judge Hunt, criticised by G. Sluiter, 'Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY' in B. Swart, A. Zahar and G. Sluiter (Eds) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) at 215.

impartially and conscientiously' as the solemn declaration which [he] took when [he] became a judge of the tribunal requires [him] to do so'.[33] This has been interpreted as an implicit and unacceptable *ad hominem* attack on the majority of the Chamber with whom Judge Hunt disagreed; that in arriving at their decision, they were not discharging their duties in accordance with the solemn declaration.[34]

It is open to question whether such an *ad hominem* attack can in fact be found in Judge Hunt's statement when it is considered outside of the context in which it was made, as was here. Within coordinately structured systems of official authority, such as the ICTY, individual decision-makers retain a greater sense of their individual self.[35] In this context individual judges can accept that they can each – individually – discharge their responsibilities in accordance with their duties under the solemn declaration, even if the outcome of the individual decision-making process differs between judges. Indeed, to suggest otherwise would be to imply that if judicial duties under the solemn declaration are properly complied with, this can only result in convergence in individual decision-making to the single outcome, resulting in a unanimously reached institutional decision.

Having said that, while the afore-mentioned expression taken out of the wider context in which this expression was made may not in itself constitute judicial dissent, it does form part of a wider criticism of the Appeals Chamber which does constitute dissent. In the same paragraph, Judge Hunt wrote that '[t]he Majority Appeals Chamber *drives a horse and cart* through the previous interpretations of Rule 92*bis*, and it *seriously prejudices* the accused in the ways already pointed out'.[36] He continued by referring to a prior dissenting opinion that he authored in connection to an ICTR Appeals Decision and extended the criticisms levelled against the Appeals Chamber in that context to the present decision, for the same reasons. He explained of the ICTR decision:

> [t]hat Decision unfortunately follows the trend of other recent decisions of the Appeals Chamber which reverse or ignore previously carefully considered interpretations of the law or the

[33] *Milošević* n.32, Dissenting Opinion of Judge Hunt at para.20.
[34] Sluiter (2011) n.32 at 216.
[35] See Chapter 2, at Sections 5.2.1 and 5.2.4.
[36] *Milošević* n.32, Dissenting Opinion of Judge Hunt at para.20 (emphasis added).

> procedural rules, which a *consequential destruction* of the rights of the accused enshrined in the Tribunal's Statute … The only reasonable explanation for the decisions appears to be a desire to assist the prosecution to bring the Completion Strategy to a conclusion.[37]

It is *then* that Judge Hunt expressed the aforementioned sentiment regarding the solemn declaration. Placed in this wider context, this example provides one of the clearest examples of dissent, illustrating a number of the characteristics that distinguish disagreement from dissent. Judge Hunt went beyond disagreeing with the interpretation of the law in the Appeals Chamber decision(s). By describing the consequences of this upon the rights of the accused, he accused the Chamber itself of conducting itself (that is, deciding) in a manner inconsistent with its judicial duty – that is, to conduct itself in a manner consistent with the law. This criticism of the Chamber is compounded by the explanation offered by Judge Hunt for the Court's decision – the allegation of bias implicit in the claim that the motivation was 'a desire to assist the prosecution' in the pursuit of a particular policy.[38] It is only when read alongside this allegation that Judge Hunt's statement with regard to the solemn declaration can be interpreted as an *ad hominem* attack against the majority, because it is the allegations that form the basis of the criticism of the majority. All of this is compounded by the deployment of particularly powerful rhetoric, emphasised in the quotes above.

Beyond the use of harsh language or rhetoric as an explicit indicator of criticism, which compounds the dissentient effect of the criticisms,[39] judicial dissent lies where a judge explains that the process or procedure according to which institutional judicial authority has been exercised has been incorrect. As may be recalled from Chapter 2 and its elaboration upon the project of international justice,[40] and also

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[37] Ibid. (emphasis added).

[38] For discussion, see G. Boas, 'The Case for a New Appellate Jurisdiction for International Criminal Law' in G. Sluiter and S. Vasiliev (Eds) *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009) at 439-442.

[39] More on which, see Section 3.

[40] See Chapter 2, Section 2.

Chapter 3,[41] one of the principal criteria for the legitimate exercise of judicial power is that it is exercised in a manner consistent with the process accepted as correct.

From this minimalist perspective, providing that procedure has been followed and the exercise of judicial power conforms to the qualities and attributes that imbue judicial power with legitimacy, the fact of disagreement over the outcome or the substantive justice of a decision is not *per se* problematic from the institution's authority for this basic purpose. On the other hand, allegations that a court (or properly, the individual judges whose views determined the court's decision) has, when exercising its judicial power, failed to conform with other characteristics or requirements constitutive of judicial authority, such as independence and impartiality,[42] are much more concerning.

This emphasis upon formal justice and procedural propriety might at first be considered to be at odds with the coordinate characterisation of international justice.[43] Whereas the hierarchical idealtype is characterised by a strict adherence to formal justice as discussed in Chapter 2, the validity of decision-making within the coordinate idealtype requires that decision-making to incorporate greater account of considerations of substantive justice *in addition to* an observation of the requirements of formal justice.[44] However, the observation that the legitimacy of the exercise of judicial power is contingent upon its conformity with the requirements of formal justice is consistent with the previous chapters' findings. First it is necessary to recall that the formal/substantive justice distinction is only one of the three attributes, the configuration of which determines the place of a given justice system on the spectrum between the coordinate and hierarchical idealtypes.[45] The configuration of the three attributes, taken together, justified the characterisation of international justice as bearing stronger resemblance to the coordinate idealtype.[46] Second, the coordinate idealtype of authority does not exclude formal justice; rather *in addition* to formal criteria for legitimacy, coordinately structured systems *also* explicitly take greater account of substantive criteria for legitimacy.

[41] See Chapter 3, Section 4.3.1.2.
[42] See Chapter 2, Section 6.1.
[43] See Chapter 2 and 3.
[44] See Chapter 2 Section 5.2.3.
[45] See Chapter 2 Section 5.
[46] See Chapter 3 at Section 2.2 and Chapter 4 at Section 2.

Judicial dissent is therefore the allegation by the author of an additional opinion that when exercising institutional power, a court or chamber failed to conform to the most basic standards of judicial legitimacy, never mind more contested standards of substantive legitimacy. Hence, judicial dissent is a criticism of the *conduct* of the court or the Chamber, and not merely disagreement with outcome of that conduct.[47] On this basis, another example of judicial dissent – this time from the ICJ – might be the description by Vice-President Schwebel of the Court's reasoning that led to its controversial conclusion in the *Nuclear Weapons* advisory opinion that it could not determine whether the threat or use of nuclear weapons would be illegal in any circumstance.[48] Describing the Court's conclusion as 'astounding', he characterised the Court's reasoning for this conclusion 'redolent of *Realpolitik*'.[49] A similar example can be found in Judge Simma's separate opinion to the *Armed Activities* judgment.[50] This is an unusual example of judicial dissent in the sense that it was engaged in by a judge who agreed with everything in the Court's judgment;[51] instead the allegation of engagement in political decision-making was levelled against what was *omitted* by the Court in its judgment. Judge Simma expressed his frustration at the Court's 'deliberate omission to characterise Uganda's 'massive use of force against the Applicant [the DRC]' as aggression.[52] He continued by referring to how this omission would be noted by 'any politically alert reader',[53] and acknowledged that while the UN Security Council may have 'its own – political reasons – from refraining from such a determination',

> the Court, as the principal *judicial* organ of the United Nations, does not have to follow that course. Its very *raison d'être* is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting

[47] Further illustrations will be provided in Section 4, which will illustrate how the most robust dissent – coinciding with the use of the most forceful language or rhetoric – concerns the expression of disagreement over the conduct of proceedings and the procedure adopted by the Court in order to arrive at its decision/judgment.

[48] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, Dispositive Paragraph 2E.

[49] Ibid, Dissenting Opinion of Judge Schwebel at 322.

[50] *Armed Activities on the Territory of the Congo* (DRC v Uganda) [2005] ICJ Rep 168, Separate Opinion of Judge Simma.

[51] Ibid. at para.1.

[52] Ibid. at para.2.

[53] Ibid.

> from stating what is manifest out of regard for such non-legal considerations.[54]

Returning to international criminal justice, an equally powerful dissent implying an allegation of engagement in *realpolitik* by the majority can be found in the dissenting opinion of Judge Ozaki at the ICC in the *Kenyatta* case.[55] Dissenting from Trial Chamber Vb's decision to excuse the defendant, Uhuru Kenyatta, from being continuously present during the course of his trial before the ICC,[56] Judge Ozaki closed her dissenting opinion by launching a strong critique of the Chamber's decision, describing it as being in places 'repetitive, irrelevant to the question before the Chamber (including the use of selective quotations from various authorities) and/or, in some cases incorrect'.[57] Moving beyond the Chamber's analysis and conclusions as a matter of law, she continued to state

> while there may be a place for proper policy considerations in the context of legal decision making, it is important to make a distinction between such proper policy considerations and the *realpolitik* of the day. Therefore, although I have not individually identified above all elements of the majority decision with which I disagree, such silence should not be interpreted as agreement.[58]

These allegations of *realpolitik* against the respective institutions go to the heart of the judicial authority within the international order from the perspective of the project of international justice.[59] The authority of the exercise of legal and judicial power derives from their distinction from *realpolitik*; *realpolitik* is the very antithesis of law.[60] Therefore, to allege that the Court has behaved in a manner 'redolent of *realpolitik*' is to strip it of the fundamentals of its very authority.[61]

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[54] Ibid. at para.3.

[55] *Prosecutor v Kenyatta*, 'Decision on the Defence Request for Conditional Excusal From Continuous Presence at Trial' (Trial Chamber Vb) 18/10/2013 (ICC-01/09-02/11-830).

[56] Ibid.

[57] *Kenyatta* n.55, Dissenting Opinion of Judge Ozaki at para.21.

[58] Ibid.

[59] See Chapter 2, Section 2.

[60] Ibid. Generally, see Shklar (1964) n.10 at 111.

[61] Ibid.

Another example of judicial dissent from the ICTY can be found in the dissenting opinion of Judge Pocar in the *Gotovina* case,[62] discussed in Chapter 4.[63] Not only did Judge Pocar describe what he identified as fundamental defects in procedure and reasoning in terms of 'negligence',[64] but he also implied that some of those alleged errors went beyond negligence. Throughout his dissenting opinion, Judge Pocar painted an image of *deliberate* wrongdoing on the part of the majority. Characterising the Appeal's Chamber's judgment as 'contradict[ing] any sense of justice',[65] Judge Pocar imputed upon the majority a pre-determined agenda to acquit the two accused. For example, he wrote that 'even if the Majority *wished* to acquit Gotovina and Markač entirely, one might wonder what the Majority *wanted to* achieve by quashing the mere existence of the JCE…I leave it as an open question'.[66] He also suggested that there was a deliberate intention on the part of the majority to manipulate or distort their analysis and legal reasoning and that of the Trial Chamber in order to obtain that objective, referring throughout his dissenting opinion to the manner in which the majority 'pretended to' take the positions it did.[67] Furthermore, by emphasising that his criticisms of the majority's reasoning and conclusions came from a 'purely legal perspective',[68] there is an implicit suggestion that the majority's reasoning or conclusions did not come from such a purely legal perspective.

Having described why the substance of the kinds of criticisms that constitute judicial dissent can undermine judicial authority, it is necessary to consider the language or rhetoric of dissent. It will explain how the mere recourse to such modes of expression is itself a danger to judicial authority, both institutional and individual.

3 The Rhetoric of Dissent

Whereas it might be tempting to dismiss the significance of the use of rhetorically forceful language from the perspective of judicial authority,[69] this section will explain the relationship between language and authority. It will identify three ways in which

[62] *Gotovina and Markač* Judgment (Appeals Chamber) 16/11/2012 (IT-06-90-A).
[63] Chapter 4, Section 5.2.2 at n.238.
[64] *Gotovina* n.62, Dissenting Opinion of Judge Pocar at para.29.
[65] Ibid. at para.39.
[66] Ibid. at para.30 (emphasis added). Judge Pocar also referred to the 'wishes' of the Majority at para.17.
[67] Ibid. at para.25.
[68] Ibid. at paras.31,32.
[69] As one of the early critics of such language did, describing it as mere 'froth'. Hambro (1956-7) n.18 at 243-4.

the use of language can undermine judicial authority. First, it can undermine the individual judicial authority of the author. Second, it can undermine the institutional authority of the law and judiciary of which the individual judge is a member. Both of these consequences concern the charismatic authority of the judiciary. The third way in which language can undermine judicial authority is by rendering criticisms of the conduct of the judicial proceedings accessible to lay audiences within society, the very audiences whose trust and acceptance that judicial power will be exercised according to correct procedure and exhibiting the attributes of judicial legitimacy the authority of the institution is vested.

3.1 Language and Authority

In order to understand how the use of language can undermine judicial authority, it is necessary first to appreciate the importance of language to establishing and consolidating judicial authority.

Scholars of the rhetorical nature of law draw to our attention how courts 'create by performance [their] own character and role and [establish] a community with others'.[70] They argue that *how* a court says what it does matters as much as *what* it says.[71] When courts, judges, or lawyers speak, in order to be accepted and to participate effectively in legal discourse, they must speak in the language of that legal audience.[72] The law

> regulates and disciplines particular acts of speaking and defines appropriate modes of making the persuasive argument. In each, conventions and rules enable and, at the same time, constrain the opportunities for voice.[73]

This may be the legitimate language and modes of expression for dialogue within the courtroom or it may equally be the language used in the production of judicial opinions (both that of the court and of individual judges).[74] Peter Goodrich has linked

[70] W. Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (University of Chicago Press 1990) at 102 cited by A. Sarat and T. Kearns, 'Editorial Introduction' in A. Sarat and T. Kearns (Eds) *The Rhetoric of Law* (UMP 1994) at 9.

[71] A. Sarat and T. Kearns (1994) n.70 at 9.

[72] Ibid. at 9.

[73] Ibid. at 12.

[74] Ibid. at 9 referring to R. Ferguson, 'The Judicial Opinion as Literary Genre' (1990) 2 *YJLH* 2.

the use of legal rhetoric, the 'obscure terminology, as well as the figurative and metaphorical devices of legal expression', directly to the capacity of courts to induce the 'cooperation and accommodation of social and institutional forces whose real affinities are antagonistic and conflictual', and thus fulfil their dispute resolution function.[75] On this account, the use of rhetorical legal devices operate upon a symbolic or conative level – an 'elitist linguistic code'[76] – that translates the social conflict or dispute into a different form which can be resolved.[77] From this perspective, language is not merely cosmetic but rather has direct implications for the advancement of the project of international justice.

Considering specifically the judgment of a court or tribunal, Goodrich explains:

> [t]o fulfil its role in relation to its own specialist institutional audience, the judgment must be inscribed or inserted in the collective body or 'oeuvre' of jurisprudence, and must equally 'conform' to the law in force.[78]

More widely, Jan Broekman has observed how the:

> [t]he life of the law is the life of words, of written and verbal expressions. Those words are embedded in phrases; they are – in view of the richness of natural languages – not many but their force and impact is made important through repetition and proceduralization … Legal decisions, procedures, institutions and hierarchies bear witness to the key functions of these words and concepts. What is true for both notions is true for legal expressiveness in general. This is one of the many reasons for the abstract character of the law, its generality, its formality, objectivity, impersonality and its reticence.[79]

Thus, the language used by judges when expressing their opinions or delivering the institutions' judgment is of great significance. Beyond the physical form of

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[75] P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (MacMillan Press 1987) at 86.
[76] Ibid. at 86.
[77] W. Mansell *et al*, *A Critical Introduction to Law* (3rd Ed Cavendish 2004) at 53.
[78] Goodrich (1987) n.75 at 119.
[79] J. Broekman, 'Communicating Law' in D. Nelken (Ed) *Law as Communication* (Dartmouth Publishing 1996) at 47-48.

institutions – their buildings, iconography and courtrooms – the written texts emanating those institutions are the predominant mechanism by which these institutions and their judges present themselves and express their authority.[80] From a sociological perspective of authority, it has been observed that within strongly coordinate judicial systems, particularly where the source of judicial authority cannot be derived from a written constitution, judges and judicial institutions lay claim to what Max Weber referred to as 'charismatic authority',[81] that being founded upon the particular qualities or attributes of the figure claiming authority which are of appeal to its subjects.[82] One way in which the judiciary preserves the characteristics of its charismatic authority (being 'the image of impartiality and objectivity in decision-making, a stance of neutrality and aloofness based on judicial wisdom divorced from all political partisanship'),[83] is through the language by which judicial (both individual and institutional) power is expressed.

3.2 Judicial Authority and Rhetoric

3.2.1 Charismatic Authority

In light of the foregoing, judicial dissent might be achieved through the adoption of language that departs from the standards and conventions of legitimate legal and judicial discourse. Those who criticise the language used by dissentient judges at the ICJ appeared less concerned with the revelation of disagreement between the judges or the substantive nature of the disagreement through the publication of a 'rival'

[80] On the significance of the physical form of institutions and of the iconography of justice to judicial authority, including in the context of international justice as pursued by the ICJ and the *ad hoc* Tribunals, see J. Resnik and D. Curtis, *Representing Justice: Invention, Controversy, and Rights' in City-States and Democratic Courtroom* (YUP 2011). Acknowledging the symbolic significance of the building of the ICC and its environment, see the 2005 report of the Inter-Organ Committee on the Permanent Premises of the International Criminal Court that addressed *inter alia*, the need for the Court's premises to 'fully reflect its character and identity as a permanent, effective, functioning, independent and credible international criminal court, with a universal vocation', to be 'dignified without being imposing', and 'open and welcoming'. See 'Report to the Assembly of States Parties on the Future Permanent Premises of the International Criminal Court: Housing Options' (9th March 2005) ICC-ASP/4/1, at para.41-43. On the 'ecclesiastical aspects' of the ICJ as 'an imaginative response to the fragile authority' of the ICJ – the 'altar-like bench, the vestments of judges and advocates, the numinous symbols of social hierarchy and authority' – see P. Allott, 'The ICJ as the Voice of Justice' in V. Lowe and M. Fitzmaurice (Eds*), Fifty Years of the International Court of Justice* (CUP 1996) at 25; on the importance of the 'symbolic validation' of rules and official authority see T. Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) at 35. On the 'ritualistic' environment of the ICJ, see M. Anzar-Gómez, 'Article 2' in A. Zimmermann *et al*, *The Statute of the International Court of Justice* (2nd Ed OUP 2012) at 243, citing Lydel Prott stating 'The very ritual concerned [regarding the solemn declaration taken by judges in open court when joining the ICJ] reinforces the role – all these symbols have come to mean that the person in the position will "act like a judge": he will apply rules consistently and will observe certain procedural formulae and so on'. L. Prott, 'The Role of the Judge in the International Court of Justice' (1974) 10 *Revue Belge Droit International* 473 at 478.

[81] R. Cotterrell, *The Sociology of Law: An Introduction* (2nd Ed Butterworths 1992) at 229.

[82] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* Volume 1 (UCP 1978) at 241.

[83] Cotterrell (1992) n.81 at 229-30.

opinion to that of the majority expressed in the judgment or decision. Rather, these objections focused upon how language that 'attacked' or was 'critical of' the decision of the Court was considered 'not worthy of members of the highest judicial tribunal' and risked undermining the prestige and dignity of the Court.[84] Even those judges who have exhibited a favourable attitude towards additional opinions and who have made extensive recourse to their right to issue additional opinions have maintained that there is 'no excuse for intemperateness. It is possible to make a protest with vigour and yet with the *elegant serenity customary in learned judicial discourse*'.[85] In doing so, these critiques evoke ideas related to Weber's conception of charismatic authority.[86] Indeed, the use of polite and courteous language when referring to the Court's judgments and opinions, or to fellow judges, has been conceived in terms of the requirements of 'integrity and propriety' implicit in the requirement in the ICJ Statute that judges be 'persons of high moral character'.[87]

In the context of contemporary international criminal justice, the use of 'improper language' by authors of additional opinions has been criticised for 'distracting from the strength of the arguments' by giving the impression that the motivation for the additional opinion was not judicial, but rather one of personal animosity.[88] Here, it seems that the detrimental impact of such practice upon judicial authority is not due to its direct challenge to the legitimacy of the exercise of judicial power by *the institution*. Rather, its effect is more indirect by undermining the image of the dispassionate judge and thereby weakening the charismatic authority of the judiciary as a whole. By deploying such language, not only does the author of judicial dissent risk undermining their own reputation or image of objectivity and dispassionate inclination as a judge, but also risks bringing into disrepute the image of the judicial institution of which they are a member and representative of.

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[84] Section 2.2.

[85] M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal* (OUP 2012) at 78 (emphasis added). Generally on 'judicial civility', see W. Ross, 'Civility Among Judges: Charting the Boundaries of Proper Criticism by Judges of Other Judges' (1999) 51 *FLR* 957, describing how 'civility is one of the hallmarks of the judicial temperament', such that judicial *incivility* is more concerning than incivility within other branches of government (at 957-8).

[86] Chapter 2 Section 3.

[87] Anzar-Gómez (2012) n.80 at 244.

[88] See Sluiter (2011) n.32 at 216.

When asked about their thoughts on the effects of the recourse to combative language by the authors of dissent, the views of the judges interviewed (one ICJ judge and two current and one former ICC judge) were split. Some judges were of the view that personal recriminations and the exchange of barbed criticisms by judges did lower the prestige of the Court;[89] however, others were more sceptical of that view.[90] Yet, all judges – when the object of another judge's criticisms – were keen to defend the necessity of their own dissentient language in order to *indicate* the depth of disagreement or concern felt by the authoring judge.[91] One judge, when asked about a particular instance of judicial dissent in which they engaged, conceded that 'maybe my dissent was a bit aggressive'.[92] However, even on that occasion, the judge stated that though they had been 'extremely critical' of their colleagues, 'I don't think I was playing the man, I was playing the ball I think'.[93] This response illustrates the sense of conflict faced by judges when considering the issue of dissent; while it suggests that the judge saw a line between what could and could not be said, the location of that line was far from clear.[94] While not providing an indication of where that line should be drawn, this judge – an ICC judge – provided an example of judicial dissent which crossed a different line of propriety. The example provided was that of Judge Pocar in *Gotovina.*[95] While implying they held ambivalence towards the Appeals Chamber judgment in *Gotovina*, the judge explained 'Pocar said that the majority was politically inspired, and that was a *very* strong accusation. Now that may be true, but whether you say it is something else'.[96] This might suggest then that at least for this judge, the allegations by dissenting judges that a court or chamber from which they dissented had been influenced in its decision-making by *realpolitik* discussed in Section 2.2 would be similarly inappropriate.

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[89] Interview #01, Fieldnotes of Interview with ICJ Judge, 06/05/2015, The Hague, on file with author; Interview #02, Transcript of Interview with ICC Judge conducted on 11/05/2015.

[90] Interview #05, Transcript of Interview with former ICC Judge, 26/05/2015, The Hague, on file with author; Interview #06, Transcript of Interview with ICC Judge, 27/05/2015, The Hague, on file with author.

[91] Interview #02 n.89, Interview #05 n.90, Interview #06 n.90, Interview #07, Fieldnotes of Interview with ICTY/ICTR Official, 27/05/2015, The Hague, on file with author.

[92] Interview #06 n.90.

[93] Ibid.

[94] On the difficulties of defining what constitutes an *ad hominem* attack in the context of legal proceedings, whether by counsel or a judge in the context of the US legal system, see L. Arnold, 'Ad Hominem Attacks: Possible Solutions for a Growing Problem' (1995) 8 *Georgia Journal of Legal Ethics* 1075 at 1090.

[95] See Section 2.2.

[96] Interview #06 n.90.

Returning to the specific examples of dissentient language that attracted mid-20th Century criticism,[97] that language may seem less objectionable when examined in view of the examples of contemporary dissent. It may be that the fears held by those critics that the use of such language was a symptom of a 'decline in manners and courtesy within society' have been realised.[98] Whether that may be the case or that there has been a trend towards the greater use of plain language by judges, it is much more common for judges to express their disagreement with the judgment of the Court with robust language.[99] This raises questions regarding the temporality of dissent: can the dissentient quality of an expression found within an additional opinion change over time, and will it cease to be dissent purely because the language of legitimate judicial expression has changed? After all, the focus of this thesis has been upon additional opinions expressed in the written form, by reason of the permanency of the written word in contrast to other modes of expression.[100]

Firstly, judicial dissent as defined in this chapter is not simply a matter of form or language, but one also of substance. As such, the effect of the deployment of dissentient language is to compound the dissentient effect of a particular substantive allegation or criticism levelled against the manner in which institutional judicial authority has been exercised. Therefore, it might be that while the dissentient quality of the language deployed by a judge may change over time, this would not diminish the dissentient quality of the substance of the criticisms expressed. Secondly, the dissentient effect of judicial dissent, by reason of its link to the authority of the institution – both as a consequence of language and as a consequence of the substance of the claims made – would also be relative to the changing purposes for which a particular judgment or decision claims authority over time (e.g. decisional versus interpretive authority). Thirdly, while judicial dissent undermines institutional authority by criticising the legitimacy of the exercise of institutional power, its real concern, as explained in Section 2.2, is the conduct of the individuals responsible for determining how institutional power is deployed. Because judicial dissent pierces the institutional veil, and focuses upon the conduct of

[97] See above, Section 2.2.
[98] Ibid.
[99] See examples throughout this chapter from the ICTY.
[100] Chapter 2, Section 4.3.1.

personnel, changes in personnel over time can weaken the long-term damage to institutional authority by the allegations made in any given instance of judicial dissent. At the same time, repeated dissent on the same grounds notwithstanding changes in the composition of the institution may be indicative of more structural or systemic institutional issues. In those instances, where a particular instance of judicial dissent is illustrative of a wider phenomenon, then the long-term impact of a particular example of judicial dissent may be stronger. However, none of these temporal variables – which may affect the continuing dissentient quality of additional opinions over time – will affect the fact that it constituted judicial dissent at the time of its writing and publication.

3.2.2 Audiences of Judicial Dissent

The use of lay language to explicitly criticise the decision of a court or tribunal not only undermines the charismatic authority of judges, but also renders the substance of the additional opinion more accessible to audiences outside the legal elite. As Section 3.1 explained, language defines the audience of speech. Section 2.2 referred to how judicial dissent concerns the expression of criticism of the manner in which the authority vested in the institution has been exercised. It explained that the minimum function of law and the judicial process within society is to provide a solution accepted by all to disagreement. That solution is accepted and rendered acceptable by the process according to which that solution is reached and the attributes exhibited by those exercising judicial authority in arriving at the solution. Criticisms by individual judges of the process and procedure followed and allegations that the institution has not exhibited the attributes expected of it, thus questions the formal authority of a Court or Chamber's decision. While allegations of procedural impropriety or other forms of judicial impropriety can be made by any actor, criticism in the form of judicial dissent is especially concerning given the author was a participant in, and bore witness to, the procedure and standards followed by a Court or Chamber.[101]

Thus the rhetoric of dissent is itself a mechanism of transparency. Legal vernacular obscures the nature and significance of disagreement and criticism from the

[101] See Chapter 2, Section 4.5.2.

understanding of the non-legal-elite,[102] thereby excluding them from the process of scrutinising the legitimacy of the exercise of institutional judicial power. By contrast, the rhetoric of dissent – the use of plain and robust language – empowers participation in the process of holding to account the exercise of institutional authority and ensuring that it is in conformity with those judicial attributes and procedures that that can be assumed or taken for granted.[103] Thus, as Lani Guinier has observed in reference to dissent by US Supreme Court judges, judicial dissent constitutes a 'portal by which the previously excluded can enter, engage with, and destabilize dominant (or majority) legal discourse'.[104]

4 Purposes of Dissent

Having explained what judicial dissent is and how it undermines judicial authority, this section will explain two different functions that dissent serves. Whereas the tradition of dissent was developed within the Peace Palace paradigm of international justice, dissent is especially important in the context of contemporary international justice – particularly within the context of international criminal justice, but also in the context of the ICJ as it is asked to address a more diverse range of social and political disputes. As with additional opinions in general, the utility of dissent lies in both instances in its capacity to determine the legitimacy of the exercise of institutional judicial power, and thus its authority. However, by speaking directly to actors outside the legal elite, judicial dissent not only operates to assist the appraisal of the degree of authority claimed by the institution, but also the degree of authority attributed to the institution by those external actors. It further can have a

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[102] For a robust critique of the exclusionary effect of the 'inaccessibility and absurdity' of legal language within the English legal system, see D. Pannick, *Judges* (OUP 1987) at 147-168. Like Pannick, Simon Lee has also referred to the intentional adoption of 'convoluted language in order to maintain a 'mystique' about the law and legal and judicial authority. See Pannick at 141-168 and S. Lee, *Judging Judges* (Faber and Faber 1988) at 45.

[103] On the need to communicate with non-legal audiences, see the Separate Opinion of Judge Kooijmans in *Armed Activities* discussed in Chapter 3, at Section 4.3.1. An example *par excellence* of an ICJ judge using plain language to speak directly to non-legal audiences when engaging in judicial dissent can be found in Judge Simma's Separate Opinion in the same case. Continuing in his criticism of the Court's refusal to characterise Uganda's use of force against the territory of the DRC as aggression, he stated

> After all, Uganda invaded part of the territory of the DRC of the size of Germany and kept it under its own control, or that of the various Congolese warlord it befriended, for several years, helping itself to the immense natural riches of these tormented region… So, why not call a spade a spade? If there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC. Compared to its scale and impact, the military adventures the Court had to deal with in earlier cases, as in *Corfu Channel, Military and Paramilitary Activities in and Against Nicaragua,* or *Oil Platforms,* border on the insignificant.

Armed Activities, n.50 at para.3.

[104] L. Guinier, 'Demosprudence Through Dissent' (2008) 122 *HLR* 4 at 26.

prospective orientation, constituting a stimulus for the enhancement of deliberations and decision-making, thereby strengthening the legitimacy of the manner in which the institutions of international justice exercise their power.

The following sections will explain why judicial dissent is necessary and how dissent operates to strengthen the legitimacy of the exercise of institutional judicial power. The first context within which judicial dissent can operate is in its moderation of the extent to which judicial authority can been claimed by external actors as validating their political positions. This may be in terms of the advancement of particular historical or political narratives – particularly associated with (but not limited to)[105] the findings of fact made by international criminal courts and tribunals – or it may be in the advancement of particular normative positions and the development of international law. From this perspective, judicial dissent moderates the degree to which judicial authority can be used by external actors in order to advance their political interests. This is important from the perspective of the advancement of the project of international justice by the judicial institutions concerned. This is not to say that (international) law and the project of international justice is apolitical. Rather, it has its own politics – which may, at times, align to differing degrees with the politics of other institutions and actors. The legitimacy of both the project of international justice and its institutions lie in their distinction (both in practice and appearance) from politics and the political interests of *particular* groups or actors. This independence and impartiality is the cornerstone of judicial legitimacy. Because of dissent's potential to engage the non-legal actors due to the manner and mode of expression often deployed, judicial dissent is a particularly powerful way in which individual judges can attempt to directly influence the use or abuse of judicial authority by those non-legal actors.

The second function of judicial dissent relies upon the transparency it provides. Critics of judicial dissent have observed that dissent can reveal, or suggest, that judicial disagreement arose out of personal animosity or other non-juridical

[105] Recourse to the contentious jurisdiction of the ICJ by States is often motivated by political considerations, including the desire to promote certain historical or political narratives. For example, mirroring proceedings before international criminal courts and tribunals, proceedings before the ICJ in the *Genocide Convention* case between Croatia and Serbia may have entrenched claims of collective victimhood and collective responsibility supporting the nationalist claims of political actors within the respective States.

factors.[106] By revealing structural dysfunction, judicial dissent is one step towards enhancing the quality of deliberations within the internal deliberative sphere, and thereby strengthening the legitimacy of the exercise of institutional judicial power in the form of decisions. Focusing upon the ICC, sub-section 4.2 will illustrate how dissent can be an appeal to external audiences, and the manner in which it can – if engaged with – have a constructive potential.

4.1 Dissent as Constraint upon the Use of Judicial Authority by External Actors

On one hand, it might be asked whether as a matter of practice it is necessary or appropriate to call for greater controls – and potentially limitations – upon the effective deployment of institutional authority. After all, all international courts and tribunals – and even international law more generally – are dogged by questions over their ability to effectively assert their authority within an international system still structured around the primacy of States.[107] Their reliance upon cooperation and financing by States to function and upon States to comply and enforce their decisions in the absence of enforcement mechanisms makes international courts and tribunals vulnerable to the shifting sands of geopolitics.[108] In view of the challenging environment within which international courts and tribunals operate, it might be argued that priority should be placed not upon measures that constrain the effective deployment of institutional authority, but rather upon reflecting upon how the effectiveness of the deployment of institutional authority can be maximised. Indeed, this concern is evident in many of those arguments in favour of restricting the entitlement of judges to issue additional opinions premised upon the fragility of international judicial authority.[109] While these effectiveness questions can be can be characterised as 'empirical issues', the need to identify institutionalised mechanisms of constraint and accountability derive from the range of normative issues that are

[106] N. Jørgensen and A. Zahar, 'Deliberation, Dissent, Judgment' in G. Sluiter et al (Eds) *International Criminal Procedure: Principles and Rules* (OUP 2013) at 1187.

[107] M. Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *CKLR* 329 at 330.

[108] Ibid. G. Ulfstein, 'International Courts and Judges: Independence, Interaction and Legitimacy' (2014) 46 *NYUJILP* 849.

[109] See Chapter 3 at Section 4.3.1 and Chapter 4 at Section 5.2.2 for examples.

presented by the proliferation of international courts and tribunals and which underpin the project to international justice.[110]

Traditionally, when the function of adjudication was confined to dispute settlement, the basis for the legitimacy of the exercise of judicial power lay in the consent of the parties to the dispute. In light of the additional functions attributed to the exercise of institutional judicial power, the traditional legitimatory criteria for the exercise of judicial power need to be evaluated. Domestic courts that engage in governance functions derive their authority from the broader system of government of which they comprise and their legitimacy is dependent upon the acceptance of the legitimacy of the system of government.[111] But, when international judicial institutions *can* and *do* exercise their power notwithstanding the challenges that they face, the source of legitimacy of that power when engaging in these expanded functions is more contested.[112] In such a decentralised and horizontally structured system of political and legal authority as that in the international sphere,[113] Stephen Wheatley has observed, for example, that 'the lawmaking activities of international courts and tribunals are a particular source of concern in relation to the democratic deficit in international law'.[114] At a more fundamental level, referring to the function of the courts and tribunals to advance the policy goals underpinning the establishment of the institution in question, it has been noted by others that to 'the extent that international adjudication supports legal norms and political institutions that are associated in the eyes of important constituencies with controversial or ideological projects such as imperialism, colonialism, capitalism and other -isms, their legitimacy is likely to be challenged'.[115]

Beyond dispute settlement and law clarification and development, the proceedings and judgments of international courts and tribunals have wider social and political implications, intended or otherwise. From a historiographical perspective, the

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[110] Ulfstein (2014) n.108.

[111] C. Romano, K. Alter, and Y. Shany 'Mapping International Adjudicative Bodies, the Issues, the Players' in C. Romano, K. Alter, and Y. Shany (Eds) *The Oxford Handbook of International Adjudication* (OUP 2014) at 16.

[112] S. Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) at 159-161; A. von Bogdandy and I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification (2012) 23 *EJIL* 7.

[113] S. Wheatley (2010) n.112 at 180.

[114] Ibid. at 161.

[115] Romano, Alter and Shany (2014) n.111 at 16.

determinations of fact made by international criminal courts and tribunals are perceived to contribute to the development and consolidation of an authoritative historical record of the violence or conflict in the course of which the international crimes were committed.[116] While the appropriateness of the judicial forum to 'write history' has been called into doubt by both courts,[117] and scholars,[118] actors *do* look to the judicial process to give meaning to historical events.

The post-WWII tribunals are commonly criticised on the basis that they constituted examples of 'victor's justice',[119] the effect being to simultaneously legitimise the victors and to delegitimise the vanquished.[120] Similar charges can be levelled against the international criminal courts and tribunals where they have indicted and prosecuted individuals from only one side of the conflict.[121] The failure of the ICTR to indict members of the Rwandan Patriotic Front for crimes committed against Hutus, the fact that the ICTY's conviction rate of Serbs has far exceeded that of members of other ethnic groups involved in the violence in the former Yugoslavia and that the Tribunal declined to investigate the actions of NATO forces involved in the bombing campaigns against the former Yugoslavia, have been used to consolidate particular collective narratives of moral and political victimhood and war guilt.[122]

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[116] Damaška (2008) n.107 at 336; G. Simpson, 'Didactic and Dissident Histories in War Crimes Trials' (1997) 60 *ALR* 801 at 624-626.

[117] The ICTY Trial Chamber has described such a function as an 'exercise in futility'. See *Delalić et al.* Judgment (Trial Chamber) 16/11/1998 (IT-96-21-T) at para.89.

[118] W. Ashby-Wilson, *Writing History in International Criminal Trials* (CUP 2011); Damaška (2008) n.107 at 336.

[119] R. Minear, *Victor's Justice: The Tokyo War Crimes Trials* (PUP 1971); W. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (OUP 2012) at 73; D. Luban, 'The Legacies of Nuremberg' in G. Mettraux (Ed) *Perspectives on the Nuremberg Trial* (OUP 2008) at 659-661.

[120] G. Simpson, 'War Crimes: A Critical Introduction', in T. McCormack and G. Simpson, *The Law of War Crimes: National and International Approaches* (MN 1997) 1, at 23-24 at 27. See Shklar (1964) n.10 at 149 defining political trials (as which she characterised the Nuremberg and Tokyo Tribunals) as 'a trial in which the prosecuting party, usually the regime in power aided by a cooperative judiciary tries to eliminate its political enemies. It pursues a very specific policy – the destruction, or at least the disgrace and disrepute, of a political opponent.'

[121] V. Peskin, 'Beyond Victors' Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005) 4 *JHR* 213; G. Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Law* (Polity 2007) at 17.

[122] In this regard, the acquittal of Gotovina and Markač by the Appeals Chamber of the ICTY, the only two Croatian generals to be indicted by the ICTY, was widely seen in Croatia as validating Croatia's military activities during the course of the conflict, and in particular, Operation Storm. By contrast, in Serbia the acquittal was met with outrage — whereas the judgment reinforced Croatian perceptions of victimhood during the conflicts in the former Yugoslavia — for Serbs it reinforced subsequent Serbian victimhood by the ICTY and the wider international community backing it. For discussion of this – and possible implications of the *Gotovina* dissents discussed in Section 2.2 – see H. Mistry, 'The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice' (2015) 13 *JICJ* 449.

More generally, as Karen Alter has explained, through their jurisprudence – whether contentious or advisory – international courts and tribunals influence political outcomes by

> 'empower[ing] those actors who have international law on their side, increasing their out of court leverage. [International courts and tribunals] then alter political outcomes by giving symbolic, legal, and political resources to compliance constituencies, ever-changing groups of actors that for a variety of reasons may prefer policies that cohere with international law'.[123]

On this basis, Alter recognises international judges as being not only legal actors but also political actors. By acknowledging how judicial pronouncements can also empower other political actors (for example, by lending support to particular historical narratives or by delegitimising political opponents) writers such as Alter also acknowledge the political power of international judges.

As argued elsewhere,[124] judicial dissent on findings of fact highlight the limitations of the authority of judicial decisions on the criminal responsibility of an individual accused for specifically charged crimes for the purposes of constructing a wider historical narrative of the context in which those crimes occurred. Judicial dissent cannot cure perceptions of bias generated by selectivity in the prosecutorial strategy adopted by the prosecutorial organs of the courts and tribunals in question. However, the presence of dissent – where it occurs – can limit the effectiveness by which any given actor can claim that the institutional authority vested in the Court or Chamber's decision validates their particular version of the factual narrative of the conflict in question.[125]

This dynamic is not limited to the institutions of international criminal justice. The revival in the enthusiasm for a rule of law based international order after the end of

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[123] K. Alter, *The New Terrain of International Law* (PUP 2014) at 19.

[124] Mistry (2015) n.122.

[125] For example, it has been argued that whereas the legacy of the Nuremberg trial is relatively simple in its casting of the evils of Nazism, the legacy of the Tokyo Tribunal, largely due to the existence and substance of the additional opinions attached thereto, is much more ambiguous. Consequently, taken together, the Tokyo judgment and its additional opinions paint a more comprehensive – albeit more complicated – picture of the period of Japanese Imperial expansionism and the Pacific arena of the Second World War. See N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (OUP 2008) at 324. See also for discussion of the 'dissident narrative' to the Tokyo Tribunal's judgment provided by Justice Pal's dissenting opinion, see Mistry (2015) n.122 at 459-460.

the Cold War did not simply result in institution building by international political actors. States and international bodies sought to engage the existing 'old style' ICJ in their efforts to address long-standing and difficult political disputes in view of the failure of diplomatic or other means. This saw requests by the UN General Assembly for advisory opinions on such contested and controversial matters as the legality of the threat or use of nuclear weapons,[126] the legal consequences of the Israeli wall in the Occupied Palestinian Territories,[127] and the legality of the unilateral declaration of independence by Kosovo.[128]

To take one example, from which the example of judicial dissent by Judge Schwebel was drawn in Section 2.2,[129] the *Nuclear Weapons* advisory proceedings of the ICJ provide a clear illustration of Alter's conception of how international law influences political outcomes and thereby contributing global governance, namely by empowering those who claim to have the law on its side by providing them with out of court leverage.[130] By mobilising the membership of UN General Assembly to make a request to the Court for an advisory opinion, it was hoped that the resulting opinion would strengthen 'both governmental and civic anti-nuclear pressures'.[131] The request was devised and promoted by a coalition of (non-nuclear) States and NGOs 'who's entire purpose was to achieve a political objective'.[132]

While the numerous examples of judicial dissent found within the 14 additional opinions attached to the Court's *Nuclear Weapons* advisory opinion diluted the authority of the Court's opinion,[133] was that dilution desirable? One of the most common grounds for judicial dissent was the Court's *non liquet* – the subject of

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[126] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* [1996] ICJ Rep 66, *Legality of the Threat or Use of Nuclear Weapons Nuclear Weapons* n.48.

[127] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136.

[128] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* [2010] ICJ Rep 403.

[129] *Legality of the Threat or Use of Nuclear Weapons Nuclear Weapons* n.48.

[130] Alter (2014) n.123.

[131] R. Falk, 'The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society' (1997) 7 *TLCP* 333 at 343.

[132] M. Matheson, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons' (1997) 91 *AJIL* 417 at 420.

[133] Even those judges who voted in favour of all the dispositive paragraphs used their additional opinions to express their dissatisfaction with it. See, for example, Judge Ferrari Bravo explaining his deep dissatisfaction and describing the Court's Opinion as 'not very courageous' (Declaration of Judge Ferrari Bravo at 282) and Judge Herczegh describing the Court's Opinion as being 'burdened with uncertainty and reluctance' (Declaration of Judge Herczegh, at 275). Other judges, dissatisfied with the Court's Opinion lay the blame not upon the Court itself, but rather upon the law it applied (see Declaration of Judge Vereshchetin at 280 and Separate Opinion of Judge Guillaume at 1).

Judge Schwebel's dissent discussed previously.[134] Yet, had the Court arrived at a less equivocal conclusion, its opinion would have provided much stronger leverage to political actors who's positions the Court's opinion validated as a matter of law.[135] The following will explain why, due to the judicial dissent and the additional opinions supplementing the Court's opinion, the Court's controversial conclusion did not in fact undermine its legitimacy.

Martti Koskeniemmi has described the international law-making as a process of consensus-building, that is, 'a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or 'neutral position'.[136] On this view, he explained that there is no objective centre or neutral point independent of political arguments, but rather that the centre-ground is actually an ever-contested 'terrain of irreducible adversity'.[137] All law, he claimed, 'is about lifting idiosyncratic ("subjective") interests and preferences from the realm of the special to that of the general ("objective") in which they lose their particular, political colouring and come to seem natural, necessary or even pragmatic'.[138] Those positions that challenge the consensus, that is dissenting positions, are marginalised.[139] This understanding of consensus forming and law-making may be applied to the analysis of decision-making and judgment forming, additional opinions and judicial dissent.

As the Court's dispositive paragraphs and the additional opinions in *Nuclear Weapons* demonstrated the process of contestation (to borrow Koskeniemmi's terminology) or deliberation (to use the language consistent with this thesis) within the Court failed to reach a consensus, with the principal question determined on the basis of the President's casting vote. In the absence of an emergence of a middle ground whereupon the law could be identified, for the Court to have bestowed upon

[134] See Section 2.2. In this regard, see also Judge Higgins' criticism of the Court's *non liquet* conclusion, describing it as an 'unwelcome formula '[that] ignores 65 years of proud judicial history' (Dissenting Opinion of Judge Higgins, at para.39) and Judge Oda's description of the conclusion as contrary to the requirements of judicial propriety, explaining that 'the elementary or equivocal conclusions reached by the Court in the present Opinion do not constitute a real response to the request and I am afraid that this unimpressive result may cause some damage to the Court's credibility' (Dissenting Opinion of Judge Oda at 372). Both Judges Koroma and Higgins suggested that in arriving at this conclusion, the Court failed to discharge the functions allocated to it by international society (Dissenting Opinion of Judge Koroma at 335 and Dissenting Opinion of Judge Higgins at para.40).

[135] Alter (2014) n.123.

[136] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (rev. ed. CUP 2006) at 597.

[137] Ibid.

[138] Ibid.

[139] Ibid.

one particular political position the additional leverage by way of having the opinion of the Court 'on its side', would have resulted in a politicisation of the Court in a manner inconsistent with the nature of judicial authority. Instead, the strength of judicial dissent accompanying the package of additional opinions alongside the Court's opinion counteracted the assumed authority of the Court's opinion, indicating that the process of contestation was still open and the outcome undecided. Rather than privileging one side in that contest, the Court through its advisory opinion and the accompanying additional opinions contributed to that ongoing process of contestation in a more even-handed manner by equipping the those actors accepted as legitimate lawmakers on either side of the contest with juridical arguments supporting their positions. In this case, judicial dissent served less as a means by which the authority of the Court is restricted, but as a restraint upon how the authority of the Court can be used by other political actors.

The qualification upon the absolute authority of international courts and tribunals provided by judicial dissent specifically (and additional opinions generally) – whether that be in the context of the ICJ or the international criminal courts and tribunals – from the perspective of providing out of court leverage to other political actors, is essential if the attributes of judicial authority are considered. On one hand, the fact that judicial decisions are perceived by political actors to afford them out of court leverage – whether that is in regard to law-making or history-writing – is indicative of the legitimacy of judicial institutions and judicial decision-making, and thus institutional authority. In this regard, to be seen as being in compliance with international law, or having international law 'on side' is seen as a legitimating factor for other actors – whether that be States or non-State actors. From the perspective of the project of international justice, the objective of which is to advance a rules-based international order,[140] this suggests some degree of success. The fact that political interests might motivate a State to make recourse to international adjudication or to cooperate with international criminal courts and tribunals, and the fact that a judicial pronouncement may have the effect of lending support to the political positions of one actor or groups of actors, should not prevent a court or

[140] See Chapter 2, Section 2.

tribunal from issuing conclusive decisions.[141] But where internal deliberations within the institution have failed to arrive at a conclusive decision, it is important for the institution (whether that be in its decision or whether that be by individual judges in their additional opinions) to acknowledge and indicate the where the limits of the authority of its decision lie. As emphasised throughout this thesis, the foundations of judicial legitimacy – both individual and institutional – lie in both the actual and the perceived independence and impartiality of judges and judicial institutions. Therefore, in order to preserve their legitimacy founded upon that impartiality and independence, international courts and tribunals and the individual international judges who comprise those institutions, cannot be blind to how the decisions and opinions may be used by other political actors once those decisions have been rendered. In this regard, the principal value of judicial dissent is its capacity to communicate more effectively with the wider range of non-legal audiences, those who may seek to use the court or tribunals decision (or an individual judge's additional opinion) to support their wider political claims. While the focus of this section has been upon judicial dissent in the context of the ICJ, it is worthwhile here to reflect upon views expressed by a judge in the context of the ICC. In view of the scepticism regarding the institutional independence and impartiality of international courts and tribunals, judicial dissent as the expression of the individual independence of the judges demonstrates to the wider public and those suspicious of the integrity of the judicial process that international judges are will and able to hold each other to account for the exercise of the institutional authority of the court or tribunal. According to one ICC judge, for such a young institution as the ICC, 'it is very good for the institution if we can show that in a particular opinion there was [a strong difference in opinion]'.[142] The judge went on to suggest that in a particular case had there 'have been a unanimous opinion, to those critical of the Court, it

[141] In this regard, it is worth considering Judge Kooijmans' observation in *Wall*, where he stated that the risk of politicising the Court would not have been neutralised had the Court refused to provide an Opinion. He continued to explain:

> [o]nce the decision to do so [that is, to make the request] had been taken, the Court was made an actor on the political stage regardless of whether it would or would not give an Opinion…Only by limiting itself strictly to the judicial function is the Court able to minimize the risk that its credibility in upholding the respect for the rule of law is affected.

Wall n.127, Separate Opinion of Judge Kooijmans at para.21.

[142] Interview #06 n.90. Details of the precise nature of the disagreement referred to by the Judge removed to preserve the identity of the judge.

would have been much worse for the Court', as it would have been used to support allegations of the institutional bias of the Court.[143]

This section has discussed the value of judicial dissent in view of the political implications of judicial decisions once issued. The following section will return to the theme recurring throughout this thesis and that is of institutional design. It will explain why, in view of a structural shortfall in accountability mechanisms for the exercise of institutional power, judicial dissent is a necessary mechanism to highlight institutional dysfunction that may be affecting the quality of deliberations within the internal sphere and thus the legitimacy of its decision-making. However, in this regard, for judicial dissent to be effective and to have the constructive effect of contributing to the improvement of deliberations and decision-making in future cases, dissent (and dissenting judges) rely upon the engagement with that practice by those in the external spheres – whether that be within the Court or beyond.

4.2 Dissent as Constructive Oversight

Hierarchically organised systems of justice, where there is a greater stratification of authority, provide an array of institutionalised mechanisms of oversight and discipline designed to ensure accountability in the exercise of judicial power.[144] By contrast, coordinately organised systems – such as those considered in this thesis, which are organised horizontally and lack a clear hierarchy of authority – have few formal and institutionalised mechanisms of oversight and discipline.[145] Within hierarchically structured systems, such mechanisms might have included, for example, the prospect of career progression contingent upon performance.[146] By contrast, judges appointed to international courts and tribunals have reached the pinnacle of career progression as international judges, with little prospect of further 'promotion'.[147]

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[143] Ibid.

[144] See Chapter 2, Section 5.1.

[145] See Chapter 2, Section 5.2.

[146] See Chapter 2 at Section 5.1.4.

[147] Although within the ICJ, there is an established system of seniority among the judges, which is reinforced throughout the deliberative process. Moreover, because in the vast majority of cases, the ICJ exercises its institutional authority in a plenary configuration, the individual power of any individual judge within the internal deliberative context is considerably more diluted than at the *ad hoc* Tribunals, where decision-making is by Chambers. See Chapter 3, Section 2.2, and Chapter 4, Section 2.2.

One mechanism designed to provide stability in judicial decision-making within coordinate systems of justice is the body of legal officers and advisers that work to support judges.[148] However, while there is an extensive structure of legal support within all the tribunals, the prospects of them serving as an effective mechanism of stability and control is weak. At the ICJ, judicial clerks have limited, non-renewable terms of office with no chance for career progression, while at the ICC it has been noted that the organisational structure of the legal support staff is also very 'flat' with few opportunities for internal career progression.[149] Whereas there is greater hierarchy and supervision within the legal team at the ICTY,[150] the legal advisors at the ICC are more directly under the supervision of the judge(s) to which they are assigned.[151] When, as was explained in Chapter 4, decision-making by ICC Chambers is so heavily determined by the composition of the particular Chamber in question and the relative power of individual judges to assert their views within the internal deliberative sphere,[152] this can give individual legal officers considerable power depending upon the judge to which they are assigned. This is even more so if account is taken of the diversity of professional backgrounds of the judges,[153] where some might rely more heavily on their legal officers than others.

This is not to question the legitimacy of legal officers and assistants in the context of international justice, but rather to explain why – unlike in other coordinately systems of justice – they may not provide the kind of stabilising or controlling influence upon judicial decision-making from a systemic perspective that might be expected. Moreover, the need to insulate the international judiciary from the interference or influence of outside actors properly limits the possibilities of external mechanisms of oversight or discipline.[154] This is in view of the risk that such mechanisms could impair the independence of the judiciary and call into question the capacity of judges

[148] See Chapter 2, Section 5.2.1.

[149] Interview #03 n.30.

[150] Ibid. Interview #07 n.91.

[151] Ibid.

[152] Chapter 4, Section 2.2.

[153] Chapter 4, Section 2.2.1.

[154] M. Bohlander, 'Separation of Powers and the International Judiciary – A vision of Institutional Judicial Independence in International Law' in S. Shetreet and C. Forsyth (Eds) *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (MN 2011). Contrast E. Posner and J. Yoo, 'Judicial Independence in International Tribunals' (2005) 93 *CaLR* 1 with L. Helfer and A-M. Slaughter, 'Why States Create International Tribunals: A Response to Professors Posner and Yoo' (2005) 93 *CaLR* 901 and the response E. Posner and J. Yoo, 'Reply to Helfer and Slaughter' (2005) 93 *CaLR* 957.

– acting collectively on behalf of the institution and individually – to decide cases impartially. Taken together with the lay background of judges and the comparatively flat distribution of authority with, at best, only one level of superior review, the degree of institutional oversight over the exercise of institutional judicial power is weak.[155] It means – consistent with the coordinate idealtype of authority – the sole source of institutional accountability is individual decision-makers themselves; they are accountable to their own personal sense of integrity and conscience as well as concerns for their individual authority and are also responsible for holding each other to account.

Turning to judicial dissent as an instrument of oversight, there are different ways in which this can operate. First, it can have a prophylactic effect. Here, the earliest rationales for additional opinions in the context of PCIJ might be recalled, namely that they operate as a 'guarantee against any subconscious intrusion of political considerations'.[156] The extraordinariness of judicial dissent in comparison to the ordinariness of additional opinions – both in terms of the nature of the allegations and the potential reach of dissent in terms of the audiences attracted – means that the threat of dissent is more compelling than the threat of a 'mere' additional opinion. The willingness of judges to deploy dissent despite the risk it poses to both individual and institutional judicial authority in order to express allegations as grave as those made by, for example, Judges Pocar and Hunt at the ICTY,[157] or Judge Schwebel at the ICJ,[158] put chambers or courts on notice of the risk of disclosure of any intentional or unintentional impropriety.

The following sections will identify further systemic functions of judicial dissent. Both of these emphasise dissent's characteristic as a mechanism of transparency. As such, in both of these contexts, the engagement in judicial dissent by a judge is only one step in a wider process engaging outside actors. Dissent simply reveals the problem. In order for dissent to be effective, it relies upon audiences of dissent to constructively engage with that practice.

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[155] Chapter 4, Section 2.2.

[156] Committee of Jurists on the Statute of the Permanent Court of International Justice ('PCIJ Committee of Jurists'), *Minutes* (May 1929) at 52.

[157] See Section 2.2.

[158] Section 2.2 and Section 4.1.

4.3 Judicial Dissent as Revealing Structural Dysfunction at the ICC

Chapter 4, Section 5.2.4 explained the often fundamental and insurmountable differences between judges at the international criminal courts and tribunals by reason of the diversity of the cultural and professional backgrounds of judges. Drawing heavily upon the conversations with judges and legal officials within the Court, this section will explain how and why these differences manifest themselves in highly critical and combative dissent. Before exploring the reasons for dissent, first two examples of particularly robust instances of judicial dissent will be provided. The first can be found in Judge van den Wyngaert's dissenting opinion in the Trial Chamber judgment in *Katanga*,[159] and the second in the joint dissenting opinion of Judges Tarfusser and Trendafilova in *Ngudjolo Chui.*[160]

Judge van den Wyngaert, describing her disagreement with the Chamber as a 'complete dissent',[161] accused the Chamber in robust language of what she characterised as the unfair and *ultra vires* exercise of judicial power.[162] She concluded that what she perceived to be a litany of defects in the Chamber's handling of the case culminated to present 'a case of overwhelming strength against the legality and legitimacy of this judgment'.[163] At the heart of disagreement between the majority and the minority were two very different conceptions of the judicial function, which in turn informed the interpretation of the authority of the Chamber pursuant to those functions. The majority invoked Regulation 55 of the Regulations of the Court in order to recharacterise the modes of liability from those charged by the Prosecutor and confirmed by the Pre-Trial Chamber *after* the conclusion of the trial. Having done so, the majority proceeded to find the accused guilty of one count of crimes against humanity and four counts of war crimes as an accessory, acquitting him of all other charges.[164] The majority – Judges Cotte and Diarra – joined the Court after extensive judicial careers within inquisitorial criminal legal systems where the recharacterisation of charges by judges during the course of

[159] *Prosecutor v Katanga*, 'Jugement Rendu en Application de l'Article 74 du Statut' (Trial Chamber II) 08/03/2014 (ICC-01/04-01/07-3436-AnxI), Dissenting Opinion of Judge van den Wyngaert.

[160] *Prosecutor v Ngudjolo Chui*, 'Judgment on the Prosecutor's Appeal Against the Decision of Trial Chamber II Entitled "Judgment Pursuant to Article 74 of the Statute' (Appeals Chamber) 27/02/2015 (ICC-01/04-02/12-271-AnxA) Joint Dissenting Opinion of Judges Trendafilova and Tarfusser.

[161] Dissenting Opinion of Judge van den Wyngaert n.159 at para.7.

[162] Ibid. at paras.16-49.

[163] Ibid. at para.15.

[164] *Katanga* n.159.

criminal proceedings is an uncontroversial and well-established practice. Accordingly, for them, the use of Regulation 55 in order to prevent the collapse of the case was well within the authority of the Chamber. However, Judge van den Wyngaert (also coming from a national legal background of the civil law tradition) considered that the Chamber did not have the authority to recharacterise the charges and to do so in the manner it did. Consequently, she characterised the effects of the majority's invocation of Article 55 as being to violate fundamental rights of the accused, and thus was beyond the authority of the Chamber.[165] Put simply, as one interviewee described Judge van den Wyngaert's dissent, 'she was accusing her colleagues of not behaving as judges … she was saying "you are acting as a prosecutor"'.[166]

Judges Tarfusser and Trendafilova's joint dissenting opinion similarly stemmed out of fundamentally opposing conceptions of the judicial function and the authority possessed by the Chamber pursuant to the fulfilment of that function. The judges dissented from the Appeal Chamber's judgment confirming the acquittal of *Ngudjolo Chui* of all charges against him by Trial Chamber II.[167] Whereas in the previous example it was judges in the majority who bore the more expansive conception of the judicial function familiar to inquisitorial systems, in *Ngudjolo* it was the minority who bore this conception. For the majority, the Trial Chamber's decision to acquit the accused was not materially affected by errors of fact, law or procedure which – if found – would have given rise to the relief by way of either reversal of the decision or the ordering of a new trial under a differently composed Trial Chamber.[168]

The dissenting judges opened their dissent by explaining how they felt 'judicially compelled to dissent' by reason of what they perceived as the failure of the Chamber's judgment 'to properly address questions at issue in the current appeal which are of fundamental importance for the case at hand, as well as for the

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[165] From a substantive perspective, Judge van den Wyngaert's additional opinions on the Regulation 55 issue are one of the principal authorities informing the academic debate as to the legitimate scope of the power granted to judges under Regulation 55. For example, see K. Heller, '"A Stick to Hit the Accused With": The Legal Recharacterisation of Facts Under Regulation 55' in C. Stahn (Ed) *The Law and Practice of the International Criminal Court* (OUP 2015) at 981 *et seq*. Note here, the use by the article's author of the phrase used by Judge van den Wyngaert to describe Regulation 55 as used by the Trial Chamber from which she dissented, in the article's title ('A Stick to Hit the Accused With'). See *Prosecutor v Katanga,* 'Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Persons' (Trial Chamber II) 21/11/ 2012 (ICC-01/04-01/07-3319) Dissenting Opinion of Judge van den Wyngaert at para.8.

[166] Interview #03 n.30

[167] *Ngudjolo Chui*, n.160, Joint Dissenting Opinion of Judges Trendafilova and Tarfusser.

[168] Article 83(2) ICC Statute.

jurisprudence of [the Court]'.[169] Explaining their view that 'the proper resolution of these questions ... shall affect the Court's operation for the years to come', they went on to explain their disagreement with the Chamber's rejection of all three grounds of appeal. Their objections related, first, to what they considered was the Appeals Chamber's acceptance of the 'passive' role played by the Trial Chamber in managing the case,[170] which they concluded was an 'abdicat[ion of] its paramount responsibility to properly manage the conduct of trial proceedings and ensure their fairness'.[171] The basis of their 'active' understanding of the judicial function was Article 64(2) of the Statute which governs the authority of the Chamber to ensure the proper conduct of proceedings, and the 'core judicial duty to establish the truth'.[172] Like Judge van den Wyngaert in *Katanga*, they expressed concern that the majority's approach violated the right to a fair trial. However, whereas Judge van den Wyngaert was concerned with the fair trial rights of *the accused*, Judges Tarfusser and Trendafilova were concerned here with the fair trial rights of the *prosecutor*.[173]

Their second objection focused upon the manner in which evidence was handled by the Trial Chamber, and endorsed by the Appeals Chamber. The 'unduly passive [approach of the Trial Chamber] throughout the evidence-gathering process', was in their view compounded by a flawed methodology for the assessment of individual pieces of evidence.[174] Rather than treating the body of evidence as a whole and assessing the credibility of each piece of evidence in view of the whole, the piece by piece evaluation of evidence undermined the ability of the Trial Chamber to pursue the truth.[175] On this point, they concluded that 'a fragmentary approach towards the evaluation of evidence and speculations on its substance create highly alarming precedents in international criminal law capable of compromising the integrity of the proceedings and undermine the perception of the victims and the public that justice is being delivered'.[176]

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[169] *Ngudjolo Chui*, n.160, Joint Dissenting Opinion of Judges Trendafilova and Tarfusser at para.1.
[170] Ibid. at para.30
[171] Ibid. at para.69.
[172] Ibid. at para.5.
[173] Ibid. at para.6.
[174] Ibid. at para.31-32.
[175] Ibid.
[176] Ibid. at para.69.

Accordingly, once an attempt is made to understand the source of this judicial dissent – that is, the fundamental differences in the conception of the judicial function in criminal proceedings – it is clear why there is disagreement between judges. However, given the apparent clarity of the source of disagreement between judges, this begs a further question: why, if the source of disagreement is so clear, do judicial deliberations become 'a dialogue of deaf people', as described by one interview participant?[177]

One reason is the inherent ambiguity in the legal instruments – or the compromises required in order to secure the adoption of the Rome Statute – which means that there is support for all positions within the Statute.[178] The interviews conducted for this research identified a second cause for the apparent insurmountability of the disagreements of the kind underpinning the examples of judicial dissent provided. The conversations that took place during the course of these interviews and upon which the following analysis is based concerned the institutional culture within the ICC *in general*. Reference was on occasion made to the aforementioned examples by way of illustration during the course of these interviews. However, the focus of the interviews was much broader than judicial practice within these two specific cases, and was aimed at developing an understanding of an institutional culture wherein disagreement and dissent such as those illustrated above could arise.

The interviews suggest that the reason why deliberations within the ICC have, to date, failed to transcend the diversity of conceptions of the judicial function in criminal proceedings is because there is a weak, or perhaps absence of an, institutional culture of collegiality.[179] Judicial collegiality consists of:

> Judges hav[ing] a common interest, as members of the judiciary, in getting the law right, and that, as a result [they] are willing to

[177] Interview #03 n.30.

[178] C. Kress, 'The Procedural Law of The International Criminal Court in Outline: An Anatomy of a Compromise' (2003) 1 *JICJ* 603 at 605.

[179] This is a more specific conception of the 'principle of collegiality' than that elaborated upon by Max Weber, which at its most general deprives any type of authority 'of its monocratic character'. Of the 13 variations of collegiality identified by Weber, judicial collegiality in the context of international justice falls within the category of 'functional collegiality', that is, where 'the acts of an authority which is not monocratic must be carried out only after previous consultation and vote. That is, their acts are subject to the rule that a plurality of individuals must cooperate for the act to be valid.' In such circumstances, as Weber noted, collegiality is a criterion for the legitimate exercise of power, and thus a pre-requisite for the exercise of that power to bear authority.
Weber (1978) n.82 at 272.

> listen, persuade, and be persuaded, all in an atmosphere of civility and respect. Collegiality is a *process* that helps to create the conditions for *principled* agreement, by allowing all points of view to be aired and considered.[180]

While the concept of collegiality has not been elaborated upon in the context of the ICC,[181] similar definitions of collegiality have been provided in the context of the ICJ. Former ICJ Judge Hardy Cross Dillard explained how the implications of the culture of collegiality at the ICJ is that the Court 'is not merely a handful of judges, but an institution, most of whose members are animated and sustained by common aims and a sense of pride and tradition'.[182] A further dimension to collegiality emphasises the responsibility of *all judges* of a court or chamber for the deliberations, decision-making and drafting of the court's decision, such that all judges – even those who issue additional opinions and may even engage in judicial dissent – bear collegial, or shared responsibility for the decision of the court or chamber.[183] Writing in the context of the ICJ, former ICJ judge Robert Jennings described the 'procedures and disciplines of collegiate responsibility' which he explained were in themselves key to preserving and promoting the authority of the institution and its decisions.[184] In the context of both domestic judicial systems and the ICJ, collegiality is identified as 'playing an important part in mitigating the role of partisan politics and personal ideology by allowing judges of differing perspectives and philosophies to communicate with, listen to, and ultimately influence one another in constructive

[180] H. Edwards, 'The Effects of Collegiality on Judicial Decision Making' (2003) 151 *UPLR* 1639 at 1645.

[181] Although individual judges have made reference to it (see *Prosecutor v Germain Katanga*, 'Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the Disqualification of Judge Christine van den Wyngaert from the Case The Prosecutor v Germain Katanga' (Decision of the Plenary) 22/07/2014 (ICC-01/04-01/07-3504-Anx), Concurring Separate Opinion of Judge Eboe-Osuji at para.60-62) and has been used in public statements by the ICC President when describing the 'collegial' nature of discussions between judges, see 'ICC Judges Agree on Measures to Improve Efficiency of Criminal Process' (Press Release) 22/06/2015 (ICC-CPI-20150622-PR1121).

[182] H. Dillard, 'The World Court: Reflections of a Professor Turned Judge' (1978) 27 *AULR* 205 at 216.

[183] See P. Robinson, 'The Interaction of Legal Systems in the Work of the International Criminal Tribunal for the Former Yugoslavia' (2009-2010) 16 *ILSAJICL* 5 at 8; *Prosector v Prlić,* 'Decision on Jadrenko Prlić's Consolidated Interlocutory Appeal against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence' (Appeals Chamber) 12/01/2009 (IT-04-74-AR73.13) at para.27; M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal* (OUP 2012) at 75-6; *South West Africa* n.28, Dissenting Opinion of Judge Jessup at 325 (footnote 1); R. Jennings, 'The Collegiate Responsibility and Authority of the International Court of Justice' in Y. Dinstein (Ed) *International Law in a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (MN 1989) at 344 *et seq.*

[184] Jennings (1989) n.183 at 341-353.

and law-abiding ways'.[185] Thus, collegiality lies at the heart of effective deliberations.[186]

The interviews conducted with ICC judges and legal officers revealed a number of reasons for the absence of a culture of collegiality within judicial chambers. The first reason is the diversity of professional backgrounds and experience among ICC judges. One ICC legal official compared the consequences of the political process of judicial appointment with senior judges within national systems.[187] In domestic systems, it was explained, all apex judges 'come from the same pot' giving rise to a minimum amount of mutual respect.[188] However, the lack of shared professional background and history of ICC judges means that judges can at times struggle to extend such respect to their colleagues.

Those judges with extensive judicial experience within national jurisdiction have developed throughout the course of their careers a particularly entrenched sense of the judicial function. Once at the ICC and confronted by colleagues from different judicial cultures with different conceptions of the judicial function, the expression of disagreement with one's professional viewpoints is often taken poorly.[189] One ICC official neatly described the sentiment among judges as 'you're telling me that I am stupid. You're telling me that what I have been doing during my 40 years in my country is not being a judge?'[190]

Sitting alongside these judges at the Court are those who have never been a judge or legal practitioner before in their career, but may have had long careers as academics or within the diplomatic service. Consequently, the expression of disagreement – even within internal deliberations – is taken particularly badly when it pitches a judge with no prior judicial experience against judges with extensive judicial careers.[191] While certainly many judges do extend professional respect and courtesy to their colleagues, there are those who find it difficult. One judge explained that 'I can accept the academic, but the diplomat – paaah [blows raspberry] I can't',

[185] Ibid. at 343-344; Edwards (2003) n.180; Dillard (1978) n.182.
[186] On the object and purpose of deliberations, see Chapter 2, Sections 4.1-4.3.
[187] Interview #03 n.30.
[188] Ibid.
[189] Interview #02 n.89, Interview #03 n.30, Interview #05 n.90, Interview #06 n.90.
[190] Interview #03 n.30.
[191] Interview #02 n.89, Interview #03 n.30, Interview #05 n.90.

referring to the judge's acceptance of the individual authority of academics and diplomats as judges and also the judge's ability to accept criticism from judges of those respective backgrounds.[192] Moreover, even as regards to criticism by judges with a judicial background, this particular judge (with experience of legal practice within a domestic criminal justice system) had difficulty accepting disagreement and criticism by judges with a background in international law on matters of criminal procedure, suggesting that judges should defer to each other depending on their respective areas of expertise.[193]

In addition to the lack of mutual respect among judges within the ICC, a second reason for the lack of collegiality within the Court identified in the course of interviews was a sensitivity to criticism by reason of the seniority of judges. Having served in or being qualified for highest judicial office within their national jurisdictions, some judges are unfamiliar with being challenged upon the correctness of their views and, worse still, having that disagreement aired in public in the form of additional opinions.[194] One judge explained that judges join the ICC 'in a very senior mood. When you are elected to this Court you are in the highest positions of your national systems … so judges arrive here with a perspective that they are right. And that they do not necessarily need to learn things from others'.[195]

To summarise so far, first, the source of judicial dissent was identified. That was the lack of common procedural culture and understanding of the judicial function in criminal proceedings. A consequence of this, as the illustrative dissents in *Katanga* and *Ngudjolo* demonstrate, is that judges accuse each other of acting in a manner inconsistent with their duties as judges. In turn, this prompted a further enquiry into why deliberations have failed to avoid disagreements and misunderstandings such as those that manifested themselves in the examples provided. The interviews conducted with both judges and legal officers with experience participating in those deliberations revealed a weak or absent institutional culture of collegiality with among the ICC judiciary. Without solving the problem of collegiality (or the lack thereof) deliberations at the ICC will continue to be unsuccessful in transcending the

[192] Interview #02 n.89.
[193] Ibid.
[194] Interview #02 n.89, Interview #03 n.30, Interview #06 n.90.
[195] Interview #06 n.90.

divergence of national procedural cultures and developing an institutional procedural culture. Currently, the challenge is circular: the lack of collegiality results, ultimately, in judicial dissent, but judicial dissent – that might simply be caused by misunderstanding as a result of ineffective communication – contributes to the further deterioration of collegiality. The picture painted in the foregoing section of disharmony is certainly not conducive to the development of a stable and predictable body of jurisprudence, stability and predictability being just two of the cornerstones of the rule of law and legal legitimacy. All ICC judges interviewed for this thesis suggested that judicial dissent over fundamental disagreements between judges can be seen as *an appeal* to the wider legal communities to contribute to the resolution of an impasse reached within the Court by 'triggering a discussion in the academia on the wider picture'.[196] Consequently, taking up this appeal, the following section will offer some suggestions that may provide a starting point for those discussions.

4.3.1 Collegiality at the ICC: Lessons from the ICJ?

In order to begin to address some of these challenges, the ICC might benefit looking to the more established judicial institutions such as the ICJ for ways in which to encourage the development a stronger culture of collegiality.[197] The development of an institutional culture is an organic process that will take time;[198] however, some lessons may be learned from the experience of other institutions as it does embark on that process. As the ICJ demonstrates, it is possible to reconcile a robust culture of expressing individual authority with a membership of judges from diverse professional and cultural backgrounds. As the following discussion explains, the suggestions offered are not without their own difficulties. However, they can provide a starting point for further reflection on this matter.

One mechanism by which to encourage the development of an institutional culture is for judges (or, rather former judges) to write or speak about their experiences on the Court extra-judicially.[199] For example, much of the secondary material on additional

[196] Interview #02 n.89, Interview #05 n.90 and Interview #06 n.90.

[197] E. Van Sliedregt, 'Introduction: Common Civility – International Criminal law as Cultural Hybrid' (2011) 24 *LJIL* 389.

[198] See Chapter 4, at Section X.

[199] Though when judges write on issues of substantive law, this can raise issues of propriety that could prejudice the integrity of judicial decision-making on the basis the apprehension of bias on grounds of 'pre-judging' and 'signalling' (i.e. coming to a case with a pre-formed view). See S. Barties and J. Gava, 'Some Problems with extra-judicial writing'

opinions relied upon in this thesis both in the context of the ICJ and domestic jurisdictions is by sitting and former judges.[200] More generally, this practice reinforces the sense of institutional culture and raises awareness of it and its importance, both internally and externally. Such extra-judicial writing is more likely to become key texts marking out the field by reason of the individual authority of the authors. Resources such as these are valuable as they can inform potential and incoming judges of the existence and importance attached to institutional culture and collegiality within the institution that they are joining, thereby contributing to the socialisation of newcomers into the institution.[201] At the same time, the background of ICJ judges is not quite as diverse as that at the ICC.[202] In the most part, ICJ judges are familiar with the discipline of international law and are therefore more likely to be familiar with the field of literature, having read the same leading journals and leading texts, for example.[203] By contrast, at the ICC, while some judges may have experience in international (criminal) law having served as counsel or as judges in other international (criminal) courts and tribunals, others may join the Court after lengthy careers as domestic criminal judges or domestic prosecutors. Accordingly, they are unlikely to be familiar with the same field of professional and scholarly literature as that of their counterparts.

(2012) 34 *SLR* 637; A. Tate, 'The Propriety of Off-Bench Writing or Speaking on Legal or Quasi-Legal Issues' (1978) 3 *JLP* 17. However, off-bench writing on *substantive* questions of law is not being suggested here (and in this regard, there is an example of where writings by a judge published prior to taking office as a judge on issues of substantive law has resulted in their subsequent disqualification from participating in certain cases due to a reasonable apprehension of bias. See *Prosecutor v Sesay,* 'Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber' (Appeals Chamber) 13/03/2004 (SCSL-04-15-AR15)). Generally on the issues surrounding the implications of prior statements by international judges upon their actual and perceived impartiality, see F. Mégret, 'International Judges' and Experts' Impartiality and the Problem of Past Declarations' (2011) 10 *LPICT* 31.

[200] For references, see Chapter 1, n.31 and n.45.

[201] On judicial socialisation and possible formal and informal mechanisms of socialisation found within different judicial systems, see in general J. Bell, *Judiciaries within Europe: A Comparative Review* (CUP 2006), N. Garoupa and T. Ginsburg, 'Reputation, Information and the Organization of the Judiciary' (2009) 4 *JCL* 228 at 251 and P. Wice, *Judges and Lawyers: The Human Side of Justice* (HarperCollins 1991) at 18-19. On informal socialisation into the judicial culture within a particular judicial system, see P. Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Bloomsbury 2011).

[202] Compare Chapter 3, Section 2.1 with Chapter 4, Section 2.1.

[203] At the ICJ, there is a relatively closed and small community of judges and legal counsel and many of ICJ judges have served as counsel before the ICJ before joining the Court. Consequently, as Keith Highet has explained, the ICJ bar is comprised of

> those international lawyers who have practiced and continue to practice as oral advocates before the Court, who represent a variety of foreign states other than their own governments, who are well-known to the Judges and Registrar of the Court, who know how things work out in practice, and who understand by experience the difficulties, pitfalls and tricks of the trade.

K. Highet, 'A Personal Memoir of Eduardo Jiménez de Aréchaga' (1994) 88 *ASILP* 577 at 579. Thus, the community of lawyers and judges in the context of the ICJ is particularly tight-knit with a strong sense of culture.

Another possible example might be to institute a more formalised process of deliberation and decision-making that reinforce a sense of judicial collegiality and judicial discipline. The system of seniority at the ICJ (one judge recalled the humbling experience of sitting at the ICJ and spoke of a sense of awe as a junior judge to be sat alongside 'greats')[204] helps to ameliorate the more human pitfalls of ego, that while all interviewees criticised, was quite clearly an evident factor exacerbating many of the divides within the Court.[205] Of course, the ultimate responsibility lies with States to nominate and elect the most qualified and suitable individuals to office and efforts in that regard to encourage a more rigorous process of nomination, selection and appointment are to be welcomed.[206] However, irrespective of this, judges – as professionals – are expected to extend the same minimum professional courtesy to their colleagues that they would expect for themselves. The adoption of a more formalised process, similar to that at the ICJ, could encourage this.

One ICC judge explained how the ICJ deliberative procedure is more conducive to encouraging robust deliberation and tolerance of critique, of respecting the views of colleagues, while not sacrificing collegiality.[207] Whereas the note-writing and circulating process may encourage judges to formulate and entrench their views prior to the Court's deliberations at the ICJ,[208] the views of *all* ICJ judges are subject to more rigorous examination and critique during the oral deliberations. However, when asked whether this process of 'cross-examination' could be something that the ICC may learn or benefit from, the judge was the view that it would not be suitable for the ICC.[209] The reason offered for this was that ICC judges are not familiar with a judicial culture of being robustly challenged on their views.[210] By contrast, because a greater number of judges at the ICJ join the Court from a long career in the academy

[204] Interview #06 n.90.

[205] Ibid., Interview #02 n.89, Interview #05 n.90, Interview #03 n.30. On the judicial ego in the context of international courts and tribunals, see D. Terris, C. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (BUP 2007) at 208-209.

[206] For example, see the campaign by the Coalition for the ICC to promote the nomination and election of the most highly qualified officials through fair, merit-based, and transparent processes'. See http://www.iccnow.org/?mod=elections.

[207] Interview #06 n.90.

[208] See G. Hernández, *The International Court of Justice and the Judicial Function* (OUP 2014) at 107 citing Terris, Romano and Swigart (2007) n.205 at 39 and S. Petrén, 'Forms of Expression of Judicial Activity' in L. Gross (Ed), *The Future of the International Court of Justice* (Volume II) (Oceana Publications 1976) at 448-449.

[209] Interview #06 n.90.

[210] Ibid.

where there is a culture of critique and disagreement, there is a greater tolerance and respect for disagreement with one's views than at the ICC.[211]

Once again, however, differences between the ICJ and the ICC – this time in terms of internal organisational structure – might make a direct transposition of some of the more formalised processes and system of seniority from the ICJ to the ICC more difficult. Because the ICJ sits in plenary, it is easier to enforce and reinforce these systems and procedures. By contrast, the chamber configuration of the ICC with judges sitting in parallel chambers inevitably makes this more difficult. However, this in itself should not discourage the exploration of other options that may be more appropriate to the ICC but which serve a similar purpose.

A third factor identifiable at the ICJ is the role played by the President of the Court in preserving and promoting collegiality. One former ICJ President has explained the manner in which the President can set the tone for decision-making and the prioritisation placed upon achieving consensus or unanimity.[212] In turn, depending upon the approach, this can encourage or discourage the use of additional opinions.[213] Again, the ability of the President of the Court to enforce a common culture or practice may be easier in an institution where judges sit in a singular plenary configuration, of which the President is always the most senior member.[214] At the ICC, the multiple divisions and Chambers make it difficult to obtain consistency.[215] Yet, if there were to be initiatives at the ICC to enhance collegiality, logically it would seem that the Presidency would be the most appropriate organ to drive such initiatives.[216]

Finally, it has been suggested that the ICC adopt a document akin to the ICJ's Resolution on Internal Judicial Practice,[217] designed to reinforce the formal process of deliberation, decision-making and drafting and strengthen the sense of internal

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[211] Ibid.

[212] G. Guillaume, 'Cultures Juridiques et Delibere Judicaire' in Societe Française Pour le Droit International, *Droit International et Diversité des Cultures Juridiques/International Law and Diversity of Legal Cultures* (Pedone 2008) at 401-402.

[213] Ibid.

[214] Chapter 3, Section 2.2.

[215] Chapter 4, Section 2.2.

[216] On the role of the President in connection to preserving and enforcing judicial discipline in principle, and the lack of disciplinary powers in practice, see Terris, Romano and Swigart (2007) n.205 at 205, drawing upon interviews conducted with a court president.

[217] Chapter 3, Section 4.2.2.

collegiality and discipline.[218] When this proposal was put to those interviewed for this research, it was met with some scepticism. The reason for such scepticism was twofold. First was doubt as to the ability to draw up meaningful guidelines that could reconcile the objective of greater judicial discipline while observing the full freedom of expression come to be expected by judges.[219] Judges and legal officers questioned the utility of rules that essentially proscribed the use of 'mean words' or which instructed judges to 'be polite and courteous'.[220] Interviewees maintained that such matters should be properly considered as an issue of professional judgment and self-policing.[221] Second, was the issue of the enforcement of such rules, should any be drawn up. One ICC official reasoned that:

> [y]ou need to have a system where you can enforce what you say or else it is better not to say it at all. Otherwise it is guidelines, and nobody gives a damn about guidelines at the international level – that's very common law, where you have guidelines and codes of conduct, and actually you take them seriously. Not at the international level.[222]

This is, of course, the opinion of just one person working within the institution. However, the general disinclination towards the adoption of a judicial code of conduct or a more robust code of judicial ethics in the context of international justice has been noted by others.[223] Support for this sentiment scepticism over the efficacy

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[218] Sluiter (2011) n.32 at 200-201. See discussion at Chapter 3, Section 4.2.2.

[219] Interview #02 n.89.

[220] Ibid. Interview #05 n.90.

[221] Ibid. Interview #06 n.90.

[222] Interview #03 n.30. Recommending the development of an international code of conduct for international judges, see D. Shelton, 'Legal Norms to Promote the Independence and Accountability of International Tribunals' (2003) 2 *LPICT* 27 at 62. In fact, there is an ICC Code of Judicial Ethics, see ICC, *Code of Judicial Ethics* ICC-BC/02-01-05. No provisions explicitly address the appropriate form of judicial expression in the form of additional opinion, however it might be argued that Article 5(1) requiring judges to 'conduct themselves with probity and integrity in accordance with their office, thereby enhancing public confidence in the judiciary' and Article 9(1) ('Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality') could indirectly cover judicial expression in the form of additional opinions. On the 'quite primitive' elaboration of codes of judicial ethics in the context of international courts and tribunals, see Terris, Romano and Swigart (2007) n.205 at 194-5.

[223] On the 'quite primitive' elaboration of codes of judicial ethics in the context of international courts and tribunals and the wariness of judges towards the adoption of 'documents that might inadvertently threaten their independence by empowering outside actors to supervise their work', see Terris, Romano and Swigart (2007) n.205 at 194-5. Here, reference is made to Detlev Vagts who observed a general characteristic within legal professions of feeling that there is no

> need for formal rules and institutions to guide and control the behaviour of judges and lawyers. There are only a few persons in the profession and they know what they are supposed to do. In the rare

of a code of conduct in the context of the ICC in particular might be found in the apparent disregard the Rome Statute provisions on additional opinions by judges in favour of following the approach adopted within established judicial institutions.[224]

Though there may be force in the argument that the adoption of such guidelines will not in themselves solve the challenges facing the ICC judges, they may – through the process of their drafting – contribute towards a development of an institutional culture in the wider sense. Even if unenforceable, their presence serves to remind judges and those working within the institution as to the importance of judicial discipline and collegiality which might easily be overlooked in the heat of the strong disagreement. From the perspective of international law, which has always grappled with the issue of enforcement, the idea that rules should not be adopted lest they are not enforced or enforceable seems difficult to accept. This is even more so when at question is the regulation of the conduct of judges.

5 Conclusion

This chapter has focused upon a particularly contentious form of individual judicial expression found within additional opinions. This has been when individual judges use their individual authority and the platform provided by additional opinions in order to criticise conduct of the individual judges whose views form the basis of the Court or Chamber's decisions. It was explained that such expressions – defined in this chapter as judicial dissent – can and do undermine judicial authority. The reason for why it undermines judicial authority lies in the nature of the criticism made. That is, judicial dissent involves allegations that a Court or Chamber, or rather the individuals whose decision formed the institution's decision, failed to conform to the standards of judicial legitimacy that imbue the exercise of judicial power with authority. Thus, judicial dissent might involve allegations that the Court acted in a manner that was not independent or impartial, or that it based its decision-making upon considerations that are not legitimate bases for judicial decision-making ('politics' or 'Realpolitik', for example).

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case that somebody is tempted to lapse from grace, the prospect of disapproval by one's peers is deterrence enough.

D. Vagts, 'The International Legal Profession: A Need for More Governance?' (1996) 90 *AJIL* 250 at 251.

[224] See Chapter 4, Section 4.2.2 and 6.3.

It further explained that judicial dissent is invariably compounded by the use of dissentient rhetoric or language. The use of language by judges that does not comport with that accepted as legitimate for the purposes of legal and judicial discourse undermines charismatic judicial authority. It undermines the charismatic authority both of the author of dissent and that of the judiciary of which the individual judges is a member. Moreover, the rhetoric of dissent – by rendering the substance of a dissenting judge's claims accessible to non-legal audiences – can have a much more significant impact upon the perceived legitimacy of the institution than criticisms couched in technical legalese.

Although – and indeed, precisely because – judicial dissent undermines judicial authority, this chapter made the claim that it serves a valuable institutional function. Firstly, Section 4 explained how judicial dissent provides judges with a mechanism by which they can control how effectively political actors beyond the court or tribunal can invoke the court's authority – as expressed in its decision – in order to advance their political interests. It was explained that this is a necessary power available to judges in order to limit the risk that such invocation of judicial authority by external actors may pose to the perceived impartiality – and in turn, legitimacy – of judicial power.

Second, Section 4 identified weaknesses in institutional legitimacy by reason of the lack of mechanisms of oversight and accountability for the exercise of judicial power. It explained the importance of the expressive function of dissent from the perspective of individual independence in view of the scepticism regarding institutional independence. Moreover, because judicial dissent holds the potential to undermine authority, the threat of dissent by individual judges stands as a deterrent for the (in)advertant abuse or misuse of institutional authority.

It also described how judicial dissent can be a symptom of more systemic dysfunction or the product of structural problems. It demonstrated how, through constructive engagement with dissent, dissent can prompt enquiry into its causes, which, in turn can form the basis of wider efforts to resolve those problems.

Despite the utility of dissent as described above, judges should nevertheless approach it with caution. Within strongly coordinate systems of authority there is a delicate balance between individual and institutional authority. While it has been explained that the judges possess individual authority independent from that of the

institution, by reason of the charismatic authority of 'judges', their individual authority also – and ultimately – relies upon that of the institution of which they are a member. At the same time, within co-ordinately structured systems of justice such as the ICJ and international criminal justice, individual judicial authority lies at the heart of institutional legitimacy. This is why it was argued in Chapters 2 and 3 that the expression of individual judicial authority is not only consistent with institutional authority but is in fact constitutive of it. Even judicial dissent – the capacity of individual judges to assert their individual authority with the effect of undermining institutional authority – is a legitimating factor from the perspective of the institution. Because of this mutually dependent relationship,[225] individual judges have both reason and responsibility to use it with restraint.

Not only does engaging in judicial dissent risk undermining individual judicial authority by reason of its impact upon the institution, but judicial dissent can directly undermine the individual authority of its author. Because the attributes of legitimacy for the purposes of charismatic judicial authority are the same irrespective of whether the individual judge or the judicial institution is in question, engagement in dissent risks undermining the charismatic authority, or reputation, of the its author.

Finally, the effectiveness of judicial dissent (both as a practice and the specific rhetoric) as 1) undermining authority and 2) operating as a mechanism of transparency lies in its extraordinariness. It is precisely because dissent fails to conform to the standards legitimate of judicial expression accepted as constitutive of judicial authority that grants it that force. By contrast, the normalisation of judicial dissent, resulting in its legitimisation, through extensive and regular use would deprive it of that force; as such expression would come to be accepted as legitimate. Criticism of judicial dissent therefore plays an important function by reinforcing its extraordinariness.

[225] On the mutually dependent relationship and its implications upon the likelihood that judicial institutions are more inclined to maintain 'corporate solidarity' and keep their disciplinary matters internal and subject to secrecy, see Terris, Romano and Swigart (2007) n.205 at 205.

6. Conclusions

Martti Koskenniemi has identified and summarised two historical 'projects of international law', each of which he identified as communitarian projects having the aim of imposing community, communal order, among an 'intolerable anarchy' of states using the law.[1] Thus, the imposition of order through the project of international justice, the 'process of setting up a system of social control' that includes, but is not limited to, the establishment of all the 'organs with law-applying and law-enforcement powers' is ultimately a political act.[2] As described in this thesis, the project of international justice extends beyond the mere establishment of those judicial institutions with law applying and law enforcing authority, but more specifically the exercise of that authority through the functioning of those institutions to achieve the ends for which they were established. Roland Bleiker has suggested that one of the best ways to understand power and authority is to understand attempts to undermine or uproot them.[3] He explained that

> [d]issent thus becomes a field of enquiry that has the potential to reveal far more about power and agency than one might think initially. The process of undermining authority says as much, for instance, about the values and function of the existing social and political order as it does about the urge to break out of it.[4]

Viewed in this light, additional opinions – and in particular, judicial dissent – that is, the public expression of disagreement from within the institution with respect to how those powers should be exercised in a given case, thus has implications for the political. Against this backdrop, this thesis has sought to develop an understanding of how the expression of judicial authority (via the platform of additional opinions) by individual judges within two paradigms of international justice have shaped and can shape the manner in which the institutions of which they are a member advance the project.

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[1] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (rev. ed. CUP 2006) at 476-478.

[2] Ibid. at 22.

[3] R. Bleiker, *Popular Dissent, Agency and Global Politics* (CUP 2000) at 26.

[4] Ibid.

Chapter 2 introduced the project of international justice and explained the connection between a specific form of judicial practice and the overarching normative objectives encapsulated by the project. It explained that the connection between additional opinions and the advancement of the project of international justice lies in the impact of additional opinions upon institutional judicial authority. However, the subject of greater contention – and the principal focus throughout this thesis – is what that impact is.

In order to effectively discharge the functions attributed to them, and in doing so advance the project of international justice, international courts and tribunals claim authority. Authority, Chapter 2 explained, denotes the ability to exercise power recognised as legitimate by those subject to that authority. Whereas power denotes the capacity to enforce one's will and influence outcomes, authority requires that that exercise of power is accepted as legitimate. In the context of international justice, in view of the decentralised nature of authority in the international sphere wherein the primacy of the State still dominates, the degree of power that international courts and tribunals wield might be considered weak. Instead, they place greater reliance upon the acceptance of their legitimacy. Traditionally, that 'acceptance' was understood primarily in terms of State consent, however the factors determining the degree of legitimacy that a particular expression of power possesses is a function of three factors. Those three factors are: 1) the criteria for legitimacy held by a particular legitimacy accepting actor; 2) the substance or content of the expression of power and whether it conforms to those criteria; and 3) the particular attributes or identity of the authority-claiming actor.

The effect of additional opinions upon institutional judicial authority involves each of the three variables determining the acceptance of the legitimacy of judicial power. However, additional opinions are themselves also expressions of judicial power and, also, usually, authority. However, rather than expressions of institutional judicial power and authority, they are expressions of individual power and authority. Chapter 2 described how and in what circumstances individual judges have power and began to consider how that power is transformed into authority. The impact of additional opinions upon the authority of international courts and tribunals, and in turn, the advancement of the project of international justice, depends upon the configuration of official authority within each paradigm of international justice and the relationship between individual and institutional judicial authority therein.

Chapter 2 introduced Damaška's heuristic framework for the analysis of the organisation of official authority – which, when applied to each of the paradigms of international justice, would enable the appraisal of the relationship between the expression of individual judicial authority in the form of additional opinions and institutional authority.

In turn, Chapters 3 and 4 took each of the two paradigms of international justice focused upon in this thesis, and considered them through the prism of Damaška's idealtypes of official authority. Chapter 3 started with the Peace Palace paradigm and focused upon the project of international justice as pursued by the ICJ. After reflecting upon the characteristics of ICJ judges, the distribution of official authority and the degree to which judicial decision-making prioritises either formal or substantive criteria for legitimate decision-making, the first half of Chapter 3 concluded that the ICJ tends strongly towards the coordinate idealtype of official authority. The implications of this for the purposes of appraising the impact of additional opinions upon the project of international justice are as follows.

First, within coordinately structured systems of official authority, individual decision-makers are considered to possess individual authority distinct from that of the institution of which they are a member. Thus the expression of individual judicial power in the form of additional opinions is not *per se* illegitimate, however the specific criteria for the legitimacy of the exercise of individual power may be more contentious. Secondly, within coordinately structured systems of judicial authority, individual and institutional judicial authority are not inconsistent. To the contrary, within coordinately structured systems of authority, the individual decision-maker is a cornerstone of institutional legitimacy. Additional opinions as manifestations of the individuality and independence of individual decision-makers are thus an expression of the legitimacy of the institution in question. Whether considering the ICJ or the institutions of international criminal justice, the diversity of the bench and the claimed representativeness of that diversity of the diversity of the international polity is one of the principal legitimising factors for the exercise of institutional judicial power.

Chapter 3 proceeded to consider different ways in which additional opinions as the expression of individual judicial authority operate within the context of the coordinately structured system of judicial authority. Specifically, they strengthen and

define the parameters of institutional judicial authority by contributing the deliberations of those actors who's acceptance of the legitimacy of judicial power is determinative of its authority. A second legitimising characteristic of judicial authority – both individual and institutional – is that of independence and impartiality. Section 4.1 considered whether secrecy (manifested in the suppression of additional opinions) or transparency (manifested in permitting additional opinions) is the more appropriate policy for the preservation and enhancement of judicial authority. It was concluded that in view of the coordinate characteristics of Peace Palace-international justice and the exigencies of the international political sphere, the policy of secrecy would be neither coherent with the wider system of justice nor practicable to implement. Rather, it explained how not only is transparency a more coherent fit within structure of international judicial authority in principle, but also how transparency has become cemented within the judicial culture at the ICJ in practice.[5]

Chapter 3 then turned to consider how additional opinions affect the claim to authority made by the ICJ pursuant to two particular functions, dispute resolution and law interpretation. Regarding the former, its decisional authority, once again the value of additional opinions lies in the transparency that they offer, that in turns demonstrates the decisional legitimacy of a given decision. In regards to process legitimacy, it explained the manner in which additional opinions provide an insight into the deliberations of the Court and thereby demonstrating the fullness of deliberations. They also provide a platform upon which individual judges can supplement the Court's decision by addressing what the Court cannot or will not express in its decision, but which parties to the case might expect to be addressed. This also relates to the purposive or universal values legitimacy of the exercise of judicial power by the institution. By demonstrating or expressing the legitimacy of the Court's decision from the perspective of decisional authority, additional opinions are conceived as mechanisms by which individual judges can encourage acceptance of the Court's decision, and in turn compliance by the parties with the decision thereby enabling it to effectively discharge its dispute-settlement function.

[5] Chapter 3, Section 4.2.

From the perspective of interpretive authority, the utility of additional opinions lie in their contribution to deliberations as to the degree of authority that the Court's decision possesses in its articulation of the law. Whereas it can be difficult – although not impossible – to ascertain the direct contribution of additional opinions by ICJ judges to the development of international law, additional opinions stimulate deliberations within the external deliberative sphere as to the legitimacy of the Court's articulation of the law. Importantly, rather than viewing additional opinions as a platform upon which States can restrain the legislative activities of the ICJ – a proposition that entails particular problems from the perspective of individual judicial independence – this views additional opinions as a means of empowering individual international judges in their own right to do so.

Chapter 3 closed by turning to consider the criteria for the legitimate expression of individual power by judges. In other words, it asked in what circumstances an additional opinion constitutes an expression of individual judicial authority. This section expressed caution against the imposition of institutional restraints upon the manner in which additional opinions may be utilised and limits upon what may be expressed by judges in that form. Proposals to restrict additional opinions or to subject them to review by the Court (above and beyond the process of deliberation) would stand in conflict with the principal rationale of additional opinions as a manifestation of individual judicial independence. At the same time, while those concerned by judicial practice focused upon the implications of that practice upon the authority of the *institution*, this section argued that additional opinions have the strongest implications for the authority of the individual authoring judge.

While different interpretive audiences may hold different legitimatory criteria for the expression of individual judicial power, a judge who fails to conform with those criteria risks undermining their personal judicial authority, at least within the audience who's criteria they failed to conform with. A judge may also undermine their personal judicial authority by expressing their additional opinion in a manner in a manner inconsistent with those criteria that imbue the judicial office with charismatic authority. While this dimension to judicial practice was the subject of greater attention in Chapter 5, it was noted in Chapter 3 that the consequence of such practice might be to frustrate the objectives sought by the author of the opinion and, more importantly from the perspective of the project of international justice, frustrate the realisation of the systemic and institutional functions of

additional opinions as identified in this chapter. The ability of a judge to effectively contribute to deliberations depends upon their authority. While additional opinions grant individual judges power in the external deliberative sphere, they only do so to the extent that those opinions are read and engaged with. If an individual judge fosters a reputation for producing additional opinions that are considered illegitimate, thereby diminishing their individual judicial authority, then this in turn would have ramifications upon the likelihood that those audiences would be read and taken seriously. Thus, in this circumstance, individual judicial power and individual judicial authority are contingent upon each other. In these circumstances the contribution that an individual judge makes to deliberations within the external sphere determining the parameters of the Court's decisional and interpretive authority in a particular decision will be limited.

This is consistent with coordinately structured systems of justice – which not only rely upon the individuality of their decision-makers for institutional legitimacy, but which also place responsibility upon individual decision-makers to exercise their power in a legitimate manner. In the context of the ICJ where the bench consists of around 15 judges – each of whom have the entitlement to issue additional opinions – the charismatic authority of the ICJ as a judicial institution can tolerate the odd judge who's practice challenges the most common standards of legitimate judicial expression. Even then, the institutional benefits of such additional opinions from the perspective of enhancing universal values and purposive legitimacy by engaging minority audiences who's criteria for judicial legitimacy may be appealed to be the judge, may outweigh the illegitimacy of the opinion in the eyes of the majority audiences.

By contrast, Chapter 4 turned to consider how the relationship between individual and institutional judicial authority plays out in the context of international criminal justice, wherein decision-making bodies are much smaller, giving any given judge significantly more power in the internal deliberative sphere in comparison to their colleagues at the ICJ. Chapter 4 commenced by considering the degree to which the structure and organisation of judicial authority in the context of international criminal justice departs from that at the ICJ. While there are some characteristics that may support evidence of greater hierarchisation (the organisation of the judiciary into two or three divisions, the possibility of appellate review of decision-making and more rigid formal grounds for decision-making), it was concluded that

taken as a whole, international criminal justice tends more heavily towards the coordinate end of Damaška's spectrum rather than the hierarchical. However, there are significant differences between judicial authority in the context of the ICJ and international criminal justice that render additional opinions especially important from the perspective of determining the parameters of institutional judicial authority within the external sphere.

The first significant difference is the expanded range of social and political functions attributed to international criminal justice in comparison to the ICJ. The legitimacy of many of those functions – in particular those relating to 'truth-seeking' or 'history-writing' – is much more contested. Thus, there is much greater disagreement as to whether in fact international criminal courts and tribunals *should* possess authority for the purpose of discharging those functions. More substantively, the procedural choices made by the judges in international criminal courts and tribunals in their decision-making not only have implications for the development of a comprehensive body of international criminal procedural law but also have direct implications upon the manner and effectiveness by which the various functions of attributed to international criminal adjudication are discharged by those institutions. In view of this, the contributions that additional opinions make to deliberations within the external spheres as to the degree of authority possessed by a particular decision for a particular purpose are especially important.

A second difference – one that emerged in the course of appraising the organisation of judicial authority in international criminal courts and tribunals – is the degree of power that individual judges have in the internal deliberative sphere in their influence over decision-making. Because institutional authority is vested in Chambers composed of either 3 or 5 judges, this gives any given judge much greater influence in the course of deliberations within a Chamber and the outcome of those deliberations. Against the backdrop of the variations in conceptions of the judicial function deriving from the diversity of professional and cultural backgrounds of judges, the result is instability, unpredictability and fragmentation in the institution's decision-making, depending on the particular composition of a given Chamber. While

fragmentation *per se* is not necessarily problematic,[6] from the perspective of the project of international justice which places the rule of law at its centre, instability and unpredictability are of far greater concern. Within systems of authority where there is some degree of hierarchy – even just one level of appellate review (as is the case with the *ad hoc* Tribunals) – that hierarchy operates to imbue the legal system with consistency and stability and predictability by clarifying and articulating the law as should be applied by 'lower' courts or chambers. By contrast, as Chapter 4 explained, there is no such hierarchical distribution of authority across judicial divisions at the ICC. The consequence of this is that the principal means of imbuing predictability and stability in the Court's jurisprudence is absent. Therefore, rather than being an anathema to the principle of legal certainty, additional opinions remain as one of the sole institutionalised mechanisms of facilitating greater certainty and in turn legality, by facilitating greater predictability in decision-making. Systemically, they reveal the importance of the individual judge in the internal deliberative sphere, demonstrating why divergent approaches between chambers occur. But specifically, additional opinions reveal the stance of the individual judge on the particular issue that forms the subject of the opinions in question. Knowledge of the individual views of each of the judges within a chamber enhances the predictability of outcomes and permits parties to plan their cases accordingly. At the same time, additional opinions within Trial Chambers (and in the case of the ICC, also the Pre-Trial Chamber) can also mitigate fragmentation. They encourage and empower parties – both the prosecution and the defence – to appeal decisions and to obtain clarification in the law from the Appeals Chamber. While the ICC Appeals Chamber is more reluctant to take up the role of providing clarification and using its jurisprudence to harmonise decision-making across Pre-Trial and Trial Chambers, this dynamic of providing stability is borne out in the jurisprudence of the ICTY.

Consequently, Chapters 3 and 4 focused upon the complementary relationship between institutional and individual judicial authority wherein additional opinions play a legitimate systemic role in enhancing the quality of deliberations that determine the authority of the institution for a particular purpose. From the perspective of the project of international justice, by encouraging and facilitating

[6] See in this regard E. Van Sliedregt and S. Vasiliev (Eds), *Pluralism in International Criminal Law* (OUP 2014) at 10-17.

deliberation within the external sphere by those subject to the authority of the institutions, additional opinions are themselves a positive affirmation of the values encapsulated by the project of international justice – the rule of law, legality and the proscription of the arbitrary exercise of power by any actor, including the institutions of international justice. By contrast, Chapter 5 turned to consider a type of judicial expression found within some additional opinions that place individual and institutional judicial authority in conflict with each other. Chapter 5 defined this type of expression as judicial dissent, and identified how it can be distinguished from additional opinions. Judicial dissent constitutes direct and explicit allegations on the part of the authoring judge that a Court or Chamber when exercising its institutional power did not do so in accordance with fundamental criteria that imbue that power with legitimacy. In that regard there is an undoubted similarity between judicial dissent and additional opinions; both contribute to ongoing deliberations within the external deliberative sphere as to the degree of authority commanded by the institution through its decisions. However, in view of the nature of the allegations that constitute judicial dissent and the manner in which judicial dissent is communicated, judicial dissent is a considerably more powerful contribution to those external spheres. Chapter 5, after defining judicial dissent and describing why and how it constitutes such a powerful contribution to those deliberations, turned to consider whether judicial dissent is legitimate and thus constitutes the expression of individual judicial authority.

Whereas this thesis has argued that additional opinions are as a matter of principle consistent with the structure and organisation of institutional judicial authority, even when the additional opinion does not conform to the criteria for the legitimate use of additional opinions held by a particular audience, judicial dissent is not only a direct challenge to institutional authority (and not merely inconsistent with it) but it also has negative implications for individual judicial authority and judicial collegiality, which may have far wider ramifications than the particular impugned decision at stake. Quite aside from the substantive allegations that judicial dissent raises in regards to the legitimacy of the exercise of institutional power by the Court or Chamber, the rhetoric of dissent undermines the charismatic authority not only of the authoring judge but also that of the institution as a judicial institution. For these reasons judicial dissent exceeds the boundaries of legitimate judicial expression, and thus cannot constitute the expression of individual judicial authority.

However, as the expression of individual judicial power, as judicial dissent certainly is, judicial dissent can nevertheless have important constructive purposes. Chapter 5 examined two purposes: the first being to limit the effectiveness by which the institutional authority vested in the Court or Chamber's decision can be exploited by out-of-court political actors in order to advance their political interests. While this may be achieved by weakening the authority of the particular decision at hand and perhaps even the institution, from the perspective of the project of international justice this can – in the long term – have a greater legitimising effect. By limiting the capacity of critics of the institution to claim that it is biased in terms of which political interests it supports, judicial dissent operates in favour of vindicating the non-partisan qualities of the institution.

Second, judicial dissent can be a symptom of a more fundamental disease afflicting deliberations and decision-making within institutions. In this latter situation, dissent is both a symptom and a cause of an absence or breakdown of collegiality. Within coordinately structured systems of authority, collegiality lies at the heart of institutional judicial authority. Whereas this thesis has in general followed Max Weber's conception of authority, in the course of analysing the nature and organisation of judicial authority, in the context of international justice it is important to note a significant departure from Weber's theory. Weber presented a negative account of collegiality, predicting a general retreat from collegiality in favour of greater bureaucratisation, deemed to be preferable due to its promotion of more rapid decision-making.[7] However, as this thesis has demonstrated, collegiality lies at the heart of judicial authority in the context of international justice. Not only is it a legitimising factor for the exercise of judicial power in the formal sense in line with Weber's 'functional collegiality',[8] but since the establishment of the Peace Palace and through to the contemporary institutions of international justice, collegiality has been conceived in a positive sense.[9] Collegiality has been viewed as an agent for integration;[10] the emphasis placed upon the diversity and representativeness of the judicial members of the institutions is posited as one of the

[7] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* Volume 1 (UCP 1978) at 277-278.

[8] Weber (1978) n.7 at 272.

[9] On the positive account of collegiality in sociological theory, see M. Waters, 'Collegiality, Bureaucratization, and Professionalization: A Weberian Analysis' (1989) 94 *American Journal of Sociology* 945 at 946.

[10] Ibid.

strongest legitimising factors for those institutions and their claim to be advancing universal standards and values.

Collegiality should also be understood in the cultural sense, as explained in Chapter 5. Collegiality – that is, the culture of mutual respect and cooperation between individual judges who *collectively* bear responsibility for determining how institutional authority will be exercised – is a pre-requisite for deliberations to be conducted effectively. If the internal deliberative sphere is hampered by poor professional relationships between members of the court or tribunal, then the quality and rigour of deliberations within that sphere, and in turn the decision-making of the institution, will suffer. Thus, the negative effect of judicial dissent upon judicial collegiality should not be taken lightly. In this respect, the cultivation and consolidation of a common institutional judicial culture respected by all judges when exercising their right to issue additional opinions should be encouraged.

Chapter 5 demonstrated how, if viewed as a symptom of latent dysfunction or a breakdown in collegiality, judicial dissent can have constructive potential. In this regard, it highlighted how a number of judges interviewed for this research described judicial dissent as an appeal to external audiences. Once again, operating as a mechanism of transparency, judicial dissent constitutes the first step in addressing and remedying that dysfunction. Thus Chapter 5 diagnosed judicial dissent as a symptom of not a breakdown in judicial collegiality, but rather an absence of a culture of judicial collegiality at the ICC which in turn prevented judicial deliberations from overcoming differences in the conceptions of the judicial function held by judges by reason of the diversity of their backgrounds. This prompted Chapter 5 to close by considering possible strategies that may be adopted in order to cultivate a culture of collegiality within the Court. In particular, it looked to the ICJ in order to identify any best practices developed within the Court's 94-year history to cultivate and consolidate a culture of collegiality. After all, the ICJ – the institution wherein there exists a vibrant culture expressing individual judicial authority – both in the form of additional opinions and judicial dissent – demonstrates that a balance can be found. While it identified some strategies that may be of benefit to the ICC, Chapter 5 acknowledged the differences between the institutional structure and the backgrounds of the judges within each institution that would likely preclude any of those strategies being a panacea.

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In doing so, this thesis has provided a primarily normative answer to the research questions identified at the outset of this thesis. In order to do so, and being grounded in a commitment to identifying and understanding the practice of issuing additional opinions in their institutional and behavioural context, this thesis has sought to break away from traditional comparative analytical categories – each with their own sets of underlying assumptions and objectives – transposed from the domestic to the international. By drawing on the work of Mirjan Damaška, this thesis has constructed an understanding of judicial authority in the context of international justice based upon its own characteristics and has situated the established doctrinal accounts of additional opinions within this context.

Having done so, this thesis provides the necessary foundations upon which further empirical studies into the systemic function of additional opinions in practice can be based. This thesis has demonstrated that individual judges *do* possess individual judicial authority distinct from – albeit related to – the authority of the institution of which they are a member. Moreover, it has shown that the expression of that individual judicial authority plays a critical systemic function, with direct implications for legitimacy of the project of international justice as pursued by those institutions. However, the effective realisation of that systemic function depends upon the engagement with additional opinions by participants in the external deliberative sphere. Throughout this thesis, examples of such engagement have been provided, however the focus of this thesis has been upon constructing an understanding of that system and upon the practice of judges – as the authors of additional opinions.

One class of actors within the external deliberative sphere whose engagement with additional opinions was touched upon in this thesis was that of courts and chambers. This can be the same court (or chambers within the same court or tribunal) and its consideration of additional opinions issued by judges of the same court in previous decisions or by judges of different institutions considering additional opinions authored by members of other institutions. Whereas the ICJ and its individual judges rarely – if ever – explicitly acknowledge when additional opinions have influenced deliberations, the judges of the international criminal courts and tribunals have been much more explicit in their recourse to additional opinions. By contrast, the ICJ's reticence towards making reference to additional opinions – while justifiable on

some grounds – makes it difficult, if not impossible, for external observers to determine the degree to which the expression of individual judicial authority in the form of additional opinions contributes to deliberations at the ICJ. Given the robustness of the culture of writing separately at the ICJ and the integral quality of the process of drafting additional opinions to the internal deliberative and drafting process, this might seem surprising. Once additional opinions have been issued at the ICJ, the Court as an institution barely acknowledges their existence.

The policy adopted by the ICJ of not disclosing when and how additional opinions have influenced institutional decision-making has the effect of obscuring the degree of individual authority actually possessed by individual judges. Thereby, this policy limits the degree of individual power that individual judges are *perceived* to wield in their additional opinions by actors in the external deliberative spheres. By contrast, notwithstanding the concerns of some participants in the drafting of the Rome Statute and which are manifested in the Statute's provisions on permitting additional opinions, the judges of the ICC and the *ad hoc* Tribunals have themselves instituted greater transparency in their decision-making by giving explicit acknowledgement of additional opinions. This has the effect of reinforcing individual judicial authority within the sphere of international criminal justice. The public acknowledgement by courts and chambers, and also individual judges, of additional opinions and their explicit reference to them in their decisions and opinions strengthens the claim to legitimacy of the practice of issuing additional opinions, and in turn the authority of those texts. Where a court or chamber goes further and as a matter of substance endorses a position advanced by an individual judge in their additional opinion, this enhances that individual authority even further.

In order to fully ascertain the effectiveness by which the systemic function of additional opinions are served, and in turn, the role of the expression of individual judicial authority upon the project of international justice in practice, further empirical research into *how* additional opinions are engaged with, by *whom*, and *to what effect* would be welcome. Moreover, this thesis has focused upon a limited set of (formal) legitimatory criteria for the use of additional opinions. Empirical research, for example in the form of literature reviews of scholarly writing, content analysis of judicial decisions and pleadings and submissions by parties to judicial proceedings, would contribute to building a comprehensive (and likely pluralist) picture of the range of legitimatory criteria held by legitimacy-accepting, and thus authority

determining actors. By identifying with greater clarity what those criteria are, this may inform judicial practice when issuing additional opinions in order to enhance the effectiveness of their contribution to deliberations within the external sphere and maximise the impact of their assertion of individual judicial authority upon the advancement of the project of international justice.

However, such empirical research depends upon the degree of transparency adopted by participants within the external deliberative sphere and the extent to which they publicly acknowledge when and how additional opinions have contributed to their deliberations, decision-making or have otherwise influenced their legal or political positions. With this future research in mind, this thesis closes by asking a question of the audiences of additional opinions, rather than their authors. It challenges those audiences – scholars, practitioners, even judges – to consider how they engage with additional opinions in the context of international justice, and to what envisaged purpose.

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Appendix 1: Illustrative Examples of Quantitative Research Methodology

Figure 1: *Illustrative excerpt from spreadsheet used to collect raw data on the use of additional opinions at the ICJ. The same spreadsheet structure was used, mutatis mutandis, when collecting data for the ICTY, ICTR, ICC and PCIJ.*

								Individual					Joint					
Judgment Number	Advisory/Contentious	Judgments	Type of Judgment	Judgment Date	Judge	Ad Hoc	No IO/Unanimous	Dissent	Separate	Declaration	Individual Opinion	Dissenting and Separate	Joint Dissenting	Joint Separate	Declaration	Joint Separate and Dissenting	Number of Opinions Additional to Court's	Number of Judges who sign on to an Opinion Additional to Court's
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Guerrero													
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Basdevant									x				
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Alvarez									x				
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Fabela													
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Hackworth													
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Winiarski									x				
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Zoricic									x				
1	C	Corfu Channel	Preliminary Objections	25/03/1948	De Visscher									x				
1	C	Corfu Channel	Preliminary Objections	25/03/1948	McNair													
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Klaestad													
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Badawi Pasha									x				
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Krylov									x				
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Read													
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Hsu Mo													
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Azevedo													
1	C	Corfu Channel	Preliminary Objections	25/03/1948	Daxner	x		x									2	8
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Guerrero													
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Basdevant								x					
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Alvarez						x							
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Fabela													
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Hackworth													
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Winiarski								x					
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Zoricic								x					
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	De Visscher													
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	McNair								x					
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Klaestad													
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Badawi Pasha													
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Krylov								x					
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Read								x					
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Hsu Mo													
2	A	Conditions of Admission into the UN	Advisory Opinion	28/05/1948	Azevedo						x						3	8

Figure 2: *Excerpt from the cribsheet used to turn the complete data set (see Fig.1) into a standardised data matrix (see Fig.3). Every judge (whether a full judge or judge ad hoc) was given a discrete numerical value, despite only a handful shown*

Variable	Value	Numerical Value
Advisory/Contentious	Advisory	1
	Contentious	2
Type of Judgment	AO	1
	Chamber Judgment	2
	Compensation	3
	Jurisdiction	4
	Jurisdiction and Admissability	5
	Merits	6
	Permission to Intervene	7
	Preliminary Objections	8
	Preliminary Question	9
Judge	Abi-Saab	1
	Abraham	2
	Ago	3
	Aguilar Mawdsely	4
	Ajibola	5

Variable	Value	Numerical Value
	x	1
	y	2
	z	3
	xy	4
Judge Ad Hoc/Additional Opinion issued	xz	5

Figure 3: *Excerpt from the standardised data matrix. This example illustrates how the data in Fig.1 is transformed in accordance with the cribsheet outlined in Fig.2. Once in this format, the* dataset *was ready to input into, and analysed using, Statistical Package for the Social Sciences (SPSS).*

Judgment Number	Advisory/Contentious	Type of Judgment	Judgment Date	Judge	Ad Hoc	No IO/Unanimous	Dissent	Separate	Declaration	Individual Opinion	Dissenting and Separate	Joint Dissenting	Joint Separate	Declaration
1	2	8	3/25/48	69										
1	2	8	3/25/48	15									1	
1	2	8	3/25/48	9									1	
1	2	8	3/25/48	54										
1	2	8	3/25/48	72										
1	2	8	3/25/48	164									1	
1	2	8	3/25/48	168									1	
1	2	8	3/25/48	42									1	
1	2	8	3/25/48	101										
1	2	8	3/25/48	83										
1	2	8	3/25/48	13									1	
1	2	8	3/25/48	89									1	
1	2	8	3/25/48	123										
1	2	8	3/25/48	75										
1	2	8	3/25/48	12										
1	2	8	3/25/48	39	1		1							
2	1	1	5/28/48	69										
2	1	1	5/28/48	15								1		
2	1	1	5/28/48	9						1				
2	1	1	5/28/48	54										
2	1	1	5/28/48	72										

Figure 4: *Screenshot of SPSS Database*

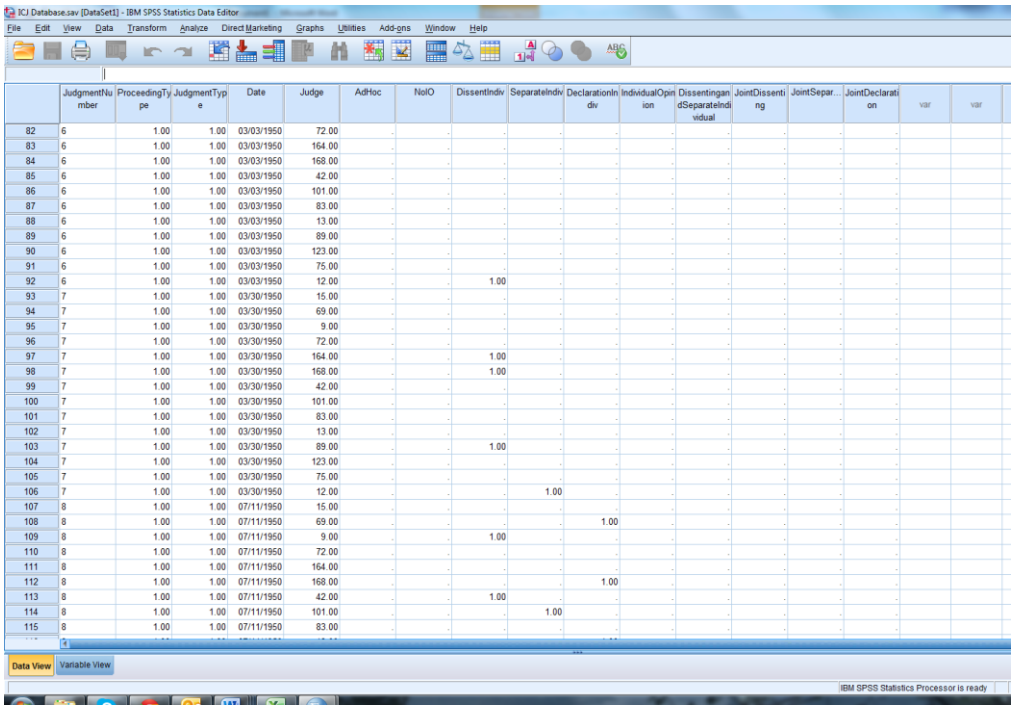
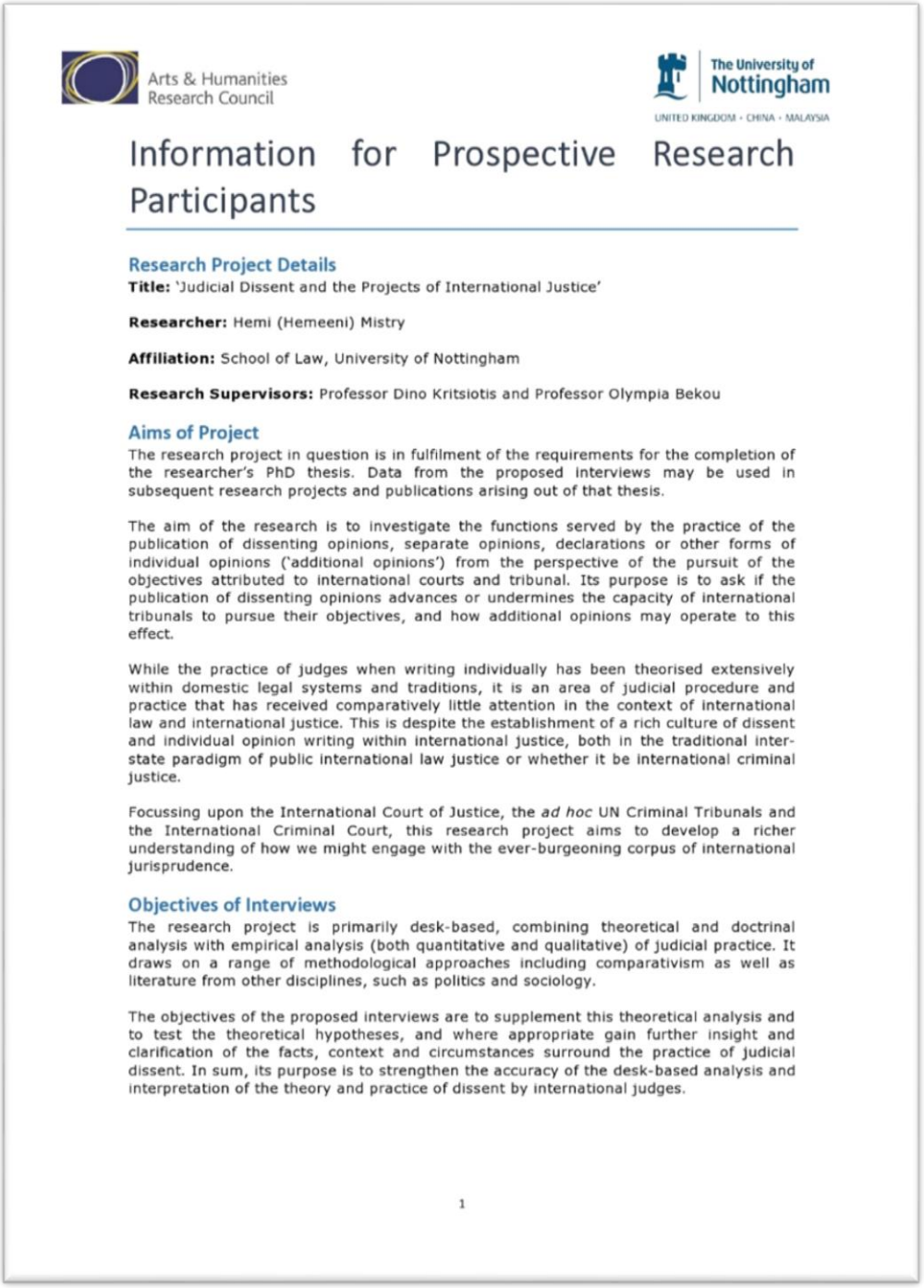


Figure 5 *Excerpt from one of the descriptive outputs following analysis using SPSS and processing. Here, the example provided is a Chart showing the judicial practice of ICTY Appeals Chamber judges in issuing additional opinions. Similar charts to these were created for each of the institutions and, where appropriate intra-institutional Chamber. Here the data is arranged according to the total number of judgments participated in by each judge (highest-*

Appeals Chamber											
		Individual				Joint					
Judge	Total Judgments Participated in	Dissenting Opinions	Separate Opinions	Declarations	Dissenting and Separate Opinions	Dissenting Opinions	Separate Opinions	Declarations	Dissenting and Separate Opinions	Total	Average IO per Judgment
Güney	26	2			2	2				**6**	0.230769
Pocar	23	5				1				**6**	0.26087
Shahabuddeen	21	6	6	5	1					**18**	0.857143
Meron	20		3		1	1	2			**7**	0.35
Vaz	16	1					1			**2**	0.125
Schomburg	13	1	4	1	4	2				**12**	0.923077
Liu	11	3	1	1	1	1				**7**	0.636364
Robinson	8	2	1	1						**4**	0.5
Agius	5	1	1				1			**3**	0.6
Nieto-Navia	5		1	1						**2**	0.4
Ndepele Mwachande Mumba	5									**0**	0
Weinberg de Roca	4	1	2							**3**	0.75
Vohrah	4			1			1			**2**	0.5
Ramaroson	3	1	1							**2**	0.666667
Hunt	2			1					1	**2**	1
Tuzmukhamedov	2	2								**2**	1
Cassese	2				1					**1**	0.5
Sekule	2	1								**1**	0.5
Wald	2	1								**1**	0.5
Jorda	2									**0**	0
Tieya	2									**0**	0
Morrison	1	1	1							**2**	2
Antonetti	1				1					**1**	1
Bennouna	1								1	**1**	1
Kirk McDonald	1						1			**1**	1
Kwon	1					1				**1**	1
Li	1				1					**1**	1
Niang	1				1					**1**	1
Stephen	1				1					**1**	1
Van Den Wyngaert	1			1						**1**	1

Appendix 2: Information for Research Participants



Arts & Humanities Research Council

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Information for Prospective Research Participants

Research Project Details

Title: 'Judicial Dissent and the Projects of International Justice'

Researcher: Hemi (Hemeeni) Mistry

Affiliation: School of Law, University of Nottingham

Research Supervisors: Professor Dino Kritsiotis and Professor Olympia Bekou

Aims of Project

The research project in question is in fulfilment of the requirements for the completion of the researcher's PhD thesis. Data from the proposed interviews may be used in subsequent research projects and publications arising out of that thesis.

The aim of the research is to investigate the functions served by the practice of the publication of dissenting opinions, separate opinions, declarations or other forms of individual opinions ('additional opinions') from the perspective of the pursuit of the objectives attributed to international courts and tribunal. Its purpose is to ask if the publication of dissenting opinions advances or undermines the capacity of international tribunals to pursue their objectives, and how additional opinions may operate to this effect.

While the practice of judges when writing individually has been theorised extensively within domestic legal systems and traditions, it is an area of judicial procedure and practice that has received comparatively little attention in the context of international law and international justice. This is despite the establishment of a rich culture of dissent and individual opinion writing within international justice, both in the traditional inter-state paradigm of public international law justice or whether it be international criminal justice.

Focussing upon the International Court of Justice, the *ad hoc* UN Criminal Tribunals and the International Criminal Court, this research project aims to develop a richer understanding of how we might engage with the ever-burgeoning corpus of international jurisprudence.

Objectives of Interviews

The research project is primarily desk-based, combining theoretical and doctrinal analysis with empirical analysis (both quantitative and qualitative) of judicial practice. It draws on a range of methodological approaches including comparativism as well as literature from other disciplines, such as politics and sociology.

The objectives of the proposed interviews are to supplement this theoretical analysis and to test the theoretical hypotheses, and where appropriate gain further insight and clarification of the facts, context and circumstances surround the practice of judicial dissent. In sum, its purpose is to strengthen the accuracy of the desk-based analysis and interpretation of the theory and practice of dissent by international judges.

1

Why have you been approached?

You have been approached due to your experience into the process and practice of the publication of additional opinions in the context of international adjudication. You may be an author of such opinions, may be (or may have been) involved in their production or their subsequent interpretation. You have been identified and selected due to your expertise and your ability to provide insight into the inner workings of judicial dissent.

What will be required of participants?

Participants will be asked to participate in the aforementioned interviews. They are entitled to respond to questions as they see fit, and are entitled to decline a response to any question asked.

The researcher will ask if the participant would be willing to have the interview recorded, however they are entitled to decline permission for recording, or to withdraw or suspend permission at any point during the interview.

Where audio recording is not permitted by the participant, the researcher will take notes throughout the interview in order to ensure the accuracy of the researcher's data. After the interview, the researcher will write up the notes from the meeting and/or will take a written transcript of any audio recording, and will send it to the participant. All participants have the right to review and request the rectification of transcripts or notes made by the researcher within reasonable time, and no later than 1st August 2015. Participants will be entitled to make further observations upon the records of the meeting.

Where consent is being sought to use the content of correspondence between the individual approached and the researcher, the researcher will identify specifically what elements of that correspondence the researcher intends to use and for which permission is sought. Provisions regarding anonymity, confidentiality and the right to withdraw relating to interviewees apply equally to written correspondence.

Anonymity and confidentiality

The collection, storage and processing of data by the researcher will conform with the University of Nottingham's Code of Research Conduct and Research Ethics.[1]

All personal data of participants will be kept strictly confidential and will be obtained and stored in accordance with the Data Protection Act 1998. Only personal data pertinent to the research will be collected by the researcher.

Research data, that is records of the interviews (including recordings where appropriate, but also transcripts or notes taken by the researcher) emails or other communications between participants and the researcher will be anonymised and kept separately from the personal data. Statements from these communications may be used in publications arising from this research; however no information will be used or made public that could identify the participant.

Unless requested otherwise by the participant (see below, 'Right to withdraw from research'), data will be securely retained for a period of seven years from the date of any publication that may be based upon it. During this period, this data may be used in subsequent research outputs in addition to the researcher's PhD thesis.

---

[1] Available at: http://www.nottingham.ac.uk/fabs/rgs/documents/code-of-research-conduct-and-research-ethics-approved-january-2010.pdf.

Right to withdraw from the research

All individuals have the right to refuse to participate in the research, and all individuals who agree to participate have the right to withdraw from the research at any time until the 1st August 2015, the date upon which the text of the researcher's thesis will be finalised for submission.

Until the 1st August 2015, all participants have the right to request that content from their interviews will not be used in any way in the researcher's thesis. The researcher will ensure that this request is acted upon.

At any point, any participant may request the deletion of their personal data and research data as a result of the interview(s) from the researcher's records.

After the 1st August 2015, the researcher will endeavour to accommodate requests to remove reference to the participant's interviews, however no guarantee can be made that this will be possible.

Contact Details

All individuals approached may, at any point, contact the researcher or her supervisors if they have any questions about the research, and may contact the School of Law Research Ethics Coordinator if they wish to make a complaint relating to the any aspect of this research or the researcher's conduct.

Researcher

Hemi Mistry
School of Law
Law and Social Sciences Building
University Park
Nottingham NG7 2RD

Email: llxhm10@nottingham.ac.uk

Researcher's Supervisors

Professor Dino Kritsiotis
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Professor Olympia Bekou
School of Law
Law and Social Sciences Building
University Park
Nottingham NG7 2RD

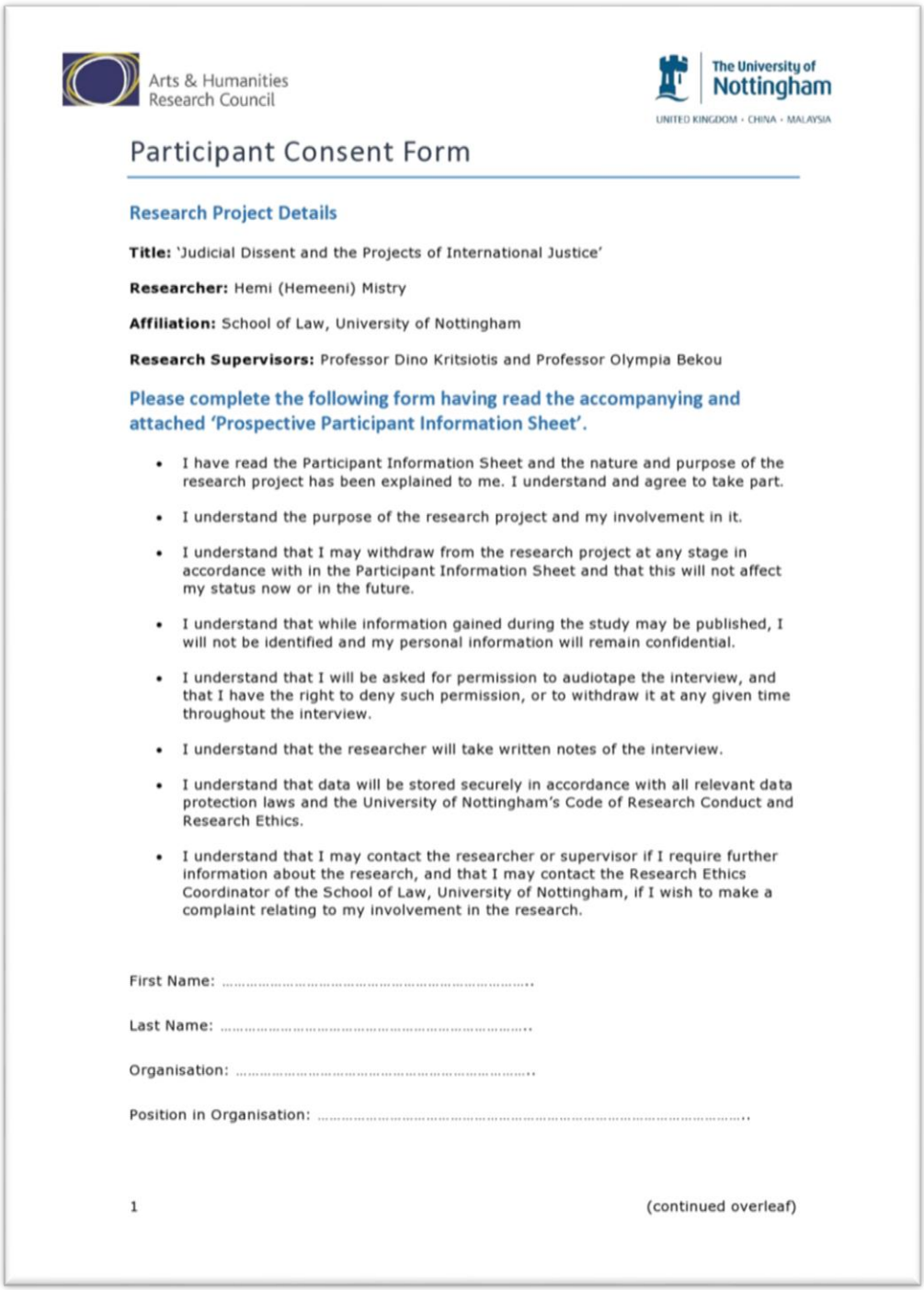
Email: olympia.bekou@nottingham.ac.uk
Telephone: +44115 846612

School of Law Research Ethics Coordinator

Dr Candida Saunders
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Law and Social Sciences Building
University Park
Nottingham NG7 2RD

Email: candida.saunders@nottingham.ac.uk
Telephone: +44115 8466317

Appendix 3: Participant Consent Form



Arts & Humanities Research Council

The University of Nottingham
UNITED KINGDOM · CHINA · MALAYSIA

Participant Consent Form

Research Project Details

Title: 'Judicial Dissent and the Projects of International Justice'

Researcher: Hemi (Hemeeni) Mistry

Affiliation: School of Law, University of Nottingham

Research Supervisors: Professor Dino Kritsiotis and Professor Olympia Bekou

Please complete the following form having read the accompanying and attached 'Prospective Participant Information Sheet'.

- I have read the Participant Information Sheet and the nature and purpose of the research project has been explained to me. I understand and agree to take part.
- I understand the purpose of the research project and my involvement in it.
- I understand that I may withdraw from the research project at any stage in accordance with in the Participant Information Sheet and that this will not affect my status now or in the future.
- I understand that while information gained during the study may be published, I will not be identified and my personal information will remain confidential.
- I understand that I will be asked for permission to audiotape the interview, and that I have the right to deny such permission, or to withdraw it at any given time throughout the interview.
- I understand that the researcher will take written notes of the interview.
- I understand that data will be stored securely in accordance with all relevant data protection laws and the University of Nottingham's Code of Research Conduct and Research Ethics.
- I understand that I may contact the researcher or supervisor if I require further information about the research, and that I may contact the Research Ethics Coordinator of the School of Law, University of Nottingham, if I wish to make a complaint relating to my involvement in the research.

First Name: .....

Last Name: .....

Organisation: .....

Position in Organisation: .....

1 (continued overleaf)

Address:

……

……

……

Contact Telephone Number: ……

Contact Email Address:……

Signature

Date: ……

Please sign and return to:

Hemi Mistry
Email: llxhm10@nottingham.ac.uk
Postal Address: School of Law, Law and Social Sciences Building, University Park, Nottingham, NG7 2RD, UK.

Appendix 4: Frequency of Additional Opinions at the ICJ

Figure 1: *Chart Showing ICJ Number of Decisions Issued Per Year and Average Number of Additional Opinions Per Decision*

Year	Number of Decisions Issued	Average Number of Additional Opinions per Decision	Year	Number of Decisions Issued	Average Number of Additional Opinions per Decision	Year	Number of Decisions	Average Number of Additional Opinions per Decision	Year	Number of Decisions Issued	Average Number of Additional Opinions per Decision
1948	2	2.5	1968	0	0	1988	2	4	2008	3	8.67
1949	3	4.67	1969	1	11	1989	2	2.5	2009	3	3
1950	6	4.17	1970	1	11	1990	1	1	2010	3	8
1951	2	3	1971	1	9	1991	1	9	2011	4	6.5
1952	2	5	1972	1	9	1992	2	4.5	2012	5	5.8
1953	3	1.67	1973	3	5	1993	1	10	2013	2	4
1954	2	3.5	1974	4	9	1994	2	4	2014	2	10.5
1955	2	3.5	1975	1	10	1995	2	5.5	2015	1	12
1956	2	6	1976	0	0	1996	4	8.25			
1957	2	5.5	1977	0	0	1997	0	0			
1958	1	11	1978	1	7	1998	4	7.75			
1959	3	7.3	1979	0	0	1999	3	5.33			
1960	3	5.67	1980	2	6	2000	1	5			
1961	2	7	1981	1	3	2001	3	7			
1962	2	7.5	1982	2	7	2002	3	6.67			
1963	1	10	1983	0	0	2003	3	5.67			
1964	1	9	1984	3	6	2004	3	6.33			
1965	0	0	1985	2	6.5	2005	3	4.67			
1966	1	10	1986	2	6	2006	1	7			
1967	0	0	1987	1	7	2007	4	6.75			

Figure 2: *Chart Showing Number of Decisions Per 5 Year Period and Average Number of Additional Opinions Per Decision*

5 Year Period	Number of Decisions Issued	Average Number of Additional Opinions per Decision
1948-1952	15	3.87
1953-1957	11	4.03
1958-1962	11	7.7
1963-1967	3	5.8
1968-1972	4	8
1973-1977	8	4.8
1978-1982	6	4.6
1983-1987	8	5.1
1988-1992	8	4.2
1993-1997	9	5.5
1998-2002	14	6.35
2003-2007	14	6.08
2008-2012	18	6.4
2013-present	5	8.33

Appendix 5: Joint Opinions at the IC J

Figure 1: *Joint Opinions Issued at the ICJ (sorted by number of judges participating in it (continued on next page)*

	Case	Proceeding Type (C = contentious, A = advisory)	Decision Date	Type of Joint Opinion	Number of Judges Participating	Judges						
1	Corfu Channel	C	25/03/1948	Joint Separate	7	Basdevant	Alvarez	Winiarski	Zoričić	De Visscher	Badawi	Krylov
103	Legality of the Use of Force	C	15/12/2004	Joint Declaration	7	Ranjeva	Guillaume	Higgins	Kooijmans	Al-Khasawneh	Buergenthal	Elaraby
23	Admissibility of Hearings of Petitioners by the Committee on South West Africa	A	01/06/1956	Joint Dissenting	5	Badawi	Basdevant	Hsu Mo	Armand-Ugon	Moreno Quintana		
48	Fisheries Jurisdiction	C	25/07/1974	Joint Separate	5	Forster	Bengzon	Jiminéz de Aréchaga	Singh	Ruda		
49	Fisheries Jurisdiction	C	25/07/1974	Joint Separate	5	Forster	Bengzon	Jiminéz de Aréchaga	Singh	Ruda		
50	Nuclear Tests	C	20/12/1974	Joint Declaration	5	Bengzon	Onyeama	Dillard	Jiminez de Arechega	Waldock		
107	Armed Activities on the Territory of the Congo (New Application: 2002)	C	03/02/2006	Joint Separate	5	Vereschetin	Kooijmans	Elaraby	Owada	Simma		
120	Ahmadou Sadio Diallo	C	30/10/2010	Joint Declaration	5	Al-Khasawneh	Simma	Bennouna	Cançado Trindade	Yusuf		
121	Application of the ICERD	A	01/04/2011	Joint Dissenting	5	Owada	Simma	Abraham	Donoghue	Gaja		
2	Conditions of Admission of a State to Membership of the United Nations	A	28/05/1948	Joint Dissenting	4	Basdevant	Winiarski	McNair	Read			
11	Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide	A	20/11/1950	Joint Dissenting	4	Guerrero	McNair	Read	Hsu Mo			
15	Rights of Nationals of the United States of America in Morocco ionals in Morocco	C	27/08/1952	Joint Dissenting	4	Hackworth	Badawi	Levi Carneiro	Rau			
16	Ambatielos	C	19/05/1953	Joint Dissenting	4	McNair	Basdevant	Klaestad	Read			
50	Nuclear Tests	C	20/12/1974	Joint Dissenting	4	Onyeama	Dillard	Jiminéz de Aréchaga	Waldock			
51	Nuclear Tests	C	20/12/1974	Joint Dissenting	4	Onyeama	Dillard	Jiminéz de Aréchaga	Waldock			
114	Application of the Convention on the Prevention and Punishment of Genocide	C	18/11/2008	Joint Declaration	4	Ranjeva	Shi	Koroma	Parra-Aranguren			
132	Maritime Dispute	C	27/01/2014	Joint Dissenting	4	Xue	Gaja	Bhandari	Orrego-Vicuna			
29	Aerial Incident of 27 July 1955	C	26/05/1959	Joint Dissenting	3	Lauterpacht	Wellington Koo	Spender				
62	Continental Shelf	C	03/06/1985	Joint Separate	3	Ruda	Bedjaoui	Jiminéz de Aréchaga				
84	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie	C	27/02/1998	Joint Declaration	3	Bedjaoui	Guillaume	Ranjeva				
84	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie	C	27/02/1998	Joint Declaration	3	Bedjaui	Ranjeva	Koroma				
85	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie	C	27/02/1998	Joint Declaration	3	Bedjaui	Ranjeva	Koroma				
92	Maritime Delimitation and Territorial Questions Between Qatar and Bahrain	C	16/03/2001	Joint Dissenting	3	Bedjaui	Ranjeva	Koroma				
95	Arrest Warrant of 11 April 2000 (DRC v Belgium	C	14/02/2002	Joint Separate	3	Koroma	Kooijmans	Buergenthal				
108	Application of the Convention on the Prevention and Punishment of Genocide	C	26/02/2007	Joint Dissenting	3	Ranjeva	Shi	Koroma				
131	Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear	C	11/11/2013	Joint Declaration	3	Owada	Bennouna	Gaja				

	Case	Proceeding Type (C = contentious, A = advisory)	Decision Date	Type of Joint Opinion	Number of Judges Participating	Judges	
31	Right of Passage over Indian Territory	C	12/04/1960	Joint Dissenting	2	Winiarski	Badawi Pasha
34	Temple of Preah Vihear	C	26/05/1961	Joint Declaration	2	Fitzmaurice	Tanaka
36	Temple of Preah Vihear	C	15/06/1962	Joint Declaration	2	Tanaka	Morelli
37	South West Africa	C	21/12/1962	Joint Dissenting	2	Spender	Fitzmaurice
42	Barcelona Traction, Light and Power Company, Limited (New Application: 1962)	C	05/02/1970	Joint Declaration	2	Petrén	Onyeama
47	Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal	A	12/07/1973	Joint Declaration	2	Forster	Singh
70	Arbitral Award of 31 July 1989	C	12/11/1991	Joint Dissenting	2	Aguilar Mawdsely	Ranjeva
82	Application of the Convention on the Prevention and Punishment of the Crime of Genocide	C	11/07/1996	Joint Declaration	2	Shi	Vereschetin
84	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie	C	27/02/1998	Joint Declaration	2	Guillaume	Fleischhauer
85	Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie	C	27/02/1998	Joint Declaration	2	Guillaume	Fleischhauer
108	Application of the Convention on the Prevention and Punishment of Genocide	C	26/02/2007	Joint Declaration	2	Shi	Koroma
112	Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge	C	23/05/2008	Joint Dissenting	2	Simma	Abraham
118	Pulp Mills on the River Uruguay	C	20/04/2010	Joint Dissenting	2	Al-Khasawneh	Simma
120	Ahmadou Sadio Diallo	C	30/10/2010	Joint Dissenting	2	Yusuf	Al-Khasawneh
120	Ahmadou Sadio Diallo	C	30/10/2010	Joint Declaration	2	Keith	Greenwood
122	Territorial and Maritime Dispute	C	04/05/2011	Joint Dissenting	2	Cançado Trindade	Yusuf
123	Territorial and Maritime Dispute (Nicaragua v Colombia)	C	04/05/2011	Joint Declaration	2	Cançado Trindade	Yusuf

Appendix 6: ICJ Judges and Additional Opinions

						Individual Additional Opinions							Joint Additional Opinions					
Judge (blue = currently sitting as full member)	Country of Origin	Region	Total Judgments Participated In	Judgments Participated in as Ad Hoc Judge	Judgments participated in as Full Member	Individual Dissenting Opinions	Individual Separate Opinions	Individual Declarations	Individual Opinions	Individual Dissenting and Separate Opinions	Total Number of Individual Additional Opinions	Additional Opinions per Judgment Participated in	Joint Dissenting	Joint Separate	Joint Declaration	Total number of Joint Opinions Participated in	**Total Number of Additional Opinions Participated in**	Additional Opinions per Judgments Participated in
Oda	Japan	Asia-Pacific	42	0	42	14	22	5	0	0	41	0.976	0	0	0	0	**41**	0.976
Koroma	Sierra Leone	Africa	47	0	46	9	11	5	0	0	25	0.532	2	1	4	7	**32**	0.681
Ranjeva	Madagascar	Africa	43	0	42	2	8	7	0	0	17	0.395	3	0	4	7	**24**	0.558
Schwebel	USA	WEOG	32	0	32	13	9	0	0	0	22	0.688	0	0	0	0	**22**	0.688
Al-Khasawneh	Jordan	Asia-Pacific	31	0	31	5	6	1	0	0	12	0.387	2	0	2	4	**16**	0.516
Parra-Aranguren	Venezuela	GRULAC	29	0	28	1	11	3	0	0	15	0.517	0	0	1	1	**16**	0.552
Badawi	Egypt	Africa	39	0	39	6	3	2	0	0	11	0.282	3	1	0	4	**15**	0.385
Cançado Trindade	Brazil	GRULAC	18	0	18	3	9	0	0	0	12	0.667	1	0	2	3	**15**	0.833
Koojimans	Netherlands	WEOG	22	0	22	1	9	2	0	0	12	0.545	0	2	1	3	**15**	0.682
Lachs	Poland	EEG	30	0	30	2	5	8	0	0	15	0.500	0	0	0	0	**15**	0.500
Owada	Japan	Asia-Pacific	33	0	32	4	6	2	0	0	12	0.364	1	1	1	3	**15**	0.455
Shahabuddeen	Guyana	GRULAC	14	0	14	3	10	1	0	0	14	1.000	0	0	0	0	**14**	1.000
Winiarski	Poland	EEG	38	0	38	6	1	2	1	0	10	0.263	2	1	0	3	**13**	0.342
Alvarez	Chile	GRULAC	18	0	18	5	0	2	4	0	11	0.611	0	1	0	1	**12**	0.667
Basdevant	France	WEOG	35	0	35	4	1	2	1	0	8	0.229	3	1	0	4	**12**	0.343
Bennouna	Morocco	Africa	28	1	26	5	1	4	0	0	10	0.357	0	0	2	2	**12**	0.429
Gros	France	WEOG	20	0	20	6	4	2	0	0	12	0.600	0	0	0	0	**12**	0.600
Keith	New Zealand	WEOG	27	0	26	0	4	7	0	0	11	0.407	0	0	1	1	**12**	0.444

						Individual Additional Opinions							Joint Additional Opinions					
Judge (blue = currently sitting as full member)	Country of Origin	Region	Total Judgments Participated In	Judgments Participated in as Ad Hoc Judge	Judgments participated in as Full Member	Individual Dissenting Opinions	Individual Separate Opinions	Individual Declarations	Individual Opinions	Individual Dissenting and Separate Opinions	Total Number of Individual Additional Opinions	Additional Opinions per Judgment Participated in	Joint Dissenting	Joint Separate	Joint Declaration	Total number of Joint Opinions Participated in	**Total Number of Additional Opinions Participated in**	Additional Opinions per Judgments Participated in
Singh	India	Asia-Pacific	20	1	19	1	5	3	0	0	9	0.450	0	2	1	3	**12**	0.600
Spender	Australia	WEOG	14	0	14	2	6	2	0	0	10	0.714	2	0	0	2	**12**	0.857
Weeramantry	Sri Lanka	Asia-Pacific	19	2	17	8	4	0	0	0	12	0.632	0	0	0	0	**12**	0.632
Yusuf	Somalia	Africa	19	0	19	2	4	2	0	0	8	0.421	2	0	2	4	**12**	0.632
Abraham	France	WEOG	28	0	27	3	5	1	0	0	9	0.321	2	0	0	2	**11**	0.393
Read	Canada	WEOG	26	0	26	6	1	0	1	0	8	0.308	3	0	0	3	**11**	0.423
Simma	Federal Republic of Germany	WEOG	19	0	18	0	4	2	0	0	6	0.316	3	1	1	5	**11**	0.579
Guillaume	France	WEOG	39	3	36	0	2	5	0	0	7	0.179	0	0	3	3	**10**	0.256
Jimenéz de Aréchega	Uruguay	GRULAC	15	4	11	0	4	0	0	0	4	0.267	2	3	1	6	**10**	0.667
Klaestad	Norway	WEOG	33	0	33	5	2	2	0	0	9	0.273	1	0	0	1	**10**	0.303
Skotnikov	Russia	EEG	27	0	26	2	3	5	0	0	10	0.370	0	0	0	0	**10**	0.370
Tomka	Slovakia	EEG	33	0	32	0	5	5	0	0	10	0.303	0	0	0	0	**10**	0.303
De Castro	Spain	WEOG	11	0	11	4	5	0	0	0	9	0.818	0	0	0	0	**9**	0.818
Dillard	USA	WEOG	11	0	11	0	6	0	0	0	6	0.545	2	0	1	3	**9**	0.818
Fitzmaurice	UK	WEOG	13	0	13	1	6	0	0	0	7	0.538	1	0	1	2	**9**	0.692
Gaja	Italy	WEOG	13	6	7	1	1	4	0	0	6	0.462	2	0	1	3	**9**	0.692
Higgins	UK	WEOG	30	0	29	1	5	2	0	0	8	0.267	0	0	1	1	**9**	0.300
Morelli	Italy	WEOG	10	1	9	3	5	0	0	0	8	0.800	0	0	1	1	**9**	0.900
Moreno Quintana	Argentina	GRULAC	18	0	18	5	1	2	0	0	8	0.444	1	0	0	1	**9**	0.500

						Individual Additional Opinions							Joint Additional Opinions					
Judge (blue = currently sitting as full member)	Country of Origin	Region	Total Judgments Participated In	Judgments Participated in as Ad Hoc Judge	Judgments participated in as Full Member	Individual Dissenting Opinions	Individual Separate Opinions	Individual Declarations	Individual Opinions	Individual Dissenting and Separate Opinions	Total Number of Individual Additional Opinions	Additional Opinions per Judgment Participated in	Joint Dissenting	Joint Separate	Joint Declaration	Total number of Joint Opinions Participated in	**Total Number of Additional Opinions Participated in**	Additional Opinions per Judgments Participated in
Onyeama	Nigeria	Africa	12	0	12	2	3	0	0	0	5	0.417	2	0	2	4	**9**	0.750
Ruda	Argentina	GRULAC	23	1	22	1	5	0	0	0	6	0.261	0	3	0	3	**9**	0.391
Spiropoulos	Greece	WEOG	15	2	13	1	0	7	1	0	9	0.600	0	0	0	0	**9**	0.600
Vereschetin	Russia	EEG	26	0	26	2	3	2	0	0	7	0.269	0	1	1	2	**9**	0.346
Wellington Koo	China	Asia-Pacific	16	0	16	2	5	1	0	0	8	0.500	1	0	0	1	**9**	0.563
Zafrulla Khan	Pakistan	Asia-Pacific	18	0	18	0	1	8	0	0	9	0.500	0	0	0	0	**9**	0.500
Ago	Italy	WEOG	21	1	20	2	5	1	0	0	8	0.381	0	0	0	0	**8**	0.381
Donoghue	USA	WEOG	14	0	12	2	2	3	0	0	7	0.500	1	0	0	1	**8**	0.571
Elaraby	Egypt	Africa	10	0	10	2	3	1	0	0	6	0.600	0	1	1	2	**8**	0.800
Krylov	USSR	EEG	10	0	10	4	0	2	0	0	6	0.600	1	1	0	2	**8**	0.800
Morozov	USSR	EEG	19	0	19	5	2	1	0	0	8	0.421	0	0	0	0	**8**	0.421
Petrén	Sweden	WEOG	11	0	11	2	5	0	0	0	7	0.636	0	0	1	1	**8**	0.727
Azevedo	Brazil	GRULAC	10	0	10	4	1	0	2	0	7	0.700	0	0	0	0	**7**	0.700
Forster	Senegal	Africa	18	0	18	1	3	0	0	0	4	0.222	0	2	1	3	**7**	0.389
Kojevnikov	USSR	EEG	15	0	15	0	0	7	0	0	7	0.467	0	0	0	0	**7**	0.467
Lauterpacht	UK	WEOG	9	0	9	1	4	1	0	0	6	0.667	1	0	0	1	**7**	0.778
McNair	UK	WEOG	20	0	20	2	1	1	0	0	4	0.200	3	0	0	3	**7**	0.350
Rezek	Brazil	GRULAC	20	0	20	1	4	2	0	0	7	0.350	0	0	0	0	**7**	0.350
Shi	China	Asia-Pacific	38	0	37	0	1	2	0	0	3	0.079	1	0	3	4	**7**	0.184
Armand-Ugon	Uruguay	GRULAC	22	2	20	4	1	0	0	0	5	0.227	1	0	0	1	**6**	0.273
Bedjaoui	Algeria	Africa	32	1	31	1	0	1	0	0	2	0.063	1	1	2	4	**6**	0.188

						Individual Additional Opinions							Joint Additional Opinions					
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Greenwood	UK	WEOG	15	0	15	0	4	1	0	0	5	0.333	0	0	1	1	**6**	0.400
Hackworth	USA	WEOG	33	0	33	3	1	1	0	0	5	0.152	1	0	0	1	**6**	0.182
Jennings	UK	WEOG	20	1	19	5	1	0	0	0	6	0.300	0	0	0	0	**6**	0.300
Jessup	USA	WEOG	7	0	7	1	3	2	0	0	6	0.857	0	0	0	0	**6**	0.857
Mahiou	Algeria	Africa	6	2	4	2	3	1	0	0	6	1.000	0	0	0	0	**6**	1.000
Padilla Nervo	Mexico	GRULAC	8	0	8	3	3	0	0	0	6	0.750	0	0	0	0	**6**	0.750
Tanaka	Japan	Asia-Pacific	8	0	8	2	2	0	0	0	4	0.500	0	0	2	2	**6**	0.750
Xue	China	Asia-Pacific	14	0	14	2	1	2	0	0	5	0.357	1	0	0	1	**6**	0.429
Zoričić	Yugoslavia	EEG	20	0	20	2	0	2	0	0	4	0.200	1	1	0	2	**6**	0.300
Ajibola	Nigeria	Africa	5	3	2	3	2	0	0	0	5	1.000	0	0	0	0	**5**	1.000
Ammoun	Lebanon	Asia-Pacific	8	0	8	1	4	0	0	0	5	0.625	0	0	0	0	**5**	0.625
Buergenthal	USA	WEOG	26	0	25	1	1	1	0	0	3	0.115	0	1	1	2	**5**	0.192
Fleischhauer	Federal Republic of Germany	WEOG	21	1	20	1	1	1	0	0	3	0.143	0	0	2	2	**5**	0.238
Herczegh	Hungary	EEG	22	0	22	0	0	5	0	0	5	0.227	0	0	0	0	**5**	0.227
Hsu Mo	China	Asia-Pacific	23	0	23	1	1	1	0	0	3	0.130	2	0	0	2	**5**	0.217
Ignacio-Pinto	Benin	Africa	9	0	9	0	2	3	0	0	5	0.556	0	0	0	0	**5**	0.556
Koretsky	USSR	EEG	9	0	9	3	0	2	0	0	5	0.556	0	0	0	0	**5**	0.556

						Individual Additional Opinions							Joint Additional Opinions					
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Kreća	Serbia and Montenegro	EEG	5	3	2	2	3	0	0	0	5	1.000	0	0	0	0	**5**	1.000
Levi Carneiro	Brazil	GRULAC	7	0	7	2	0	0	2	0	4	0.571	1	0	0	1	**5**	0.714
Sepúlveda-Amor	Mexico	Africa	27	1	25	1	3	1	0	0	5	0.185	0	0	0	0	**5**	0.185
Sette Camara	Brazil	GRULAC	14	1	13	2	3	0	0	0	5	0.357	0	0	0	0	**5**	0.357
Torres Bernárdez	Spain	WEOG	8	8	0	3	2	0	0	0	5	0.625	0	0	0	0	**5**	0.625
Waldock	UK	WEOG	10	0	10	0	2	0	0	0	2	0.200	2	0	1	3	**5**	0.500
Bengzon	Philippines	Asia-Pacific	12	0	12	0	0	1	0	0	1	0.083	0	2	1	3	**4**	0.333
Evensen	Norway	WEOG	10	1	9	2	1	1	0	0	4	0.400	0	0	0	0	**4**	0.400
Mbaye	Senegal	Africa	13	4	9	0	3	1	0	0	4	0.308	0	0	0	0	**4**	0.308
Mosler	Federal Republic of Germany	WEOG	10	1	9	1	3	0	0	0	4	0.400	0	0	0	0	**4**	0.400
Sebutinde	Uganda	Africa	8	0	8	1	3	0	0	0	4	0.500	0	0	0	0	**4**	0.500
Valticos	Greece	WEOG	5	5	0	1	3	0	0	0	4	0.800	0	0	0	0	**4**	0.800
Bhandari	India	Asia-Pacific	5	0	5	0	2	0	0	0	2	0.400	1	0	0	1	**3**	0.600
Cordova	Mexico	GRULAC	13	0	13	2	1	0	0	0	3	0.231	0	0	0	0	**3**	0.231
Elias	Nigeria	Africa	15	0	15	0	2	1	0	0	3	0.200	0	0	0	0	**3**	0.200
Guerrero	El Salvador	GRULAC	22	0	22	1	0	1	0	0	2	0.091	1	0	0	1	**3**	0.136

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Mampuya	Democratic Republic of Congo	Africa	3	1	2	0	3	0	0	0	3	1.000	0	0	0	0	**3**	1.000
Vukas	Croatia	EEG	3	3	0	1	1	1	0	0	3	1.000	0	0	0	0	**3**	1.000
Aguilar-Mawdsely	Venezuela	GRULAC	7	0	7	0	0	1	0	0	1	0.143	1	0	0	1	**2**	0.286
Alfaro	Panama	GRULAC	7	0	7	0	1	1	0	0	2	0.286	0	0	0	0	**2**	0.286
Barwick	Australia	WEOG	2	2	0	2	0	0	0	0	2	1.000	0	0	0	0	**2**	1.000
Chagla	India	Asia-Pacific	2	2	0	2	0	0	0	0	2	1.000	0	0	0	0	**2**	1.000
Cot	France	WEOG	3	3	0	0	0	2	0	0	2	0.667	0	0	0	0	**2**	0.667
De Visscher	Belgium	WEOG	13	0	13	1	0	0	0	0	1	0.077	0	1	0	1	**2**	0.154
Dugard	South Africa	Africa	2	2	0	1	1	0	0	0	2	1.000	0	0	0	0	**2**	1.000
Ečer	Czechoslovakia	EEG	2	2	0	2	0	0	0	0	2	1.000	0	0	0	0	**2**	1.000
El-Khani	Syria	Asia-Pacific	6	0	6	1	0	1	0	0	2	0.333	0	0	0	0	**2**	0.333
Fernandes	Portugal	WEOG	2	2	0	1	0	1	0	0	2	1.000	0	0	0	0	**2**	1.000
Ferrari Bravo	Italy	WEOG	4	0	4	0	0	2	0	0	2	0.500	0	0	0	0	**2**	0.500
Franck	USA	WEOG	2	2	0	1	1	0	0	0	2	1.000	0	0	0	0	**2**	1.000
Mbanefo	Nigeria	Africa	2	2	0	1	1	0	0	0	2	1.000	0	0	0	0	**2**	1.000
Ni	China	Asia-Pacific	10	0	10	0	2	0	0	0	2	0.200	0	0	0	0	**2**	0.200
Orrego Vicuña	Chile	GRULAC	1	1	0	0	0	0	0	1	1	1.000	1	0	0	1	**2**	2.000
Tarzai	Syria	Asia-Pacific	2	0	2	1	1	0	0	0	2	1.000	0	0	0	0	**2**	1.000

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Van Wyk	South Africa	Africa	2	2	0	1	1	0	0	0	2	1.000	0	0	0	0	**2**	1.000
Abi-Saab	Egypt	Africa	2	2	0	0	1	0	0	0	1	0.500	0	0	0	0	**1**	0.500
Alayza y Paz Soldán	Peru	GRULAC	2	1	1	0	0	1	0	0	1	0.500	0	0	0	0	**1**	0.500
Bastid	France	WEOG	1	1	0	0	1	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Beb à Don	Cameroon	Africa	1	0	1	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Berman	UK	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Boni	Cote D'Ivoire	Africa	1	1	0	0	1	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Bula-Bula	Democratic Republic of Congo	Africa	1	0	1	0	1	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Caicedo Castilla	Colombia	GRULAC	2	1	1	1	0	0	0	0	1	0.500	0	0	0	0	**1**	0.500
Carry	Switzerland	WEOG	1	1	0	0	0	1	0	0	1	1.000	0	0	0	0	**1**	1.000
Charlesworth	Australia	WEOG	1	1	0	0	1	0	0	0	1	1.000				0	**1**	1.000
Daudet	France	WEOG	1	0	1	0	1	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Daxner	Czechoslovakia	EEG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Dimitrijevic	Yugoslavia	EEG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
E Lauterpacht	UK	WEOG	1	1	0	0	0	1	0	0	1	1.000	0	0	0	0	**1**	1.000
El-Erian	Egypt	Africa	3	0	3	0	1	0	0	0	1	0.333	0	0	0	0	**1**	0.333
Fischer	Denmark	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Fortier	Canada	WEOG	2	2	0	0	1	0	0	0	1	0.500	0	0	0	0	**1**	0.500

						Individual Additional Opinions							Joint Additional Opinions					
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Goitein	Israel	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Guggenhein	Switerland	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Kateka	Tanzania	Africa	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Luchaire	France	WEOG	1	1	0	0	1	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Mavungu	Democratic Republic of Congo	Africa	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Mensah	Ghana	Africa	1	1	0	0	0	1	0	0	1	1.000	0	0	0	0	**1**	1.000
Offerhaus	Netherlands	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Paolillo	Uruguay	GRULAC	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Pirzada	Pakistan	Asia-Pacific	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Rao	India	Asia-Pacific	1	1	0	0	1	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Rau	India	Asia-Pacific	3	0	3	0	0	0	0	0	0	0.000	1	0	0	1	**1**	0.333
Reddy	India	Asia-Pacific	1	1	0	0	1	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Rigaux	Belgium	WEOG	2	2	0	0	1	0	0	0	1	0.500	0	0	0	0	**1**	0.500
Riphagen	Netherlands	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Roucounas	Greece	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Skubiszeqski	Poland	EEG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Sorensen	Denmark	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Stassinapoulos	Grece	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Sur	France	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000

						Individual Additional Opinions							Joint Additional Opinions					
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Tarassov	Russia	EEG	9	0	9	0	0	1	0	0	1	0.111	0	0	0	0	**1**	0.111
Thierry	France	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Urrutia Holguin	Colombia	GRULAC	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Van Den Wyngaert	Belgium	WEOG	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Verhoeven	Belgium	WEOG	1	1	0	0	0	1	0	0	1	1.000	0	0	0	0	**1**	1.000
Vinuesa	Argentina	GRULAC	1	1	0	1	0	0	0	0	1	1.000	0	0	0	0	**1**	1.000
Baxter	USA	WEOG	1	0	1	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Castañeda	Mexico	GRULAC	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Cohen	Canda	WEOG	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Colliard	France	WEOG	2	2	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Crawford	Australia	WEOG	0	0	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
De Lacharrière	France	WEOG	6	0	6	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
El-Kosheri	Egypt	Africa	2	2	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Fabela	Mexico	GRULAC	5	0	5	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Ganshof van der Meersch	Belgium	WEOG	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Garcia Bauer	Guatamala	GRULAC	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Gevorgian	Russia	EEG	0	0	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Kirsch	Belgium	WEOG	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Lalonde	Canada	WEOG	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Oxman	USA	WEOG	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000

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Pathak	India	Asia-Pacific	1	0	1	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Robinson	Jamaica	GRULAC	0	0	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Stephen	Australia	WEOG	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Sterzel	Sweden	WEOG	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000
Zourek	Czechoslovakia	EEG	1	1	0	0	0	0	0	0	0	0.000	0	0	0	0	**0**	0.000

Appendix 7: Numerical Breakdown of ICTY Practice

	Total Number of Judgments	Individual				Joint				Total	Average number of additional opinions per judgment
		Dissenting Opinions	Separate Opinions	Declarations	Dissenting and Separate Opinions	Dissenting Opinions	Separate Opinions	Declarations	Dissenting and Separate Opinions		
Trial Chamber	42	10	5	1	7	0	1	0	0	24	0.57
Appeal Chamber	38	29	21	13	13	4	3	0	1	84	2.21

TRIAL CHAMBER JUDGES TO HAVE PARTICIPATED IN AT LEAST ONE ADDITIONAL OPINION

Judge	Total Number of Judgments Participated In	Individual				Joint				Total
		Dissenting Opinions	Separate Opinions	Declarations	Dissenting and Separate Opinions	Dissenting Opinions	Separate Opinions	Declarations	Dissenting and Separate Opinions	
Moloto	4	3	0	0	0	0	0	0	0	**3**
Nieto-Navia	2	0	0	0	1	0	1	0	0	**2**
Robinson	3	0	2	0	0	0	0	0	0	**2**
Antonetti	2	0	0	0	1	0	0	0	0	**1**
Chowhan	1	1	0	0	0	0	0	0	0	**1**
David	2	1	0	0	0	0	0	0	0	**1**
Höpfel	2	1	0	0	0	0	0	0	0	**1**
Kesia-Mbe Mindua	3	0	1	0	0	0	0	0	0	**1**
Kirk McDonald	1	0	0	0	1	0	0	0	0	**1**
Kinis	1	1	0	0	0	0	0	0	0	**1**
Kwon	1	0	0	0	1	0	0	0	0	**1**
Lindholm	1	0	0	0	1	0	0	0	0	**1**
Matimba Nyambe	1	0	0	0	1	0	0	0	0	**1**
Orie	5	0	1	0	0	0	0	0	0	**1**
Picard	2	1	0	0	0	0	0	0	0	**1**
Prost	1	0	1	0	0	0	0	0	0	**1**
Shahabuddeen	1	0	0	1	0	0	0	0	0	**1**
Simoes Rodrigues	1	1	0	0	0	0	0	0	0	**1**
Trechsel	1	0	0	0	1	0	0	0	0	**1**
Van Den Wyngaert	5	1	0	0	0	0	0	0	0	**1**
Vohrah	2	0	0	0	0	0	1	0	0	**1**

Appeals Chamber											
		Individual				Joint					
Judge	Total Judgments Participated in	Dissenting Opinions	Separate Opinions	Declarations	Dissenting and Separate Opinions	Dissenting Opinions	Separate Opinions	Declarations	Dissenting and Separate Opinions	Total	Average Number of Additional Opinions per Judgment
Shahabuddeen	21	6	6	5	1					**18**	0.857
Schomburg	13	1	4	1	4	2				**12**	0.923
Meron	20		3		1	1	2			**7**	0.350
Liu	11	4	1	1	1	1				**8**	0.727
Güney	26	2			2	2				**6**	0.231
Pocar	23	5				1				**6**	0.261
Robinson	8	2	1	1						**4**	0.500
Agius	5	1	1				1			**3**	0.600
Weinberg de Roca	4	1	2							**3**	0.750
Vaz	16	1					1			**2**	0.125
Nieto-Navia	5		1	1						**2**	0.400
Vohrah	4			1			1			**2**	0.500
Ramaroson	3	1	1							**2**	0.667
Hunt	2			1					1	**2**	1.000
Tuzmukhamedov	2	2								**2**	1.000
Morrison	1	1	1							**2**	2.000
Cassese	2				1					**1**	0.500
Sekule	2	1								**1**	0.500
Wald	2	1								**1**	0.500
Antonetti	1				1					**1**	1.000
Bennouna	1								1	**1**	1.000
Kirk McDonald	1						1			**1**	1.000
Kwon	1					1				**1**	1.000
Li	1				1					**1**	1.000
Niang	1				1					**1**	1.000
Stephen	1			1						**1**	1.000
Van Den Wyngaert	1			1						**1**	1.000
Ndepele Mwachande Mumba	5									**0**	0.000
Jorda	2									**0**	0.000
Tieya	2									**0**	0.000
May	1									**0**	0.000
Rachid Khan	1									**0**	0.000
Riad	1									**0**	0.000