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

Sarmiento Lamus, A.D.

Introduction

1. The proliferation of dissenting opinions in international law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

append dissenting opinions to decisions arising from individual communications.

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

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

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

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

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

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

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

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

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

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

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

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

2. Statement of the problem and research aim

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Delineation of the concepts of dissenting opinion and judgment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Research methodology

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

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

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

5. Structure of the dissertation

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

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

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

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