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

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4 The differences between the International Court of Justice and the Inter-American Court and their influence on the exercise of the right to append dissenting opinions

The previous chapter (Chapter 3) has addressed the mandate, jurisdictional and procedural features of the International Court of Justice and the Inter-American Court of Human Rights. To be more precise, in addressing the judicial function and anatomy of both courts, Chapter 3 has highlighted fundamental differences between both courts and formulated concrete questions, on how these differences may inform the exercise of the right to append dissenting opinions at the respective courts. Guided by these questions, this chapter illustrates, how and to what extent the differences in mandate, jurisdictional and institutional design may influence the exercise of the right to append dissenting opinions. It will be made by offering insight trough illustration of the practice from judges from the International Court of Justice and the Inter-American Court of Human Rights, in the exercise of their right to append dissenting opinions. It will moreover not be limited to pointing out the *differences* in the exercise of the right to append dissenting opinions that arise from the differences in the judicial function and anatomy. It also includes aspects where, despite the differences between both international courts, *similarities* exist in the exercise of the right to append dissenting opinions.

This chapter will be divided in four sections. Each section refers to an aspect of mandate, jurisdiction and procedure of the International Court of Justice and the Inter-American Court of Human Rights, addressed in Chapter 3 (*i.e.* judicial function, composition of the bench, judges *ad hoc* and national judges, deliberations and the moment to disclose the content of dissents and the scope and publicity of dissenting opinions). In turn, each section will be divided in subsections and aims to answering to each of the questions formulated in order to guide analysis as to how and to what extent the differences in mandate, jurisdictional and institutional design may influence the exercise of the right to append dissenting opinions.

4.1 The judicial function of the International Court of Justice and the Inter-American Court of Human Rights and its influence on the right to append dissenting opinions

4.1.1 The main function of the International Court of Justice and the Inter-American Court of Human Rights in the context of the exercise of the right to append dissenting opinions

The most significant of the differences between the International Court of Justice and the Inter-American Court of Human Rights refers to what can

be said to constitute their main judicial function. The ICJ is entrusted with the function of the settlement of disputes that states submit to it. For its part, the Inter-American Court has a completely different judicial function. It relates to the protection of human rights; to be more precise it is related to an allegation from a person concerning the violation from a state of its duty to ensure or guarantee the protection of his human rights.

The dissenting judges may refer to main function of the respective courts in varying degrees and different ways or with a view to different types of outcomes. In the case of the International Court of Justice, there are 34 instances in which judges have explicitly referred to the main function of the ICJ, as a core reason for their decision to append a dissenting opinion.[1] The following four examples are illustrative of how the main function of the International Court of Justice informs the exercise of the right to dissent. The first instance is the dissenting opinion appended by judge Onyeama to the ICJ's judgments on the merits of the cases concerning *Fisheries Jurisdiction* instituted by Iceland against Germany and the United Kingdom. This judge noted,

1 *Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America)*, Preliminary Question, Judgment of 15 June 1954, [1954] ICJ Rep. 19, (Dissenting Opinion, Judge Levi Carneiro); *Nottebohm (Liechtenstein v. Guatemala)*, Merits, Judgment of 6 April 1955, [1955] ICJ Rep. 4 (Dissenting Opinion, Judge Klaestad) and (Dissenting Opinion, Judge Read); *Certain Norwegian Loans (France v. Norway)*, Preliminary Objections, Judgment of 6 July 1957, [1957] ICJ Rep. 9, (Dissenting Opinion, Judge Guerrero); *Right of Passage over Indian Territory (Portugal v. India)*, Merits, Judgment of 12 April 1960, [1960] ICJ Rep. 6, (Dissenting Opinion, Judge Moreno Quintana); *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment of 25 July 1974, [1974] ICJ Rep 3, (Dissenting Opinion, Judge Gros) and (Declaration, Judge Ignacio-Pinto) and (Dissenting Opinion, Judge Onyeama) and (Dissenting Opinion, Judge Petrén); *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment of 25 July 1974, [1974] ICJ Rep 3, (Dissenting Opinion, Judge Gros) and (Declaration, Judge Ignacio-Pinto) and (Dissenting Opinion, Judge Onyeama) and (Dissenting Opinion, Judge Petrén); *Nuclear Tests Case (Australia v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 253, (Joint Dissenting Opinion, Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock) and (Dissenting Opinion, Judge de Castro); *Nuclear Tests Case (New Zealand v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 457, (Joint Dissenting Opinion, Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock) and (Dissenting Opinion, Judge de Castro); *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, [1998] ICJ Rep. 432, (Dissenting Opinion, Judge Bedjaoui) and (Dissenting Opinion, Judge Ranjeva) and (Dissenting Opinion, Judge Vereschtein); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, [2007] ICJ Rep. 832, (Dissenting Opinion, Judge Bennouna) and (Dissenting Opinion, Judge Al-Khasawneh) and (Separate Opinion, Judge Abraham) and (Declaration, Judge Simma); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, [2010] ICJ Rep. 14, (Joint Dissenting Opinion, Judges Simma and Al-Khasawneh); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment of 20 July 2012, [2012] ICJ Rep. 422, (Dissenting Opinion, Judge *ad hoc* Sur); *Jurisdictional Immunities of the State (Germany v. Italy)*, Merits, Judgment of 3 February 2012, [2012] ICJ Rep. 99, (Dissenting Opinion, Judge Cançado Trindade) and (Dissenting Opinion, Judge Yusuf); *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 833, (Dissenting Opinion, Judge Robinson).

> "that the Court settled an issue on which the Parties were not in dispute. In my view the Court's approach to the entire case has led it to refrain from deciding the sole dispute before it, and to consider and settle an issue on which the Parties were not shown to be in difference and on which the Court's jurisdiction is very much in doubt."[2]

A perhaps more challenging pronouncement was made by judge Gros in the dissent that he appended to this same judgment. This judges expressed his dissenting views as follows,

> "[t]he Court has not fulfilled its mission in the present case, since it has not decided the legal question which the Parties to the 1961 agreement had envisaged laying before it (…) such a judgment cannot therefore be effective for the settlement of the real substantive dispute, even there were an intention to achieve this (…) the States -of which there are now not many- which come before the Court do not do so to receive advice, but to obtain judicial confirmation of the treaty commitments which they have entered into, according to established international law."[3]

In addition, an also relevant instance is to be found in the dissenting opinions appended by the judges who voted against one subparagraph of the *dispositif* of the ICJ's judgment on preliminary objections in the case concerning *Territorial and Maritime Dispute*.[4] With regard to a claim advanced by Nicaragua and the way it was addressed by the majority in its judgment, judge Bennouna noted in his opinion that,

> "[f]or if any pat could nip in the bud an argument on the merits at a point where the other party had not had the opportunity to discuss it fully, as is its right, the question would arise as to whether international justice had been prevented from performing its principal task, which is to settle a dispute once the States have exhausted all their arguments on the subject. It is the very credibility of the International Court of Justice as the principal judicial organ of the United Nations which is at stake here."[5]

The last instance that exemplifies the relation between the main function of the International Court of Justice and dissents, is the opinion appended by judge Yusuf in the recent judgment in the case on *Jurisdictional Immunities of the State*. The majority noted in its decision as a matter of surprise and regret, that despite the significant steps taken by Germany in order to compensate Italian victims, it decided to exclude the Italian prisoners of war from these measures.[6] In this regard, judge Yusuf noted that,

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2 *Fisheries Jurisdiction (United Kingdom v. Iceland)*, *supra* note 1, (Dissenting Opinion, Judge Onyeama), p. 164, para. 1.

3 Ibid, (Dissenting Opinion, Judge Gros), at pp. 148 – 149, para. 34.

4 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1.

5 Ibid, (Dissenting Opinion, Judge Bennouna), p. 927.

6 *Jurisdictional Immunities of the State (Germany v. Italy)*, supra note 1, p. 143, para. 99.

> "[t]he dispute before the Court is not about the general applicability of immunity to unlawful acts committed by the armed forces of a State in a situation of armed conflict. This is a very broad subject which is best left for academic papers and scholarly discussions. The dispute in this case is about the decisions of Italian courts to set aside the jurisdictional immunity of Germany to allow certain categories of Italian victims (…) instead of assessing the impact that this failure to make reparations (…) the Court limits itself to state that [it] considers that it is a matter of surprise — and regret — that Germany decided to deny compensation. It bears to be recalled in this connection that disputes between States are not submitted to an international adjudicatory body, and particularly to the principal judicial organ of the United Nations, for expressions of surprise and regret, but for their appropriate settlement on the basis of international law."[7]

On the other hand, in the case of the Inter-American Court of Human Rights there are 10 instances in which dissenting judges expressly referred to the main the court's main function.[8] In these opinions the judges have argued that the IACtHR has either failed in protecting the human rights either of the victims in the case at hand or that the exercise of its main function may have negative consequences for the protection of the human rights of the population in general.

In the case of an instance where a decision from the IACtHR may have negative consequences for the protection of human rights of the population in general, a relevant example is the partial dissenting opinion appended by judge Sierra Porto in the case of *Cuscul Pivaral et al v. Guatemala*. The majority of the IACtHR declared a violation of article 26 of the American Convention (progressive development) by virtue of Guatemala's failure to guarantee full medical care to people with HIV. Consequently, the Inter-American Court of Human Rights ordered Guatemala to *inter alia* imple-

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7 Ibid, (Dissenting Opinion, Judge Yusuf), pp. 293 – 294, paras. 7 – 10.

8 *Gangaram Panday v. Suriname*. Merits, Reparations and Costa. Judgment of 21 January 1994. Series C No. 16, (Joint Dissenting Opinion, Judges Picado Sotela, Aguilar Aranguren and Cançado Trindade); *El Amparo v. Venezuela.* Reparations and Costs. Judgment of 14 September 1996. Series C No. 28, (Dissenting Opinion, Judge Cançado Trindade); *Caballero Delgado y Santana v. Colombia*. Reparations and Costs. Judgment of January 29, 1997. Series C, No. 31, (Dissenting Opinion, Judge Cançado Trindade); *Serrano Cruz Sisters v. El Salvador.* Preliminary Objections. Judgment of November 23, 2004. Series C No. 118, (Dissenting Opinion, Judge Cançado Trindade); *Serrano Cruz Sisters v. El Salvador*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120, (Dissenting Opinion, Judge Cançado Trindade); *Brewer Carías v. Venezuela*. Preliminary Objections. Judgment of May 26, 2014. Series C No. 278, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor); *Landaeta Mejia Brothers t al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 27, 2014. Series C No. 281, (Partial Dissenting Opinion, Judge Caldas); *Duque v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 26, 2016. Series C No. 310, (Dissenting Opinion, Judge Vio Grossi); *Campos del Lago v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340, (Dissenting Opinion, Judge Vio Grossi); *Cuscul Pivaral et al v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 23 August, 2018. Series C No. 358, (Partial Dissenting Opinion, Judge Sierra Porto).

menting mechanisms for improving accessibility, availability and quality of health benefits for people living with HIV and ensuring the provision of antiretrovirals and other medication to any affected person.[9] Judge Sierra Porto noted with respect to this order, that despite the practice of the IACtHR to ordering administrative or public policy measures with an impact beyond the concrete victims of the case, it is necessary to adopt a cautious approach when excessively broad reparations refer to aspects that require action by the public authorities.[10] In his view, it is therefore necessary to also take into account that,

> "while the present case deals with the right to health, specifically in relation to people living with HIV, it is necessary to bear in mind that, together with them, there is people whose access to food, housing, water, is not satisfied either (…) [hence] it is necessary to adopt an approach that takes into account the needs of the society as a whole, rather than focusing in the specific needs of a particular group (…) therefore, in a region where financial resources are limited (…) the role of a regional human rights court should not be to order inflexible measures. This may lead, not only to the impossibility of complying with these measures, but also to a negative effect on the allocation of financial resources for other rights whose satisfaction is the same or more urgent."[11]

An additional instance that clearly exemplifies this relation between the main function of the Inter-American Court of Human Right and the exercise of the right to append dissenting opinions, with respect to the alleged failure from the IACtHR to protecting the human rights of the victim, is to be found in the case of *Brewer Carías v. Venezuela*. Judges Ventura Robles and Ferrer MacGregor, who appended a joint dissent, noted that,

> "the failure to analyse the merits of the case of the criminal prosecution of Mr. Brewer Carías restricted what should be the main task of an international human rights court: the defense of the human being in the face of the high-handedness of the State. An international court of human rights must, above all else, defend the rule of law."[12]

Further, an analysis of the content of the opinions appended by dissenting judges shows that certain methods are used when they exercise their right to append dissents, with a view to contributing to the fulfilment of the main function of the International Court of Justice and the Inter-American Court of Human Rights.

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9 *Cuscul Pivaral et al v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 23 August, 2018. Series C No. 358, operative paragraph 14.

10 Ibid, (Partial Dissenting Opinion, Judge Sierra Porto), para. 13.

11 Ibid, (Partial Dissenting Opinion, Judge Sierra Porto), paras. 13, 14, 17.

12 *Case of Brewer Carías v. Venezuela*. Preliminary Objections. Judgment of May 26, 2014. Serie C No. 278, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), paras. 2, 124 - 125.

In the case of the ICJ, the method takes account of the subject-matter of the dispute that states bring before it, their submissions and the point of fact and law that sustain them. In this regard, it is in principle for the applicant state to indicate in its application the subject matter of the dispute.[13] This does not, however, mean that the International Court of Justice is not limited to consider the dispute in the contours set forth by the applicant states. It is free to make its own assessment as to the subject-matter of the dispute,[14] with a view to isolate the real issue in the case and to identify the object of the claim.[15] In addition, with regard to the submissions and the points of fact and law that sustain them, the ICJ is not bound to address all of them. It is at liberty to address only those points either of fact or law, that it considers as necessary for the settlement of the dispute.[16] Consequently, having in mind that its judicial function refers to the settlement of the dispute, the International Court of Justice has,

> "the freedom to select the ground upon which it will base its judgment, and is under no obligation to examine all the considerations advanced by the Parties if other considerations appear to it to be sufficient for its purpose."[17]

It is against this background, that the exercise of the right to append dissenting opinions, with a view to contributing to the main function of the International Court of Justice (*i.e.* the settlement of disputes), takes account of an assessment of the subject-matter of the dispute, the submissions of the parties and the points of fact and law that sustain them.

A relevant instance in this regard is the case concerning *Territorial and Maritime Dispute*[18] between Nicaragua and Colombia. Nicaragua requested *inter alia* from the ICJ, a declaratory judgment concerning its sovereignty over certain maritime features in the Caribbean Sea. An important aspect of this claim was the submission concerning, the invalidity or termination of the 1928 Esguerra-Bárcenas treaty. In its judgment on preliminary

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13 Judge Schwebel for instance noted in his separate opinion appended to the first judgment on jurisdiction and admissibility in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* that, "It is (…) a commanding feature of the jurisprudence of this Court that the submissions of the Parties define the parameters of a judgment, that is the function of the *dispositif* of the judgment to rule upon and dispose of those submissions (unless exceptional considerations rendered them moot)." *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 1 July 1994, [1994] ICJ Rep. 112, (Separate Opinion, Judge Schwebel), p. 130.

14 Juan J. Quintana, Litigation at the International Court of Justice (Martinus Nijhoff Publishers 2015), 264.

15 See, *e.g.*, *Nuclear Tests* case, *supra* note 1, p. 466, para. 30; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 1, pp. 441 – 445, paras. 44 – 55.

16 Robert Kolb, The International Court of Justice (Hart Publishing 2013), 305.

17 *Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, Judgment of 28 November 1958, [1958] ICJ Rep. 55, p. 62.

18 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, supra note 1.

objections, the majority of the ICJ decided that the subject-matter of the dispute exclusively related to issues concerning sovereignty over territory and the subsequent determination of the maritime boundary between the parties. Nicaragua's claim as to the invalidity or termination of the 1928 Esguerra-Bárcenas treaty, was not therefore part of the subject-matter of the dispute.[19] Consequently, in the interest of the sound administration of justice, it decided to address the invalidity or termination of the 1928 Esguerra-Bárcenas treaty, in the preliminary objections phase.[20] In this regard, the majority concluded that since more than 50 years have passed until Nicaragua claimed the said invalidity for the first time; the 1928 Esguerra-Bárcenas treaty was therefore valid and in force.

The three judges that voted against this decision from the majority, noted that the ICJ's conclusion has denied the current existence of a dispute concerning the invalidity of the 1928 Esguerra-Bárcenas treaty. Moreover, the manner in which the majority addressed the claims of invalidity, did not satisfactorily settle this aspect. For instance, Judge Al-Khasawneh noted in his dissenting opinion that the majority "sought to avert this eventuality [*i.e.* that a an answer in the preliminary objections phase, regarding the validity of the 1928 Esguerra-Bárcenas treaty, would determine an element of the merits of the dispute] by resort to the simple device of first defining the subject-matter of the dispute narrowly so as to exclude the status of the Treaty and Protocol from its ambit."[21] For judge Al-Khasawneh, such a course of action taken by the majority completely disregarded the submissions of Nicaragua.[22]

An also relevant instance in the case of the International Court of Justice, is to be found in the joint dissenting opinion appended to the majority judgment in the *Nuclear Tests* case. The judges who authored this opinion noted that,

> "the basic premise of the Judgment, which limits the Applicant's submissions to a single purpose, and narrowly circumscribes its objective in pursuing the present proceedings is untenable (…) the Judgment fails to account of the purpose and utility of a request for a declaratory judgment and even more because its premise fails to correspond to and even changes the nature and scope of New Zealand's formal submission as presented in the Application."[23]

Based on New Zealand's submission, these judges observed that a declaration as to the violation of its rights by means of the conduct by France of nuclear tests, constitutes the main prayer in the application.[24] Hence, "[t]he

19 Ibid, p. 849, para. 42.
20 Ibid, pp. 851 – 852, para. 76.
21 Ibid, (Dissenting Opinion, Judge Al-Khasawneh), p. 882, para. 12.
22 Ibid, at p. 883, para. 13.
23 *Nuclear Tests* case, *supra* note 1, (Joint Dissenting Opinion, Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock), p. 494, para. 2.
24 Ibid, p. 498, para. 11.

interpretation made by [the majority of] the Court constitutes in our view not an interpretation but a complete revision of the text, which ends in eliminating what constitutes the essence of that submission."[25] Consequently, the majority erred in concluding that the dispute between the parties has disappeared, since the said conclusion was "based on the premise that the sole purpose of the Application was to obtain a cessation of tests as from the date of the Judgment."[26]

The last instance to be mentioned is the case concerning the *Arbitral Award of 31 July 1989* between Guinea Bissau and Senegal. For the majority of the International Court of Justice, the fact that the answer provided in the arbitral award did not permit a complete settlement of the disputes between the two states, did not mean that a complete answer was not provided in the said award.[27] Based on this assertion from the majority, judges Aguilar Mawdsley and Ranjeva noted in their joint dissenting opinion that,

> "[i]t is incumbent on the court seised of a dispute to take simultaneously into account the three constitutive elements of an international agreement: the letter, the object and the purpose of the agreement (…) [in the light of these elements] the Court should have taken it upon itself to carry the analysis to its conclusion by drawing the appropriate legal conclusion from the omission and the failure of which it took note (…) the Court should, in our opinion, having regard to this omission, have called into question the soundness of the Award inasmuch as the necessary respect for the right of the Parties to a proper administration of international justice was at stake."[28]

On the other hand, in the case of the Inter-American Court of Human Rights the method used by judges takes account of the factual framework of the case that has been submitted to it, as well as the *iura novit curia*[29] and *pro homine* principles.[30] In this regard, the IACtHR has noted that it is its duty to apply the juridical provisions relevant to a proceeding, even when the parties do not expressly invoke them.[31] As a consequence, it can declare the violation of rights contained in the ACHR and other relevant treaties,

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25 Ibid, p. 499, para. 12.

26 Ibid, p. 502, para. 18.

27 *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment of 12 November 1991, [1991] ICJ Rep 53, p. 73, para. 60.

28 Ibid, (Joint Dissenting Opinion, Judges Aguilar Mawdsley and Ranjeva), pp. 124 – 129, paras. 14, 16 and 25.

29 Rafael Nieto Navia, 'La Aplicación del Principio *Jura Novit Curia* por los órganos del Sistema Interamericano de Derechos Humanos', in Ernesto Rey Caro & Maria Cristina Rodríguez (eds.) *Estudios de Derechos Internacional en Homenaje a la Dra. Zlata Drnas de Clément* (Advocatus 2014), 619.

30 Yota Negishi, 'The *Pro Homine* Principle's Role in Regulating the relationship between Conventionality Control and Constitutionality Control', (2017) 28 *European Journal of International Law*, 457, 468 – 473.

31 *Hilarie, Constantine and Benjamin et al v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of 21 June, 2002. Series C No. 94, para. 107.

even though the victims have not referred to these rights in its application.[32] In this order of ideas, a declaration as to the violation of additional rights is permitted, as long as the facts that sustain the said declaration do not surpass the factual framework of the case submitted to the Inter-American Court of Human Rights.[33]

A relevant instance of the method concerning the framework of the submitted before the IACtHR is present in the opinion appended by judge Ferrer MacGregor in the case of *Suarez Peralta v. Ecuador.* The majority of the Inter-American Court of Human Rights concluded that a failure from the state to establish quality standards for public and private health care institutions, as well as a failure to supervise and control health services, amounted to a violation of the right to personal integrity.[34] Despite voting with the majority, judge Ferrer MacGregor appended an opinion in which he noted that, without approaching the right to health directly and autonomously (*i.e.* without a declaration as to the violation of article 26 of the American Convention) no real justice and human rights protection would be effective in the case at hand. In his view,

> "the Inter-American Court could have approached the problem taking into account what really caused this case to reach the Inter-American system… [namely] the implications for the 'right to health', owing to medical malpractice with State responsibility that had a serious impact on the health of a woman of 22 years of age, mother of three children, leading to several operations and ailments affected her human dignity… this situation could have been considered explicitly, so that the considerations of the judgment… could have dealt with the question fully, and the implications in the case for the right to health could have been examined autonomously."[35]

The need for the Inter-American Court of Human Rights, to approach the right to health directly and autonomously is necessary for judge Ferrer MacGregor, since the protection of economic, social and cultural rights indirectly and in connection with other civil and political rights, does not fully accord full efficacy and effectiveness to them.[36] He therefore devotes his opinion to addressing the direct justiciability of economic, social and cultural rights (especially the right to health). Based on the views expressed therein, he concludes that, despite the interdependence of the right to health with the right to life and the right to personal integrity, this fact did not

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32 *Cf.* Dina Shelton, 'The Rule and the Reality of the of Petition Procedures in the Inter-American Human Rights System', (2004) *The Future of the Inter-American Human Rights System Working Paper No. 2*, 1, 20 – 32.

33 *Mendoza and others v. Argentina.* Preliminary Objections, Merits and Reparations. Judgment of 14 May, 2013. Series C No. 260, para. 57.

34 *Suarez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2003. Series C No. 261, paras. 139 – 154.

35 Ibid, (Concurring Opinion, Judge Ferrer MacGregor), paras. 2 – 3.

36 Ibid, para. 11.

justify the majority decision to deny its autonomous and direct application. It is only through its autonomous and direct application that specific arguments on the reasonableness and proportionality of public policy measures on this right can be assessed, there will be certainty with regard to the obligations surrounding the right to health, and there will be a specific methodology to assess compliance with the obligations to respect and guarantee the right.[37]

In the context of the application of the *iura novit curia* and *pro homine* principles, there are three instances that exemplify how these principles, in the context of the IACtHR's main function, inform the exercise of the right to dissent. These instances are the dissenting opinion appended by judge Cançado Trindade to the request for the judicial review of the judgment on the merits in the case of *Genie Lacayo v. Peru*, the joint dissenting opinion appended by judges Ventura Robles and Ferrer MacGregor to the judgment on preliminary objections in the case of *Brewer Carías v. Venezuela* and the partial dissenting opinion appended by judge Ferrer MacGregor in the case of the *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*.

Judge Cançado Trindade noted in his dissent that a decision from the Inter-American Court of Human Rights concerning the admissibility of an appeal for revision of a judgment, although there ACHR or the rules of procedure are silent in this regard, should not be based,

> "much by analogy with general international law (reflected in the aforementioned provision of the Statute of the International Court of Justice), as claimed by the complainant party in the present *Genie Lacayo* case, but rather on the basis – in application of the principle *iura novit curia* – of general principles of procedural law, and making use of the powers inherent to its judicial function."[38]

For its part, judges Ventura Robles and Ferrer MacGregor, noted with respect to the assessment made by the majority as to some arguments advanced by the victim that,

> "the arguments and consideration of this aspect should have been interpreted by the Court pursuant to Article 29 of the American Convention, which establishes an interpretation that is preferentially *pro homine* (…) the majority opinion admits the position of the State; in other words, the more restrictive interpretation of the right of access to justice of the presumed victim, which is evidently prohibited by Article 29 of the American Convention and runs counter to the *pro homine* principle."[39]

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37 Ibid, para. 102.

38 *Genie Lacayo v. Peru*. Application for Judicial Review of the Judgment of Merits, Reparations and Costs. Order of September 13, 1997. Series C No. 45, (Dissenting Opinion, Judge Cançado Trindade), para. 7.

39 *Brewer Carías v. Venezuela*, *supra* note 8, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), paras. 44, 98.

As for judge Ferrer MacGregor, he noted with respect to the majority decision as to the instant nature of Panama´s failure to pay the economic compensation owed to the indigenous people, as a consequence of the expropriation of its territory in 1972 for the purpose of constructing a hydroelectric, that,

> "it is pertinent to clarify that in accordance with the proven facts of this case, in accordance with international law and specially to international human rights law, there were enough judicial decisions (…) that if applied in accordance with the *pro homine* principle, would have led this Inter-American Court to a different decision."[40]

Lastly, it should be noted that, despite the importance that the Inter-American Court has given in it jurisprudence to the concepts of *ius cogens* and *erga omnes* obligations (section 3.1 above), they are not a method that judges often use in their dissenting opinions with a view to contributing to the fulfilment of the IACtHR's main function in contentious proceedings.

On the other hand, in the context of the advisory jurisdiction of the International Court of Justice and the Inter-American Court of Human Rights, the difference between these courts refers to the main judicial function that both are expected to exercise. As already noted, the ICJ holds an ample jurisdiction that seeks to providing an answer on questions of a legal nature submitted by organs of the United Nations or specialised agencies, with a view to assisting the requesting organ or specialised agency, in the fulfilment of its functions. The functions from certain organs are fairly broad and with regard to nearly all aspects of international law (*e.g.* the General Assembly of the United Nations). In that sense, the questions of a legal nature, from which an advisory opinion is sought, can nearly refer to any topic. In contrast, the advisory jurisdiction of the IACtHR is limited to the interpretation of the American Convention or other human rights treaties related to the protection of human rights. In a few words, even though the only actors authorised to request an advisory opinion are organs and states members of the Organization of American States, their request should be limited to the protection of human rights in the Americas.

Reference to this main judicial function in advisory proceedings, is mentioned by dissenting judges in their opinions. In the case of the International Court of Justice, 6 are the instances in which the right to append

40 *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2014. Series C No. 284, (Partial Dissenting Opinion, Judge Ferrer MacGregor), para. 77.

a dissenting opinion was informed by the main function of the ICJ,[41] as they explicitly referred to this function as the reason for dissent. In contrast, in the case of the Inter-American Court of Human Rights there are only 3 instances in which the exercise of the right to append dissenting opinions was informed by its main function in advisory proceedings.

Two examples from the ICJ are useful to illustrate how its main function in advisory proceedings informs the exercise of the right to dissent. The first instance is the most recent advisory opinion rendered by the ICJ with regard to the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. Judge Tomka appended a dissenting opinion where he noted that,

> "The Court is, however, convinced that its replies in the present Advisory Opinion will assist the General Assembly in the performance of the latter's functions and that 'by replying to the request, the Court is [not] dealing with a bilateral dispute' (…) the Court is thus willing to provide "its advice" to the General Assembly on an issue which the latter had not considered for half a century, despite the undisputable role assigned to the General Assembly by the Charter of the United Nations in matters of decolonization. If one accepts this course of action, one must also exercise caution to go further than what is strictly necessary and useful for the requesting organ (…) [in that order of ideas] there was no need to decide on matters of States responsibility in order to answer the General Assembly's second question and to 'assist it in the performance of its functions'."[42]

An also relevant instance is the dissenting opinion appended by judge Skotnikov to the advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*. With respect to the fact that the ICJ decided not to refrain from exercising its advisory jurisdiction, he noted that,

> "In its Advisory Opinion on *Legal Consequences of the Construction of a Wall*, the Court reaffirmed that 'advisory opinions have the purpose of furnishing to the requesting organs the elements of law for them in their action. In the present case, the General Assembly is not an organ which can usefully benefit from 'the elements of law' to be furnished by the Court. The Assembly, when it receives the present Advisory Opinion, will be precluded by virtue of Article 12 of the

41 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, (Dissenting Opinion, Judge Koroma) and (Dissenting Opinion, Judge Shahabuddeen); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, (Separate Opinion, Judge Keith), (Dissenting Opinion, Judge Bennouna) and (Dissenting Opinion, Judge Skotnikov); *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion Advisory Opinion of 25 February 2019, [not yet published in the ICJ Reports], (Declaration, Judge Tomka).

42 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, *supra* note 41, (Declaration, Judge Tomka), paras. 6, 9.

> United Nations Charter, from making any recommendation with regard to the subject-matter of the present request, unless the Security Council so requests."[43]

In the case of the Inter-American Court of Human Rights, the 3 existing instances clearly show that the judges have exercise their right to appended dissents opinions, because the majority opinion has not contributed to the fulfilment of the IACtHR's judicial function in the exercise of its advisory jurisdiction, namely, the construction of the ACRH or other treaties concerning the protection of human rights in the American states, with a view of contributing to the protection of human rights in the Americas.

The first of these instances is the opinion appended by judge Piza Escalante to the advisory opinion concerning the *Enforceability of the Right to Reply or Correction*. In general terms, the request for an advisory opinion presented by Costa Rica centered on the interpretation of article 14 of the ACHR (right of reply).[44] In his separate opinion, judge Piza Escalante noted with respect to the three questions submitted by Costa Rica that,

> "the answer given to the first and second questions, although correct, are expressed in such a general manner they are merely a repetition, almost word for word, of the norms of the Convention, and that they do not completely answer the concrete, although confusing, request of the Government of Costa Rica (…) the Government [of Costa Rica] manifested in clarifying an ambiguous situation, which exists in the context of its domestic legal system, but which is also directly related to the fulfillment of its obligations as a State Party to the Convention and the responsibility that it might incur if it did not comply on the international plane."[45]

Also relevant in this regard, is the dissenting opinion appended by judge Jackman to the advisory opinion on the *Juridical Condition and Human Rights of the Child*. He noted that the request by the Inter-American Commission on Human Rights for an interpretation of articles 8 and 25 of the ACHR was vague, almost to the point of meaningless. He signaled that,

> "[r]epeatedly in its examination of the scope of the 'broad ambit' of its consultative function, the Court has insisted that the fundamental purpose of that function is to render a service to member-states (…) in order to assist them 'in fulfilling and applying treaties that deal with human rights (…) I would suggest that a request to provide 'general and valid guidelines' to cover a series of hypothesis that reveal neither public urgency nor juridical complexity is, precisely, an invitation to engage in 'purely academic speculation' of a kind which assuredly

43 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *supra* note 41, (Dissenting Opinion, Judge Skotnikov), pp. 516 – 517, para. 3.

44 *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights*. Advisory Opinion OC-07/86 of August 28, 1986. Series A No. 7, paras. 13 – 17.

45 Ibid, (Separate Opinion, Judge Piza Escalante), para. 4.

> 'would weaken the system established by the Convention and would distort the advisory jurisdiction of the Court.'"[46]

Lastly, reference is to be made of the opinion appended by judge Pérez to the recent advisory opinion that concerned the *Entitlement of legal entities to hold rights under the Inter-American Human Rights System*. This dissent constitutes an interesting example, since it also shows the methods that dissenting judges use in their opinions, with a view to contributing to the fulfilment of the judicial function of the Inter-American Court of Human Rights in advisory proceedings.

The request for an advisory opinion presented by Panama, sought an answer to the question whether the applicability and protection afforded by the ACHR, is limited to natural persons. Judge Perez only voted in favour of two of the six operative paragraphs of the majority opinion. In his partial dissenting opinion, he noted that the approach adopted by the majority was not in keeping with the protection of human rights. In his words,

> "[t]he main objection to this advisory opinion adopted by the Court by majority, is that it is not addressed from the standpoint of international human rights law (as all its pronouncements should be), but from the standpoint of classic international law. The international law norms whose content is related to the consecration and protection of fundamental rights, differs from the traditional norms of international law in many respects, particularly what concerns its interpretation, which is govern by the *pro homine* principle (…) Had [the Court] focused [its answer] as part of international human rights law, few words would have been necessary to answer the first and most important of Panama's questions."[47]

In that order of ideas, the majority of the Inter-American Court of Human Rights should have construed the ACHR, in accordance with the rules of interpretation contained in the Vienna Convention on the Law of Treaties, but without losing sight of the fact that the ACHR is a human rights treaty. In the light of this approach, account should have been taken of the object and purpose of the American Convention, namely, the protection of the fundamental rights of human beings; this object and purpose demonstrates that it was created with the sole and exclusive purpose of protecting natural persons.[48] Consequently, the juridical person itself is not entitled to any of the rights contained in the American Convention. In sum, being the natural person the only subject of protection in the Inter-American System of Protection of Human Rights, it was wrong for the majority to conclude that natural persons may exercise their rights through a juridical person and that they sometimes can exhaust local remedies on behalf of the natural person.

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46 *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, (Dissenting Opinion, Judge Jackman), p. 2.

47 *Entitlement of legal entities to hold rights under the Inter-American Human Rights System*, Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, (Dissenting Opinion, Judge Perez), paras. 2 – 3.

48 Ibid, para. 12.

4.1.2 The exercise of the right to append dissenting opinions at the International Court of Justice in the adjudication of human rights cases

As already noted (section 3.1. above), in view of the ample jurisdiction *ratione materiae* of the International Court of Justice, it is possible for states to submit before it, disputes concerning human rights violations. This possibility for the ICJ to be seised of this kind of disputes is interesting for two reasons. First of all, because it is not a human rights court in the contemporary sense of the term.[49] Secondly, because this fact makes inevitable the existence of a concurrence with specialised human rights bodies.[50]

The International Court of Justice is regarded as a generalist court,[51] whose engagement with human rights cases takes place in an inter-state context.[52] Consequently, the role that it plays with regard to human rights is not necessarily in the area of direct enforcement;[53] it is directed towards what Bruno Simma has called the mainstreaming of international law, *i.e.* integrating international human right law into the fabric of general international law, as well as other branches of law.[54] In clear contrast, specialised human rights courts and tribunals such as the IACtHR that do not exclusively act in an inter-state context, should seek in their jurisprudence "the balance in the quantum of cases is tilted further towards matters of detailed application to the facts as distinct from fundamental contests over the meaning of the legal norms themselves."[55]

In fact, in cases with a human rights dimension, the opinions appended by dissenting judges show that they are informed by the ICJ's role in this context, namely, to provide an interpretation on fundamental issues,[56] in connection with the whole gamut of international law; not so much on the protection of human rights. The dissenting opinions appended in four cases are relevant to exemplify this aspect.

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49 Stephen Schwebel, 'Human Rights in the World Court', (1991) 24 *Vanderbilt Journal of Transnational Law*, 945, 946.

50 Marcelo Kohen, 'Considerations about What is Common: The I.C.J. and Specialised Bodies', in Pierre d'Argent & Jean Combacau (eds.) *Reflections on What Remains Private: Essays on the Limits of International Law. Liber Amicorum Joe Verhoeven* (Bruylant 2014), 287, 289.

51 Samanta Besson, 'International Courts and the Jurisprudence of Statehood', (2019) 10 *Transnational Legal Theory*, 30.

52 *Cf.* Sandy Ghandi, 'Human Rigths and the International Court of Justice: The *Ahmadou Sadio Diallo Case*' (2011) 11 *Human Rights Law Review*, 527.

53 Sandesh Sivakumaran, 'The International Court of Justice and Human Rights', in Sarah Joseph & Adam McBeth (eds.) *Research Handbook on International Human Rights Law* (Edward Elgar Publishing 2010), 299, 325.

54 Bruno Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice', (2012) 3 Journal of International Dispute Settlement, 7, 27.

55 Ralph Wilde, 'Human Rights Beyond Borders at the World Court: The Significance of the International Court's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties', (2013) 12 *Chinese Journal of International Law*, 639, 652.

56 Ibid, 677.

In the first place, reference should be made of the dissenting opinion appended by judge Oda to the ICJ's judgment on the merits of the *LaGrand* case. He noted that he was always aware of the humanitarian concerns raised by the fate of the LaGrand brothers; nonetheless, he was not

> "convinced of the correctness of the Court's holding that the Vienna Convention on Consular Relations grants foreign individuals any rights beyond those which might necessarily implied by the obligations imposed on States under that Convention (…) If the Vienna Convention on Consular Relations is to be interpreted as granting rights to individuals, those rights are strictly limited to those corresponding to the obligations borne by the States under the Convention and do not include substantive rights of the individual, such as the rights to life, property, etc."[57]

Also relevant is the opinion appended by judge Xue in the case concerning *Questions relating to the Obligation or Prosecute or Extradite*. She voted against the ICJ's decision concerning the admissibility and subsequent breach of article 6 and 7 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. With regard to the admissibility of the claim, judge Hanqin pointed out that the characterisation of the obligations contained in the said convention as *erga omnes* obligations is abrupt and unpersuasive. The ICJ's case law shows that the concept of *erga omnes* refers to substantive law and "in terms of standing, however, the Court only spelt out the conditions for the breach of obligations in bilateral relations and stopped short of the question of standing in respect of obligations *erga omnes*."[58] Moreover, this conclusion as to the *erga omnes* character of the obligations contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is contrary to the rules on state responsibility. This is so since,

> "the mere fact that a State is a party to the Convention does not, in and by itself, give [a] State standing to bring a case in the Court. Under international law, it is one thing that each State party has an interest in the compliance with these obligations, and it is another that every State party has standing to bring a claim against another State for the breach of such obligations in the Court."[59]

The third of the cases to be mentioned is *Jurisdictional Immunities of the State* between Germany and Italy. The opinions appended by judges Yusuf and

57 LaGrand (Germany v. United States of America), Merits, Judgment of 27 June 2011, [2001] ICJ Rep. 466, (Dissenting Opinion, Judge Oda), at p. 537, para. 27.

58 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 1, (Dissenting Opinion, Judge Xue), at p. 574, para. 15.

59 Ibid, at p. 575, para. 17.

Bennouna,[60] centre on the integration of the law on the immunities of states with human rights, rather than on the violations of the victims of the case at hand. Judge Yusuf for instance noted in his dissenting opinions that,

> "[i]t is true that State immunity is a rule of customary international law and not merely a matter of comity (…) its coverage has, however, been contracting over the past century, in light of the evolution of international law from a State-centred legal system to one which also protects the right of human beings *vis-à-vis* the State."[61]

In view of this evolution, judge Yusuf indicated that when there is a conflict between jurisdictional immunities and fundamental rights consecrated under human rights and international humanitarian law, it is necessary to struck a balance between both set of rules.[62] Such a balance is necessary since "[i]n today's world, the use of State immunity to obstruct the right of access to justice and the right to an effective remedy may be seen as a misuse of such immunity."[63] In that order of ideas, to recognise the rights of access to justice and an effective remedy will result in bringing the rules on state immunity in line with the normative weight that the international community nowadays attaches to the protection of human rights and humanitarian law.[64] In a similar vein, judge Bennouna noted with regret in his opinion that,

> "the Court's reasoning was not founded on the characteristics of contemporary international law, where immunity, as one element of a mechanism for the allocation of jurisdiction, could not be justified if it would ultimately pose an obstacle to the requirements of the justice owed to victims."[65]

Consequently,

> "when it arises in connection with international crimes, as in the present dispute, the question of jurisdictional immunity raises fundamental ethical and juridical problems for the international community as a whole, which cannot be evaded simply by characterizing immunity as a simple matter of procedure."[66]

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60 It should be noted that judge Bennouna appended a separate opinion. It must, however, amounts to a dissent since (as he explicitly indicated in the opening paragraph of the opinion) he could not "endorse the approach adopted by the majority, or support the logic of its reasoning." *Cf. Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 1, (Separate Opinion, Judge Bennouna), at p. 172, para. 1.

61 Ibid, (Dissenting Opinion, Judge Yusuf), at p. 296, para. 21.

62 Ibid, at p. 298, para. 28.

63 Id.

64 Ibid, at p. 306, para. 52.

65 Ibid, (Separate Opinion, Judge Bennouna), at p. 177, para. 31.

66 Ibid, at p. 173, para. 9.

In his view, account should be taken of exceptional circumstances, as it is the case when a state that is the author of a serious human rights violation, rejects any engagement of its responsibility in whatever form. In a situation of this kind, the state must lose its benefit of immunity before the courts of the forum state,[67] especially in current international law where "[t]he Westphalian concept of sovereignty is thus gradually receding, as the individual takes centre stage in the international legal system."[68]

All in all, the views expressed by both judges are directed towards the integration of the law on state immunity with human rights law, especially in the light of the recent developments in this regard.

The last instance to be mentioned is the decision on preliminary objections in the case concerning *Armed Activities on the Territory of the Congo*. Judge Koroma was one of the two members who voted against the finding that the International Court of Justice had no jurisdiction to entertain the filed by the Democratic Republic of Congo. In his dissenting opinion, judge Koroma expressed his disagreement with regard to the majority's decision concerning the Convention on the Prevention and Punishment of the Crime of Genocide. The majority concluded that the reservation formulated by Rwanda to article IX was not contrary to its object and purpose of the treaty, as it does not affect substantive obligations.[69] In clear contrast with the position adopted by the majority, judge Koroma noted in his dissenting opinion that, while a reservation to a provision concerning dispute settlement is not *prima facie* incompatible with the object and purpose of the treaty, the said reservation turns incompatible if the provision to which it refers relates constitutes the *raison d'être* of the treaty.[70]

In his view, "[t]he object and purpose of the Genocide Convention is the prevention and punishment of the crime of genocide, and this encompasses holding a State responsible whenever it is found to be in breach of its obligations under the Convention."[71] Article IX constitutes the only means for adjudicating on the responsibility of a state for its failure to prevent or punish the crime of genocide. Consequently, a reservation to the said article is contrary to it object and purpose. In addition, the failure from a state to object a reservation of this kind is irrelevant. In the case of human rights treaties, that are not based on reciprocity between states, but seek to protect individuals and the international community as a whole, the rule concerning the acceptance or objection of the reservation is not applicable.[72]

67 Ibid, at p. 174, para. 15.
68 Ibid, at p. 175, para. 18.
69 *Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 3 February 2006, [2006] ICJ Rep. 6, at p. 32, para. 67.
70 Ibid, (Dissenting Opinion, Judge Koroma), at p. 57, para. 11.
71 Ibid, (Dissenting Opinion, Judge Koroma), at p. 57, para. 12.
72 Ibid, (Dissenting Opinion, Judge Koroma), at p. 58, para. 14.

In sum, the views expressed by judge Koroma are an attempt to put together the law on reservations and human rights treaties, by taking into account some aspects that differentiate these treaties from those that states conclude for other purposes.

4.1.3 The development of the law in the exercise of the right to append dissenting opinions

Just as judicial decisions are capable in practice to contribute to the development of the law, dissenting opinions are also suitable to contributing in this regard. In this sense, judges may exercise their right to append dissenting opinions by being informed by the development of the law. In the case of the International Court of Justice, there are 10 instances in which judges have taken account of this function as the reason for appending a dissenting opinion.[73] A relevant example is to be found in the dissenting opinion appended by judge Cançado Trindade to the judgment on the merits of the case concerning *Jurisdictional Immunities of the State*. He noted that he,

> "thus present with the utmost care the foundations of [his] entirely dissenting position on the whole matter dealt with by the Court in the Judgment which it has just adopted (…) to this effect, [he] shall dwell upon all the aspects concerning the dispute brought before the Court which forms the object of its present Judgment, in the hope of thus contributing to the clarification of the issues raised and to the progressive development of international law."[74]

As for the Inter-American Court of Human Rights, there are 9 instances in which the exercise of a judge's right to append a dissenting opinion has

73 *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, (Dissenting Opinion, Judge Badawi Pasha) and (Dissenting Opinion, Judge Krylov); *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951, [1951] ICJ Rep. 116, (Dissenting Opinion, Judge Alvarez); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15, (Joint Dissenting Opinion, Judges Guerrero, McNair, Read, Hsu Mo); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment of 11 June 1998, [1998] ICJ Rep. 275, (Dissenting Opinion, Judge Weeramantry) and (Dissenting Opinion, Judge Koroma) and (Dissenting Opinion, Judge *ad hoc* Ajibola); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, note Preliminary Objections, Judgment of 18 November 2008, [2008] ICJ Rep. 412, (Dissenting Opinion, Judge Ranjeva); *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment of 30 November 2010, [2010] ICJ Rep. 639, (Joint Dissenting Opinion, Judges Al-Khasawneh and Yusuf); *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 1, (Dissenting Opinion, Judge Cançado Trindade).

74 *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 1, (Dissenting Opinion, Judge Cançado Trindade), at p. 182, para. 2.

been informed by the development of the law.[75] One of these instances that clearly exemplify this attempt to develop the law is present in the partial dissenting opinion that judge Vio Grossi appended to the judgment in the case of *Amrhein et al v. Costa Rica*. This judge noted that,

> "what is indicated in this text is in the hope that the jurisprudence of the Court in this regard, is in the future modified according to its intrinsic nature, *i.e.* as an auxiliary source of international law or means for the determination of international law rules and therefore not immutable, except for the case in which the respective judgment has been rendered."[76]

Despite the examples above, the actual contribution of a dissenting opinion to the development of international law is not to be found in the judge's intention. Considering what was explained above (section 3.1.), it is only when the views expressed by the judge (irrespective of his intention) meet with the normative expectations of international law actors, that the said views actually contribute to the development of the law. In consequence, there is only one instance from each court in which it can be said that a dissenting opinion has actually contributed to the development of international law.

In the case of the International Court of Justice, this instance is the dissenting opinion appended by judge Lauterpacht to the judgement on preliminary objections in the *Interhandel* case. Shabtai Rosenne has signalled that this opinion, in conjunction with the separate opinion also appended by judge Lauterpacht in the *Norwegian Loans* case, has had a marked effect

75 *Artavia Murillo et al (In Vitro Fertilization) v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2012. Series C No. 257 (Dissenting Opinion, Judge Vio Grossi); *Lagos del Campo v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340 (Dissenting Opinion, Judge Vio Grossi); *Amrhein et al v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of April 25, 2018. Series C No. 354 (Dissenting Opinion. Judge Vio Grossi); *Muelle Flores v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of March 6, 2019. Series C No. 375 (Dissenting Opinion, Judge Vio Grossi); *Díaz Loreto et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 19, 2019. Series C No. 392 (Dissenting Opinion, Judge Vio Grossi); *Gómez Virula et al. v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 393 (Dissenting Opinion, Judge Vio Grossi); *National Association of Discharged and Retired Employees of the National Tax Administration Superintendence v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2019. Series C No. 394 (Dissenting Opinion, Judge Vio Grossi); *Hernández and others v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 22, 2019. Serie C No. 395 (Dissenting Opinion, Judge Vio Grossi); *López and others v. Argentina*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2019. Series C No. 396 (Dissenting Opinion, Judge Vio Grossi).

76 *Amrhein et al v. Costa Rica*, *supra* note 75, (Partial Dissenting Opinion, Judge Vio Grossi), at para. 5.

on the attitudes of governments with regard to their unilateral declarations of acceptance of the compulsory jurisdiction of the International Court of Justice. In that sense, following judge's Lauterpacht opinion states deliberately abandoned the so-called automatic reservation of their unilateral declarations of acceptance of the ICJ compulsory jurisdiction; likewise, after his opinion no new declaration incorporating the automatic reservation was made.[77]

In the case of the Inter-American Court of Human Rights, the actual contribution of a dissenting opinion to the development of international law is to be found in the opinion appended by judge Cançado Trindade, in the case of *Caballero Delgado and Santana v. Colombia*. In general terms, he noted that the two general obligations enshrined in the American Convention (article 1) and that of harmonizing domestic law (article 2), are ineluctably intertwined. In consequence, regardless of the fact that the majority has not declared a violation of the obligation to harmonize domestic law with the provisions of the American Convention, "the finding of non-compliance with the general duty of Article 1(1) is *per se* sufficient to determine to the State Party that it ought to take measures, including of legislative character, to guarantee to all persons under its jurisdiction the full exercise of all the rights protected by the American Convention."[78] This views expressed by judge Cançado Trindade were subsequently adopted by the majority of the Inter-American Court of Human Rights in the case of *Suarez Rosero v. Ecuador*, where it was noted that "Ecuador is obliged, in accordance with the general duties to respect rights and adopt provisions under domestic law (Article 1(1) and 2 of the Convention), to adopt such measures that may be necessary to ensure that violations as those established in the instant case never again occur in its jurisdiction."[79]

On the other hand, account should also be taken of an additional means for a dissenting opinion to contribute to the development of international law. In view of the fact that judicial decisions are in practice cogent *erga*

77 Shabtai Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge', (1961) 55 *American Journal of International Law*, 825, 852 – 853.

78 *Caballero Delgado and Santana v. Colombia*. Reparations and Costs. Judgment of January 29, 1997. Series C No. 31 (Dissenting Opinion, Judge Cançado Trindade), at para. 19.

79 *Suarez Rosero v. Ecuador.* Merits. Judgment of November 12, 1997. Series C No. 35, at para. 106.

omnes,[80] whose effects cannot be limited to the parties to the dispute[81] (especially when it is necessary for international courts and tribunals to ensure consistency of jurisprudence, predictability and stability),[82] they are not therefore prevented from having persuasive force.[83] The International Court of Justice has for instance noted that,

> "It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding [a state] to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases."[84]

It is against this background that a dissenting opinion may also contribute to the development of the law when it constitutes, in Charles Evans Hughes words, "an appeal to the brooding spirit of the law, to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting justice believes the court have been betrayed." [85]

In this sense, the dissenting opinion constitutes an attempt to either limiting the applicability of the majority decision[86] (in terms of its *ratio*

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80 Shabtai Rosenne, *supra* note 295, 1578; María Angélica Benavides-Casals, 'El Efecto Erga Omnes de las Sentencias de la Corte Interamericana de Derechos Humanos', (2015) 27 *International Law, Revista Colombiana de Derecho Internacional*, 141; Adam Bodnar, '*Res Interpretata:* Legal Effect of the European Court of Human Rights' judgments for other States Than Those Which Were Party to the Proceedings', in Yves Haeck & Eva Brems (eds.) *Human Rights and Civil Liberties in the 21st Century* (Springer 2014), 226.

81 The International Court of Justice has explicitly referred to this difficulty in its judgment on preliminary objections in the case concerning the *Aegean Sea Continental Shelf*, where it noted with regard to the status of the General Act for the Pacific Settlement of International Disputes that, "[a]lthough under Article 59 of the Statute the decision of the Court has no binding force except between the parties and in respect of that particular case, it is evident that any pronouncement from the Court as to the status of the 128 Act, whether it were found to be a convention in force or to be no longer in force, may have implications in the relations between States other than Greece and Turkey." *Cf. Aegean Sea Continental Shelf (Greece v. Turkey)*, Questions of Jurisdiction and Admissibility, Judgment of 19 December 1978, [1978] ICJ Rep. 3.

82 Hersch Lauterpacht, The Development of International Law by the International Court (Cambridge University Press 1958), 19.

83 Maurice Mendelson, 'The International Court of Justice and the Sources of International Law', in Vaughan Lowe *et al* (eds.) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press 1996), 60, 81; Michal Balcerzak, 'The Doctrine of Precedent in the International Court of Justice and the European Court of Human Rights', (2004) 27 *Polish Yearbook of International Law*, 131, 132.

84 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *supra* note 73, at p. 292, para. 28; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *supra* note 73, at pp. 428 – 429, para. 53.

85 Charles Evans Hughes, The Supreme Court of the United States: Its Foundation, Method and Achievements (Columbia University Press 1928), 68.

86 Godefridus J. H. Hoof, *Rethinking the Sources of International Law* (Kluwer 1983), 172.

decidendi, to the factual circumstances to which it has been applied),[87] or warning as to the repercussions of the pronouncement of the international court or tribunal for other states in their relations. In this attempt to limit the scope of the majority decision, the dissenting opinions therefore seeks to prevent the law to develop in line with the content of the majority decision and, as a consequence, providing room for a subsequent development of international law in a different direction.

In fact, the exercise of the right to append a dissenting opinion, for the purposes of limiting the scope of the majority decision (and therefore providing room for a subsequent development of international law), is an aspect in which the exercise of the right to append dissenting opinions, is similar at the International Court of Justice and the Inter-American Court of Human Rights.

In the case of the International Court of Justice, dissents appended in 19 cases have attempted to limit the scope of the decision or warn as to the repercussions of the judgment for other states in their relations.[88] In some of these judgments, a plural number of dissents have been appended.

87 Maurice Kelman, 'The Forked Path of Dissent', (1985) *Supreme Court Review*, 227, 242 – 257; Diane P. Wood, 'When to Hold, When to Fold, and When to Reshuffle: The Art of Decision making on a Multi-Member Court', (2012) 100 *California Law Review*, 1445, 1452.

88 *Judgments of the Administrative Tribunal of the ILO upon Complaints made against UNESCO*, Advisory Opinion of 23 October 1956, [1956] ICJ Rep. 77 (Dissenting Opinion, Judge Cordova); *Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden)*, *supra* note 17, (Dissenting Opinion, Judge Lauterpacht); *Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment of 26 May 1959, [1959] ICJ Rep. 127, (Joint Dissenting Opinion, Judges Lauterpacht, Percy Spender and Wellington Koo); *Nuclear Tests Case (Australia v. France)*, *supra* note 1, (Joint Dissenting Opinion, Judges Onyeama, Dillard, Jimenez de Arechaga and Waldock); *Continental Shelf (Tunisia/Lybian Arab Jamahiriya)*, Merits, Judgment of 24 February 1982, [1982] ICJ Rep. 18, (Dissenting Opinion, Judge Gros) and (Dissenting Opinion, Judge Oda); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, [1984] ICJ Rep. 246, (Dissenting Opinion, Judge Gros); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 26 November 1984, [1984] ICJ Rep. 392, (Dissenting Opinion, Judge Schwebel); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep. 351, (Dissenting Opinion, Judge Oda); *Fisheries Jurisdiction (Spain v. Canada)*, *supra* note 1 , (Dissenting Opinion, Judge Bedjaoui) and (Dissenting Opinion, Judge Ranjeva); *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70, (Separate Opinion, Judge Abraham) and (Separate Opinion, Judge Donoghue); *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, (Dissenting Opinion, Judge Yusuf), (Dissenting Opinion, Judge Robinson), (Dissenting Opinion, Judge Crawford), (Dissenting Opinion, Judge Bennouna) and (Dissenting Opinion, Judge *ad hoc* Bedjaoui); *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, [2016] ICJ Rep. 100, (Joint Dissenting Opinion, Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower).

In contrast, the number of judgments from the Inter-American Court of Human Rights, where a dissenting opinion has been appended in an attempt to limit the scope of the majority decision, is limited to one.[89]

From the dissenting opinions at the International Court of Justice, those appended in the following three cases clearly exemplify how the exercise their right to append a dissent is informed by the need to limit the scope of the majority decision. The first instance is the separate opinion appended by judge Donoghue to the judgment on preliminary objections in the case concerning *Application of the International Convention on the Elimination of all forms of Racial Discrimination* between Georgia and Russia. She noted that,

> "The Judgment's test for determining whether there is a dispute and its conclusion regarding the meaning and effect of this particular compromisory clause have implications that could go beyond this case. In particular, while I am confident that this is not the intention of those who voted in favour of the Judgment, I am concerned that the Judgment will work to the disadvantage of States with limited resources and those that have little or no experience before this Court."[90]

The second instance is the joint dissenting opinion appended by judges Lauterpacht, Percy Spender and Wellington Koo in the *Aerial Incident of 27 July 1955*. In this case, the majority of the ICJ decided that it was without jurisdiction to proceed to the merits of the case, since article 36, paragraph 5 of its Statute was not applicable to the declaration of acceptance of the compulsory jurisdiction from the Republic of Bulgaria. For the majority of the ICJ, the text of article 36, paragraph 5 of the Statute does not explicitly indicate that its effects should include those states that (as Bulgaria) were neither represented at the San Francisco Conference, nor signed both treaties. At the time of the adoption of the Statute of the ICJ a difference was envisaged between signatory states and other states that may later be admitted as members of the United Nations.[91]

In its joint opinion, the dissenting judges addressed the consequences that the majority decision might have in practice and in law. Hence they noted that to admit that a provision of the Statute is only applicable to certain states parties to it, would run counter to the proposition that the United Nations should be considered as a universal community of states and the equality of rights and obligations of its members.[92] Moreover, in

89 *Brewer Carías v. Venezuela*, *supra* note 12, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor).

90 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 88, (Separate Opinion, Judge Donoghue), at p. 338, para. 22.

91 *Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, Judgment of 26 May 1959, [1959] ICJ Rep. 127, at p. 136.

92 Ibid, (Joint Dissenting Opinion, Judges Lauterpacht, Wellington Koo and Sir Percy Spender), at p. 177.

practical terms, this interpretation would restrict the operation of unilateral declarations from states such as Thailand, who although not participating in the San Francisco Conference (i) renewed its declaration of acceptance of the compulsory jurisdiction on 3rd May, 1940, for a ten years period, (ii) acceded to the Charter of the United Nations on 16th December, 1946; and (iii) when the ten years period expired, she renewed her declaration on 3rd May, 1950, for an additional ten years period.[93]

This joint dissent, has led some scholars to considered that the majority decision was unsatisfactory, since "[i]t rests upon an unfortunate departure from established rules of interpretation and gratuitously introduces into the Constitution of the United Nations the notion of an unequal status of different members attended by varying rights and duties."[94] In addition, the views expressed in the joint dissenting opinion had had a importance influence in the subsequent cases where a declaration of acceptance of the compulsory jurisdiction deposited before the Permanent Court of International Justice, was advanced as a basis for the jurisdiction of the International Court.

For instance, in the decision on preliminary objections in the *Temple of Preah Vihear*, the majority of the ICJ concluded that Thailand's position was not substantially the same as that of Bulgaria in the *Aerial Incident of 27 July 1955*;[95] in consequence, the latter decision was not applicable to this case. This approach adopted by the majority took place in view of their disagreement with the majority decision in the *Aerial Incident of 27 July 1955* and subsequent approval of the views expressed in the joint dissenting opinion.[96] In fact, all the judges that appended a separate opinion or a declaration to the majority decision on preliminary objections in the *Temple of Preah Vihear* case noted that, taking into account the close connection between this case and the *Aerial Incident of 27 July 1955*, they wanted to clarify that the fact that they concurred with the former does not thereby imply that they concur with the decision in the *Aerial Incident of 27 July 1955*. Judges Fitzmaurice and Tanaka for instance noted in their joint declaration that,

> "[the] preliminary objection [from Thailand] is based on the conclusion concerning the effect of paragraph 5 of article 36 of the Statute which the Court reached in its decision of 26 May 1959, given in the case of the *Aerial Incident July 27th, 1955 (Israel v. Bulgaria)*. The objection necessarily assumes the correctness of that conclusion (…) The view that this conclusion was in fact incorrect would, for

93 Ibid, at pp. 182 – 183.

94 Chava Shachor – Landau, 'The Judgment of the International Court of Justice in the Aerial Incident Case between Israel and Bulgaria', (1960) 8 *Archiv des Völkerrechts*, 277, 289 – 290.

95 *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, [1961] ICJ Rep. 17, at p. 26.

96 *Cf.* Jan Hendrik W. Verzijl, 'International Court of Justice: Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)', (1962) 9 *Netherlands International Law Review*, 229, 235; Shabtai Rosenne, *supra* note 259, 1553.

> anyone holding that view, furnish a further reason for rejecting the objection, and a much more immediate one than any of those contained in the present Judgment (…) This is precisely our position since, to our regret, we are unable to agree with the conclusion which the Court reached in the *Israel v. Bulgaria* case (…) we need not give our reasons for this, for they are substantially the same as those set out in the Joint Dissenting Opinion of Judges Sir Hersch Lauterpacht and Sir Percy Spender, and of Judge Wellington Koo. Furthermore, it is not our purpose to call in question or attempt to reopen the decision in that case."[97]

By the same token, this joint dissenting opinion was also important for the interpretation of other provisions, such as article 37 of the Statute of the Court, that confer jurisdiction based on the consent previously given by states to the Permanent Court of International Justice. In this regard, since the dissenting judges also addressed in their opinion the drafting history of article 37 of the Statute of Court, it may be argued that the majority of the ICJ decided to follow their approach and reasoning in the decision on preliminary objections in the *Barcelona Traction* case.[98]

As third instance to exemplify how, the exercise their right to append a dissent is informed by the need to narrow down the scope of the majority decision, is to be found in the in the case concerning *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*. The majority of the International Court (by the casting vote of the President) concluded to be with jurisdiction to adjudicate on the merits of Nicaragua's request for a delimitation of the continental shelf beyond 200 nautical miles. The ICJ arrived to this conclusion by noting that it did not decide on the merits of this claim in the case concerning *Territorial and Maritime Dispute*.[99] Consequently Nicaragua's application was not precluded by the *res judicata* principle from being adjudicated on its merits.[100] Along with criticising the reasoning contained in the majority decision, the dissenting judges emphasised in their opinion, the practical consequences that this decision might entail. In that sense, they noted that the purpose of the *res judicata* principle is to put an end

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97 *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, [1961] ICJ Rep. 17, (Joint Declaration, Judges Fitzmaurice and Tanaka), at p. 37.

98 This conclusion is to be reinforced by the comments made by some judges in their individual opinions. For instance, Judge Tanaka (who voted with the majority on this objection) noted that "[a]s one who shares the view of the Joint Dissenting Opinion concerning the interpretation of Article 36, paragraph 5, I consider that the Court should have overruled the Judgment of 1959 in the *Aerial Incident* case… Furthermore, I assume that the Court's opinion is, in its fundamental reasoning, not very far from that of the Joint Dissenting Opinion in the *Aerial Incident* case". C*f.* Ibid, (Separate Opinion, Judge Tanaka), at p. 77. See also, Juan J. Quintana, Litigation at the International Court of Justice (Martinus Nijhoff Publishers 2015), 99.

99 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 1, at pp. 662 - 670, paras. 104 – 131.

100 *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*, *supra* note 88, at pp. 128 - 132, at paras. 72 – 88.

to a dispute and protect the respondent from repeat litigation.[101] In consequence,

> "[b]y casting the rejection of Nicaragua's request for delimitation in the *Territorial and Maritime Dispute* case as a decision to which *res judicata* does not attach, the Court may be seen by some as being open repeat litigation, which cannot be the case… But [if the ICJ] is to continue to be regarded as [the principal judicial organ of the United Nations], it cannot afford to be seen to allow States to bring the same disputes over and over again. Such a scenario would undercut the certainty, stability and finality that judgments of this Court should provide."[102]

In this way, the dissenting judges sought to limit the scope of the judgment by trying to argue that it should be considered as an exception; states should not thus interpret it as a message indicating the flexibility of the *res judicata* principle.

The last of the instances to be mention is *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament*, where the ICJ had to assess whether a dispute existed between the Marshall Islands and the three respondent states. In making this assessment, the majority used as the relevant criterion for the determination of a dispute whether "on the basis of the evidence, that the respondent, was aware, or could not have been unaware, that its views were positively opposed by the applicant."[103] Applying this criterion, ICJ concluded that no dispute exist because the statements from the Marshall Islands in multilateral fora, were made in hortatory terms and could not therefore be understood as an allegation that any of the respondent states was in breach of its obligations.[104] In consequence, the statements did not call for a specific reaction by the respondent states;[105] none of the respondents were therefore not aware or could not have been unaware, that they were in breach of their obligations concerning nuclear disarmament.

The articulation and application, for the first time in the ICJ's case law of an awareness criterion[106] (for the determination of the existence of a dispute), was the basis of the disagreement of the dissenting judges. Judge Robinson for instance noted that, in articulating and applying this criterion, the majority "seem to introduce to the back door a requirement that the Court has previously rejected, i.e. an obligation on the applicant

101 Ibid, (Joint Dissenting Opinion, Judges Yusuf, Cançado Trindade, Xue, Gaja, Bhandari, Robinson and judge *ad hoc* Brower), at p. 161, para. 65.

102 Ibid, at p. 162, paras. 66 – 67.

103 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, p. 18, para. 41.

104 Ibid, p. 20, para. 49.

105 Ibid, p. 21, para. 50.

106 Fernando Lusa Bordin, 'Procedural Developments at the International Court of Justice', (2017) 16 *The Law and Practice of International Courts and Tribunals*, 307, 312.

to notify the other State of its claim."[107] In similar terms, judge Bennouna indicated that, in order to support its contention as to the existence of the awareness criterion, the majority had relied on previous decisions that,[108] "cannot be used as a lifeline for a decision which is no way related to the well-established case law of the Court on this question."[109] In consequence, and bearing in mind that the introduction of the new requirement would have an impact on all kind of proceedings that require the previous establishment of the existence of a dispute,[110] each of the dissenting judges set out in their opinions, how the case law of the ICJ and its predecessor has been consistent in indicating that, the existence of a dispute is a matter for objective determination. Their purpose is to show that the ICJ's approach has been characterised for its flexibility.[111] In that sense, the introduction of the awareness criterion marks a shift towards formalism, which carries profound implications.[112] In fact, dissenting judges such as Robinson, Bennouna, *ad hoc* Bedjaoui refer to the undermining of the sound administration of justice and the peaceful settlement of disputes, as part of the consequences from this decision.[113] Their opinions therefore seek to point out these aspects, in an attempt to narrow down the scope of the decision, sending a message that the awareness test should not be considered as a new criterion, for the determination of the existence of a dispute.

Moving to the Inter-American Court of Human Rights, as already noted it is only possible to find one instance in which the exercise of the right to append dissenting opinions is informed by an attempt to limit the scope of the majority decision. This instance is the joint dissenting opinion appended by judges Ventura Robles and Ferrer MacGregor appended to the

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107 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, (Dissenting Opinion, Judge Robinson), p. 7, para. 24.

108 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 88; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, [2016] ICJ Rep. 3.

109 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, (Dissenting Opinion, Judge Bennouna).

110 Béatrice I. Bonafé, 'Establishing the Existence of a Dispute before the International Court of Justice: Drawbacks and Implications', (2018) 45 *Questions of International Law*, 3, 23.

111 Vincent-Joël Proulx, 'The *Marshall Islands* Judgments and Multilateral Disputes at the World Court: Whither Access to International Justice?', (2017) 111 *American Journal of International Law Unbound*, 96, 97.

112 Vincent-Joël Proulx, 'The World Court's Jurisdictional Formalism and Its Lost Market Share: The *Marshall Islands* decision and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes', (2017) 30 *Leiden Journal of International Law*, 925, 930.

113 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1, (Dissenting Opinion, Judge Yusuf), p. 866, paras. 24 – 26; Ibid, (Dissenting Opinion, Judge Bennouna), pp. 905 – 906; Ibid, (Dissenting Opinion, Judge Robinson), pp. 1082 - 1084, paras. 52 – 55; Ibid, (Dissenting Opinion, Judge *ad hoc* Bedjaoui), pp. 1129 – 1131, paras. 81 – 86.

judgment in the case of *Brewer Carías v. Venezuela*. The case concerned the alleged lack of judicial guarantees and protection throughout the proceedings instituted against Mr. Brewer Carías, for the crime of conspiracy with regard to a change to the Venezuelan Constitution. One of the preliminary objections put forward by Venezuela related to the lack of exhaustion of local remedies, by the alleged victim. It argued that the proceedings against Mr. Brewer Carías were at an intermediate stage, have not advanced due to his absence in the proceedings and, any adverse decision is subject to appeal, cassation and appeal for review. For its part, the victim argued that the adequate local remedies were exhausted, by means of the filing of two requests for the annulment of the proceedings, which were still pending.

For the majority of the IACtHR, since the decision of first instance was still pending, *i.e.* it is at an early stage, it is not possible to rule on the alleged violation of the judicial guarantees of Mr. Brewer Carías. In that sense, "it is not possible to analyse the negative impact that the decision could have if taken at in the early stages when such decisions may be rectified or corrected by means of the remedies or actions established in domestic law."[114] The majority therefore upheld the preliminary objection put forward by Venezuela and did not proceed to an analysis of the merits of the case.

Judges Ventura Robles and Ferrer MacGregor dissented from the majority decision, considering that the approach taken by the majority concerning (i) the lack of exhaustion of the adequate and effective local remedies and, (ii) that none of the exceptions to the rule on the exhaustion of local remedies is met. But above all, the main reason for appending the opinion, is related to the fact that,

> "[they] observe with concern that, for the first time in history, the Court does not proceed to examine the merits of a litigation because it finds admissible a preliminary objection of failure to exhaust domestic remedies… In addition, as analysed below, the Judgment includes some considerations that, in our opinion, are not only contrary to the Inter-American Court's case law, but also represent a dangerous precedent for the Inter-American system for the protection of human rights as a whole."[115]

In their view, the Inter-American Court should have decided that the two requests for the annulment of proceedings against Mr. Brewer Carías constituted the adequate and effective local remedies that the victim was required to exhaust.[116] The real crux of the matter for them is therefore to be found, in the application of a new criterion in the analysis of the rule of exhaustion of local remedies, namely, that proceedings are in an early stage. It is in this respect that the majority decision constitutes a disturbing precedent

114 *Case of Brewer Carías v. Venezuela*, *supra* note 12, para. 96.
115 Ibid, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), para. 2.
116 Ibid, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), para. 44.

contrary to the approach adopted by the Inter-American Court in its case law, for more than 26 years.[117]

For the dissenting judges,

> "[t]he new theory of the 'early stage' used in this Judgment represents a step backwards that affects the whole of the Inter-American system as regards the matters before the Inter-American Commission and the cases pending the decision of the Court, because it has negative consequences for the presumed victims in the exercise of the right of access to justice. Accepting that, at the 'early stages' of the proceedings, no violations can be determined (because they could eventually be remedied at subsequent stages), creates a precedent entail ranking the severity of the violations based on the stage of the proceedings.[118]

The ideas expressed throughout their joint opinion, seek therefore to downplay the decision of the majority in an attempt to impede the introduction of a new criterion in the rule concerning the prior exhaustion of local remedies.

4.1.4 The exercise of the right to append dissenting opinions in a universal and a regional international court or tribunal

The position of the International Court of Justice and the Inter-American Court of Human Rights, in the universe of international courts and tribunals, is completely different. It refers to the fact that the ICJ is the principal judicial organ of the United Nations, whereas the Inter-American Court on Human Rights is a regional judicial organ. In that sense, the International Court of Justice is open to all states, not only to those members of the organization. In contrast, the Inter-American Court of Human Rights is open to the states from the Americas that are moreover members of the Organization of American States. Moreover, the universal and regional character of each of these courts is not only limited to the aspect of access from states. This universal and regional character is also related to the aspect (already mentioned) that relates to the kind of cases that each court can adjudicate. Consequently, the universal character of the International Court of Justice also means that states can submit disputes concerning any question of international law. It is therefore conceived as the general court of the international community.[119] For its part, the regional character of the IACtHR also means that it can only adjudicate certain kind of cases, namely, those related to the responsibility of states for the violation of human rights, contained in the American Convention, to a person subject to its jurisdiction. With

117 Ibid, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), para. 47.

118 Ibid, (Joint Dissenting Opinion, Judges Ventura Robles and Ferrer MacGregor), at para. 56.

119 Karin Oellers-Frahm, 'Article 92', in Bruno Simma *et al* (eds.) *2 The Charter of the United Nations: A Commentary* (3rd edn, Oxford University Press 2012), 1897, 1912.

respect to this last aspect from the Inter-American Court of Human Rights, it is also important to note that the Americas (especially Latin America), is a region where the violation of certain human rights and under certain circumstances (*e.g.* forced disappearance, rights of indigenous communities, extrajudicial killings), is usual and has taken place in the majority of states. In consequence, it is usual for the IACtHR to decide similar cases.

This universal and regional character of both courts, is relevant in the adjudication of a case and in consequence informs the exercise of the right to append dissenting opinion. This aspect was in fact highlighted by judge Ranjeva in the dissent that he appended to the judgment on preliminary objection in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between Croatia and Serbia. In the opening paragraph of his opinion, judge Ranjeva noted that,

> "[r]endering justice under the law in a judicial institution having a universal jurisdiction is a particularly difficult exercise (…) An arbitral court, unconstrained in its decisions, is responsible for its judgment only to parties which have consented to its jurisdiction. A court of law, on the other hand, acts within the context of a concept of legal policy; it has a heritage to uphold embodied in its jurisprudence, which helps promote legal certainty and the consistency of the law."[120]

It is against this background that the exercise of the right to append dissenting opinions is informed by the universal and the regional character of the International Court of Justice and the Inter-American Court of Human Rights, respectively. Principally, the universal and regional character informs the exercise of the right to append dissents, when judges attempt to need to narrow down the scope of the majority decision. This is so since the universal character of the International Court of Justice, makes it less likely to be seised in more than one occasion of a dispute on the same subject-matter; in consequence, it cannot easily revisit an aspect that it is expected to address in its decisions. On the contrary, the regional character of the Inter-American Court of Human Rights, coupled with the fact that certain human rights violations are recurrent in the Americas, makes it more likely to be seised of cases on the same subject-matter; in consequence, it can easily revisit an aspect in subsequent cases.

In this order of ideas, the universal and regional character is one of the factors that may explain why, a significant difference exist in the number of instances in which judges exercise their right to append dissenting, with a view of limiting the scope of the majority decision.

120 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *supra* note 73, (Dissenting Opinion, Judge Ranjeva), at p. 482, para. 1.

4.2 The institutional design of the International Court of Justice and the Inter-American Court of Human Rights and its influence on the right to append dissenting opinions

4.2.1 The composition of the bench of the International Court of Justice and the Inter-American Court of Human Rights and its influence on the right to append dissenting opinions

The bench of the International Court of Justice is heterogeneous, whereas in the case of the Inter-American Court of Human Rights, the requirements for the composition of its bench make it more homogeneous. This heterogeneity/homogeneity divergence in their composition has a significant influence, on the role and function of dissenting opinions appended to their judgments. To be more precise, this influence can be appreciated in two facts. First, since it is useful for explaining the reasons of a judge for dissent;[121] second, it may constitute one of the factors in order to explain why despite the Inter-American Court of Human Rights has rendered more judgments than the International Court of Justice, fewer dissents have been appended to the latter's judgments and advisory opinions.

The heterogeneity in the composition of the International Court of Justice comprises several factors. They are aptly summarised and associated to the fact that they may constitute a source of disagreement between the members of the ICJ, by judge Herczegh in the declaration that he appended to the ICJ's advisory opinion concerning *Legality of the Threat or Use of Nuclear Weapons*, where he noted that,

> "[a]ccording to Article 9 of the Statute of the International Court of Justice, 'the representation of the main forms of civilization and of the legal systems of the world should be assured' in the membership of the Court. It is inevitable therefore that differences of theoretical approach will arise between the Members concerning the characteristic features of the system of international law and of its branches, the presence or absence of gaps in this system, and the resolution of possible conflicts between its rules, as well as on fundamental relatively fundamental issues."[122]

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121 See, *e.g.*, Andrea Bianchi, 'Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes again in the *Marshall Islands* case', 111 *American Journal of International Law Unbound* (2017), 81, 85.

122 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 41, (Declaration, Judge Herczegh), at p. 275. Similarly, judge Levi Carneiro noted in his dissenting opinion appended to the preliminary objections judgment in the *Anglo-Iranian Oil Co.*, that "it is inevitable that every one of [the members of] this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Court is to be representative of 'the main forms of civilization' and of the principal legal systems of the world. *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objections, Judgment of 22 July 1952, [1952] ICJ Rep. 93, (Dissenting Opinion, Judge Levi Carneiro), at p. 161, para. 14.

In that sense, the fact that a judge has been educated under a certain legal system has an influence on how she or he conceives the law and, in consequence, on how she or he approaches an issue.[123] The judge is moreover, in accordance to the wording of article 9 of the Statute of the International Court of Justice, a representative of both, one of the main forms of civilization and a legal system of the world. She or he might therefore be expected to exercise the right to append a dissenting opinion, based on these factors.

In this regard, reference is to be made of the joint dissenting opinion appended by judges Bedjaoui, Ranjeva and Koroma to the judgment on the merits in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain.* With respect to the decision from the majority to refuse to apply the *uti possidetis iuris* principle, these judges noted that,

> "as representatives of the various legal systems of the continent of Africa, we are committed to that principle and have never lost sight of its importance for the post-colonial phase of State development in Africa under conditions of stability and peace."[124]

An also relevant example is the dissenting opinion appended by judge Moreno Quintana to the decision on the merits in the case concerning the *Temple of Preah Vihear*, where he noted to be,

> "unable to agree with the majority of my colleagues in the decision of this case. It is my firm conviction that sovereignty over the portion of territory of the Temple of Preah Vihear belongs to Thailand. The dissenting opinion which I express hereunder gives the reasons on which it is based. In American international law questions of sovereignty have, for historical reasons, a place of cardinal importance. That is why, I could not, as a representative of a legal system depart from it."[125]

Another and more significant example can be found in the *Asylum* and *Haya de la Torre* cases. Both cases constitute the judicial facet of the saga related to the granting of asylum to Mr. Raúl Haya de la Torre by the Colombian Government, considering that he qualified as a political offender in accordance with the Montevideo Convention on Political Asylum; in consequence, the Colombian Government requested the safe-conduct necessary for Mr. Haya de la Torre to leave Peru. Nevertheless, Peru refused to grant the said safe-conduct, by noting that he was a common criminal not entitled

123 See, *e.g.*, Kazimierz Grzybowski, 'Socialist Judges in the International Court of Justice', (1964) 21 *Duke Law Journal*, 536.

124 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, *supra* note 62, (Joint Dissenting Opinion, Judge Bedjaoui, Ranjeva and Koroma), at p. 214, para.

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

to asylum.[126] In view of the divergence of opinions, both parties decided to bring the dispute before the International Court of Justice, requesting it to answer whether Colombia (based on treaties and American international law) had the right to qualify the nature of the offence, and whether Peru was under the obligation to give the necessary assurances and guarantees for the departure of Mr. Haya de la Torre from the country.

For the majority of the ICJ, both states have equal rights in the qualification of the offence. Hence, Colombia was not entitled to unilaterally qualify the offence, in spite of the fact that "[t]his institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied."[127] As for the second of the questions presented, the ICJ by relying on a construction of the Convention on Asylum of February 20th, 1928, noted that it is only after the territorial state asks the refugee to leave its territory, that the state granting asylum can afterwards request the necessary assurances and guarantees for the departure of the refugee.[128] Having Peru not asked Mr. Haya de la Torre to leave the country, Colombia was not therefore entitled to request the said assurances and guarantees.

In this case, four of the five dissenting judges belonged to American countries (Álvarez, Azevedo, Read and judge *ad hoc* Caicedo Castilla). In their view, the majority erred in concluding that the granting of asylum to Mr. Haya de la Torre was contrary to the Convention on Asylum. In other words, they considered that the majority of the International Court of Justice has disregarded the nature and practice of asylum in Latin America. As judge Azevedo has put it in his opinion, "it is very difficult to adopt and interpret a text without regard to the special circumstances in which it was drafted; these circumstances are both numerous and varied."[129] Hence, as noted by judge Álvarez,

> "in order to understand an institution and to give an adequate solution to the questions which it raises, it is necessary to know the political and social environment which gave it birth, and to consider how the institution has been applied. The Latin-America environment is very different, in matters of asylum, from the European environment."[130]

126 Manuel R. García-Mora, "The Colombian-Peruvian Asylum Case and the Doctrine of Human Rights", 37 *Virginia Law Review* (1952), 928.

127 *Asylum (Colombia/Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 266, at p. 269.

128 Ibid, at p. 279.

129 Ibid, (Dissenting Opinion, Judge Azevedo), at p. 353.

130 Ibid, (Dissenting Opinion, Judge Álvarez), at p. 292. Judge *ad hoc* Caicedo Castilla made a somewhat similar claim in his opinion, when noting that "in studying the problems of diplomatic asylum and in reaching a decision, account must be taken of the Latin-American spirit and environment, as well as of the special interpretation of American international law regarding asylum, which is very different from the European interpretation." *Cf.* Ibid, (Dissenting Opinion, Judge *ad hoc* Caicedo Castilla), at p. 359.

Based on the nature and practice of the institution of asylum in Latin America, a party to the Convention on Asylum has never refused to grant or recognise diplomatic asylum to a political offender, in times of political disturbance, on the ground that he was seeking to escape from arrest, prosecution or imprisonment, for a political offence.[131] The dissenting judges therefore concluded that urgent cases also include cases of revolution.[132]

In this sense, the reason for dissent of these judges was the fact that the approach adopted by the majority in its judgment, clearly disregarded the views of American law on the matter. Consequently, and bearing in mind that the dispute involved two states belonging to this legal system, it has been considered that the dissenting opinions were more useful than the majority judgment, since they gave special weight to the role and history of the institution of asylum in that part of the world.[133] The composition of the ICJ, seem to have an impact on the exercise of the right to append dissenting opinions role from the judges belonging to states from the continent. It shows how the representation of the principal legal systems of the world, influences the exercise of the judicial function of the International Court of Justice.

In line with this example, reference is also to be made of the dissenting opinion appended by judge Sir Percy Spender to the judgment on the merits of the *Temple of Preah Vihear* case. He noted in his opinion that,

> "[i]n determining what inferences may or should be drawn from Thailand's silence and absence of protest regard must, I believe, be had to the period of time when the events we are concerned with took place, to the region of the world to which they related, to the general political conditions existing in Asia at this period, to the political and other activities of Western countries in Asia at the time and to the fact that of the two States concerned one was Asian, the other European. It would not, I think, be just to apply to the conduct of Siam in this period objective standards comparable to those which reasonably might today be or might there have been applied to highly developed countries."[134]

Another relevant example in line with the above is constituted, by the advisory opinion of the International Court of Justice on *Certain Expenses of the United Nations*. The General Assembly requested from the ICJ an advisory opinion on the question whether the expenditures authorised by the General Assembly in some resolutions, constitute expenses of the United Nations within the meaning of article 17, paragraph 2, of the Charter of the

131 Ibid, (Dissenting Opinion, Judge Read), at p. 325.
132 See, *e.g.* Ibid, (Dissenting Opinion, Judge Badawi Pasha), at p. 309 – 312.
133 L. C. Green, 'Right of Asylum case', (1951) 4 *International Law Quarterly* 229, 239.
134 *Temple of Preah Vihear (Cambodia v. Thailand)*, *supra* note 125, (Dissenting Opinion, Judge Sir Percy Spender), at p. 128.

United Nations.[135] The reason that prompted this request for an opinion from the International Court of Justice was the refusal from some member states, such as the Soviet Union to pay their contributions to cover the expenditures authorised, for peace-keeping operations in the Middle East and in the Congo.[136] For the states who refused to pay they said expenses, both operations were undertaken in violation of the provisions of the Charter of the United Nations; the necessary expenses to cover the function of both operations could not therefore be considered as legitimate expenses that members must pay.[137]

The majority of the International Court of Justice concluded that any expenses authorised with a view to carrying out the purposes of the United Nations, should be considered as expenses that should be paid by its members. The peace-keeping operations and the resolutions authorising its expenditures were approved, in order to carry out a purpose of the United Nations, namely, the maintenance of international peace and security. In consequence, they amount to expenses of the United Nations and should be paid by its members.[138]

Five judges voted against this advisory opinion rendered by the majority. From this minority group, the dissenting opinions appended by judges Winiarski and Koretsky are relevant, since the exercise of their right to append dissenting opinion is associated to the region of the world they belong. In this sense, both judges belonged to socialist states [139] and the views expressed by each of them in their opinions are connected with the principles that constitute the basis of the socialist doctrine.

In this regard, it is to be noted that from the perspective of socialists states, the resolutions from international organizations may amount to norm-creators, when they are taken within the bounds of their competence and do not contradict basic principles of international law.[140] One of these basic principles is the sovereignty of states.[141] This principle constitutes

135 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151, at p. 152.

136 Alphonse D. Pharand, 'Analysis of the Opinion of the International Court of Justice on Certain Expenses of the United Nations', (1963) 1 *Canadian Yearbook of International Law*, 272.

137 James Fergusson Hogg, 'Peace-keeping Costs and Charter Obligations – Implications of the International Court of Justice Decision on *Certain Expenses of the United Nations*', (1962) 62 *Columbia Law Review*, 1230, 1232.

138 *Certain Expenses of the United Nations*, *supra* note 135, p. 179.

139 Thomas R. Hensley, 'Bloc Voting on the International Court of Justice', (1978) 22 *The Journal of Conflict Resolution*, 39.

140 John B. Quigley, 'The New Soviet Approach to International Law', (1965) 1 *Harvard International Law Club* Journal, 1, 19.

141 *Cf*. Zigurds L. Zile, 'A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy', (1964) 58 *American Journal of International Law*, 359, 371 – 379.

the means for a state to isolate itself and prevent any interference from any other states not belonging to the non-communist circle.[142]

This socialist perspective of international law is present at the dissenting opinions of judges Winiarski and Koretsky. For the former, "only lawful expenses can be expenses of the Organization; they must be validly approved and validly apportioned among the Members. The question is therefore one of the interpretation of the Charter."[143] In interpreting the Charter of the United Nations, judge Winiarski considered that,

> "The intention of those who drafted [the Charter] was clearly to abandon the possibility of useful action rather than to sacrifice the balance of carefully fields of competence (…) it is only by such procedures, which we clearly defined, that the United Nations can seek to achieve its purposes."[144]

In that sense, the General Assembly has no role in the maintenance of international peace and security. Its resolutions are but recommendations, which are only binding for those states that have accepted them. Consequently,

> "It is difficult to see by what process of reasoning recommendations could be held to be binding on States which have not accepted them. It is difficult to see how it can be conceived that a recommendation is partially binding, and that on what is perhaps the most vital point, the financial contribution levied by the General Assembly under the conditions of paragraph 2 of Article 17. It is no less difficult to see at what point in the transformation of a non-binding recommendation into a partially binding recommendation is supposed to take place, at what point in time a legal obligation is supposed to come into being for a Member State which has not accepted it."[145]

A similar position is adopted by judge Koretsky, for whom the resolutions adopted by the General Assembly were not in conformity with the Charter of the United Nations.[146] In his view, "[t]he Court (…) should have in mind the strict observation of the Charter (…) rules, without limiting itself by reference to the purposes of the Organization; otherwise one would have to come to the long ago condemned formula: the ends justify the means."[147]

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142 Hideaki Shinoda, Re-examining Sovereignty: From Classical Theory to the Global Age (MacMillan Palgrave 2000), 114 – 129; Eugene Korovin, 'Respect for Sovereignty: An Unchanging Principle of Soviet Foreign Policy', (1956) 11 *International* Affairs, 32; Mintauts Chakste, 'Soviet Concepts of the State, International Law and Sovereignty', (1949) 43 *American Journal of International* Law, 21, 30 – 36.

143 *Certain Expenses of the United Nations*, *supra* note 135, (Dissenting Opinion, Judge Winiarski), p. 228.

144 Ibid, p. 233.

145 Ibid, p. 234.

146 *Cf*. Kazimierz Grzybowski, 'Socialist Judges in the International Court of Justice', (1964) 3 *Duke Law* Journal, 536, 543

147 *Certain Expenses of the United Nations*, *supra* note 135, (Dissenting Opinion, Judge Koretsky), p. 268, para. 27.

Moreover, the resolutions from the General Assembly amount to mere recommendations. Transforming them into binding commitments is contrary to the Charter of the United Nations, international law in general and even common sense.[148]

In sum, the references made to the views expressed by judges Winiarski and Koretsky, constitute a clear indication that the exercise of their right to append dissenting opinions was connected to the idea of international law in socialist states.[149]

Further, an additional aspect in the composition of the bench of the International Court of Justice is the manifestation of power politics through the allocation of the seats. In this context, two additional factors informing the exercise of the right to append dissenting opinions are (i) the position adopted by the state of nationality of the judge, with regard to the aspects that constitute the subject-matter of a case before the ICJ; and, (ii) the fact that the a national from each of the five permanent members of the Security Council (with the exception of the China, between 1967 and 1985, and currently the United Kingdom), is always in the bench. Both are important factors considering, as it has been noted elsewhere, that judges are partially elected because of their nationality. Consequently, nationality plays a role when specific certain cases entre the docket of the ICJ despite once a person has been elected to be part of the bench this link should disappear.[150]

In the case of the factor concerning the position adopted by the state of nationality of a judge, with regard to the aspects that constitute the subject-matter of a case brought before the ICJ, an interesting and significant example in this regard is constituted by the recent judgments on preliminary objections rendered in the cases concerning *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament*. The composition of the bench of the International Court of Justice included, by the time that the case was discussed, some judges belonging to states possessing nuclear weapons. Interestingly, only the members of the ICJ from these states voted in favour of rejecting the applications filed by the Marshall Islands;[151] the rest of the members of the ICJ voted against this decision. The opinions appended by the dissenting judges clearly refer

148 Ibid, p. 287, para. 48.

149 Henri Isaïa, 'Les Opinions Dissidentes des Juges Socialistes dans la Jurisprudence de la Cour Internationale de Justice', (1975) 79 *Revue General de Droit International* Public, 657; Also relevant in this regard is (i) the advisory opinion of 30 March 1950 on the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania*, where judges Winiarski (Poland), Zoričić (Yugoslavia) and Krylov (Union of Soviet Socialist Republics) voted against the majority advisory opinion; and, (ii) the case concerning *United States Diplomatic and Consular Staff in Tehran*, where judges Morozov (Union of Soviet Socialist Republics) and Tarazi (Syria) voted against the majority judgment

150 Chiara Giorgetti, 'The Challenge and Recusal of Judges of the International Court of Justice', in Chiara Giorgetti (ed.) *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (Martinus Nijhoff Publishers 2015), 3, 13.

151 Judges Abraham (France), Owada (Japan), Greenwood (United Kingdom), Xue (China), Donoghue (United States), Gaja (Italy), Bhandari (India) and Gevorgian (Russia).

to a manifestation of power politics in the decision adopted by the majority. Judge Robinson for instance noted that,

> "[i]nternational law, like any other branch of law, is not static and some of the greatest developments in history would not have taken place but for the dynamism of law. But where current law can be applied to serve the interests of the international community as a whole, such a dramatic change is only warranted if there is a compelling consideration in favour of doing so (…) The majority has not advanced such reasons (…) This conclusion is rendered even more telling by the subject-matter of the dispute before us today."[152]

In this same line, judge Cançado Trindade noted in his dissenting opinion that,

> "[a] small group of States – such as the NWS – cannot overlook or minimize those reiterated resolutions, extended in time, simply because they voted against them, or abstained (…) The present case stresses the utmost importance of fundamental principles, such as that of juridical equality of States, following the principle of humanity, and of the idea of an objective justice (…) Factual inequalities and the strategy of 'deterrence' cannot be made to prevail over the juridical equality of States."[153]

On the other hand, the position from members of the ICJ belonging to states possessing nuclear weapons is to be found in the context of the advisory opinion rendered in the *Legality of the Threat or Use of Nuclear Weapons*. All the judges belonging to this group of states appended opinions, with a view to explain their vote with regard to operative subparagraph E, where the majority noted that

> "the threat of use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of international law; however, the International Court, cannot conclude, in view of the current state of international law, whether the threat or use of nuclear weapons would be unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[154]

With regard to this operative subparagraph, judge Guillaume for instance noted that,

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152 *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, supra note 1, (Dissenting Opinion, Judge Robinson) p. 1091, paras. 68 – 69.

153 Ibid, (Dissenting Opinion, Judge Cançado Trindade), pp. 1022, 1025 – 1026, paras. 307, 320.

154 *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 41.

> "this wording is not entirely satisfactory, and I therefore believe that it needs some clarification (…) The right of self-defence proclaimed by the Charter of the United Nations is characterized by the Charter as natural law (…) Accordingly, international law cannot deprive a State of the right to resort to nuclear weapons if such action constitutes the ultimate means by which it can guarantee its survival (…) In such a case the State enjoys a kind of 'absolute defence' (…) In these circumstances, the Court, in my view, ought to have carried its reasoning to its conclusions and explicitly recognized the legality of deterrence for defence of the vital interest of States."[155]

For its part, Judge Schwebel noted in this same vein that the possession of nuclear weapons and the policy of deterrence,

> "is not a practice of a lone and secondary persistent objector. This is not a practice of a pariah Government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas."[156]

To conclude, a last instance to be mentioned is some of the dissenting opinions appended in the *Fisheries* case between the United Kingdom and Norway. Interestingly, the two dissenting judges in this case, Read and McNair, belong to countries that consider that their coasts are similar to the Norwegian coast (*i.e.* Canada and the United Kingdom). Consequently, both judges referred in their dissents to the Norwegian argument regarding the uniqueness or exceptionality of its coast. They therefore noted in their opinions that the countries they belong to, also have long and indented coasts. Judge McNair for instance noted that,

> "Norway has no monopoly of indentations or even skerries. A glance at an atlas will shew that, although Norway has a very long and heavily indented coastline, there are many countries in the world possessing areas of heavily indented coast-line. It is not necessary to go beyond the British Commonwealth."[157]

Similarly, judge Read noted in his dissent that,

> "It is unrealistic to suggest that the northern coast of Norway is unique or exceptional in that it has a broken coast line in East Finnmark, or because West Finnmark, Troms and Nordland are bordered by a coastal archipelago, deeply indented by fjords and sunds. In other parts of the world, different names are used, but there are many other instances of broken coast lines and archipelagoes

155 Ibid, (Separate Opinion, Judge Guillaume), pp. 290 – 291, paras. 8 – 9.
156 Ibid, (Dissenting Opinion, Judge Schwebel), p. 312.
157 *Fisheries Case (United Kingdom v. Norway)*, supra note 73, (Dissenting Opinion, Judge McNair), p. 169.

(…) There are coastal archipelagoes, deeply indented bays and broken coast lines on the north, south, east and west coasts of Canada."[158]

In striking contrast, all these kinds of differences in the composition of the bench of the International Court of Justice, can hardly be found in the case of the Inter-American Court of Human Rights. This diversity in the composition of the bench is not present in the IACtHR. As noted above, it is not a statutory requirement. In addition, despite states from the Americas belong to either the continental or the common law systems, [159] all of its current judges come from states pertaining to the former.[160] Consequently, no heterogeneity exists in the composition of the Inter-American Court of Human Rights. All the judges, along with coming from states that belong to the same legal system, are experts on human rights, as well as are part of the same region. Hence one might expect a greater common denominator of agreement between its members.[161] These three factors have an important impact on the exercise of the right to append dissenting opinions. The first of these factors, in the sense that the source for dissent, is not to be found in a difference related in the manner how the aspect under consideration, is approached in the legal system of the state of the nationality of a judge.[162] With regard to the second aspect, the source of the dissent is homogeneous since all the members of the IACtHR share in broad terms the same expertise (*i.e.* the protection of human rights). In that sense, whenever a judge dissents from a majority judgment, the main reason may be found in the fact that he disagrees with the (existence or lack of a) violation of a human right, in the case at hand. As for the last factor, the fact that all judges come from the same region avoids the existence of ideological factions and

158 Ibid, (Dissenting Opinion, Judge Read), p. 193.

159 It should be recalled, as already noted above (fn. 585), that only during the first twelve years of its existence, the bench of the Inter-American Court always included at least one judge from a country belonging, to the common law system. This has, however, changed and all of the members of the current bench, come from countries that belong to the continental system.

160 This fact has moreover led some people to argue that the system is more Latin American than Inter-American. *Cf*. Christina M. Cerna, 'The Inter-American Court of Human Rights', in Chiara Giorgetti (ed.) *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Martinus Nijhoff 2012), 368.

161 Forest L. Grieves, 'Reform of the Method of Rendering Decisions in the International Court of Justice', (1970) 64 *American Journal of International Law* 144, 150.

162 As a former member of the International Court has put it, "la question de la diversité des systèmes juridiques mérite trop d'attention pour la traiter ici ; pour répondre à l'argument dans le sujet étudié il suffira sans doute de remarquer que cette diversité ne doit être que dans la manière d'envisager un problème et qu'il ne peut être dans les intentions de personne de souhaiter que la diversité des systèmes juridiques constitue un obstacle au rapprochement des raisonements juridiques afin d'obtenir la plus large majorité possible sur la décision de la Cour." *Cf*. André Gros, '*Observations sur le mode de Délibération de la Cour Internationale de Justice*', in Roberto Ago et al (eds.) Il Processo Internazionale: Studi in Onore di Gaetano Moreli (Pedone 1975), 377, 380.

regional seats.[163] Nevertheless, one must not lose sight that the members of the Inter-American Court of Human Rights have each of them moral convictions, which cannot be disregarded when deciding a case.[164] As judge Vio Grossi recently noted in the dissenting opinion he appended to the advisory opinion on *Gender identity, and equality and non-discrimination with regard to same sex couples*, "the views [expressed in a dissenting opinion] are formulated (…) as an evident demonstration of the dialogue and diversity of thoughts within the [the Inter-American Court]."[165]

These factors, when taken together, explain why the exercise of the right to append dissenting opinions is not informed by factors related to the composition of the bench of the Inter-American Court of Human Rights. The homogeneity in its composition makes the disagreement within this court, to find its basis in the IACtHR's decision to either consider a certain situation as a human rights violation, or the decision as to what are the adequate measures of reparation. Moreover, this homogeneity is also relevant in explaining why (as already noted in the main introduction to this dissertation), there is a significant difference in the number of judgments to which dissenting opinions have been appended in both courts. It is to be recalled that, in the case of the International Court of Justice, in only 11 of its judgments no dissenting opinions have been appended (and furthermore there has only been one judgment without a single individual opinion),[166] whereas from the 403 judgments rendered by the Inter-American Court of Human Rights, in 332 occasions these decisions have been taken by the unanimous vote of its members.

Further, it should also be considered that every judge comes to the bench with all his cultural, social and intellectual baggage.[167] Part of this baggage is the legal system in which he was educated. In this regard, the two predominant legal systems are the common and continental law systems.[168] Undoubtedly, more legal systems exist around the world. Nonetheless, if a classification in large groups is followed the other legal systems

163 *Cf*. Debra P. Steger, 'Improvements and Reform of the WTO Appellate Body', in Federico Ortino and Ernst-Ulrich Petersmann (eds.) *The WTO Dispute Settlement System* (Kluwer 2004), 41, 45.

164 See, *e.g.*, Jonathan Crowe, 'Dworkin on the Value of Integrity', (2007) 12 *Deakin Law Review*, 167.

165 *Gender identity, and equality and non-discrimination with regard to same sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples.* Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24, (Separate Opinion, Judge Vio Grossi) at para. 2. See also, *Amrhein et al v. Costa Rica*, *supra* note 75, (Partial Dissenting Opinion, Judge Vio Grossi), p. 2.

166 *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 February 2009, [2009] ICJ Rep. 61

167 Mandfred Lachs, 'A Few Thoughts on the Independence of Judges of the International Court of Justice', (1987) 25 *Columbia Journal of Transnational Law*, 593, 594.

168 René David, *Les Grands Systèmes de Droit Contemporains* (Dalloz 1964), 14.

can be allocated in one of the two main legal systems;[169] The other existing legal systems finds some of their roots either in the common or continental law systems, particularly with respect to aspects such as the precedential value of judicial decisions and the permissibility of individual opinions.[170] In this context, 77 of the judges of the International Court of Justice belong to countries that their legal system is based in the continental system; 31 judges belong to countries that their legal system is based in the common law system. It has been noted that the ICJ judges that belong to the continental system have traditionally tended to make use of the exercise of the right to append dissenting opinions sparingly.[171] The number of dissenting opinions appended, however, by judges belonging to countries that their legal system is based in the continental system, seems to run counter to this assertion. Thus, 241 of the 349 dissenting opinions appended to judgments of the International Court of Justice, were appended by judges belonging to countries that their legal system is based in the continental system. Consequently, only 31% of the dissenting opinions at the International Court of Justice (*i.e.* 108 dissents) were appended by judges belonging to the common law system. As for the Inter-American Court of Human Rights, only 4 of its judges belong to countries in the Americas that their legal system is based in the common law. These judges have appended a number of 5 dissenting opinions. In contrast, 37 are the judges belonging to states that their legal system is based in the continental system and have appended 81 dissenting opinions.

4.2.2 The exercise of the right to append dissenting opinions from national and ad hoc judges

In the case of the participation from national and *ad hoc* judges in contentious proceedings, it was already noted above (section 3.2.1) that in the case of the Inter-American Court of Human Rights, the possibility for states to appoint *ad hoc* judges, as well as for judges of the nationality of the respondent state, to be part of the proceedings, is currently forbidden.

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169 Jaakko Husa, 'Classification of Legal Families Today, Is it Time for a Memorial Hymn?', (2004) 56 *Revue Internationale de Droit Comparé*, 11.

170 Kwai Hang & Brynna Jacobson, 'How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore', (2017) 12 *Asian Journal of Comparative Law*, 209; Mahdi Zahraa, 'Characteristic Features of Islamic Law: Perceptions and Misconceptions', (2000) 15 *Arab Law Quarterly*, 168; Chenguang Wang & Guobin Zhu, 'A Tale of Two Legal Systems: The Interaction of Common Law and Civil Law in Hong Kong', (1999) 51 *Revue Internationale de Droit Comparé*, 917; Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems', (1978) 26 *The American Journal of Comparative Law*, 187; Paolo Contini, 'Integration of Legal Systems in the Somali Republic', (1967) 16 *The International and Comparative Law Quarterly*, 1088.

171 Philippe Couvreur, 'Charles de Visscher and International Justice', (2000) 11 *European Journal of International Law*, 905, 906.

Nevertheless, one should also bear in mind that in the initial anatomy of the IACtHR, as it was envisaged by the drafters of the American Convention, *ad hoc* judges and national judges were allowed. This difference in the anatomy of both courts is therefore a recent one. In view of this fact, it is not only important to address the relevance of this current difference; it is also important to address if differences existed as to whether and how *ad hoc* and national judges dissented, when they were still allowed at the Inter-American Court of Human Rights.

In this regard, as it was also noted above (section 3.2.1 above), *ad hoc* judges have been frequently criticised for voting in favour of the appointing state. In fact, an analysis of the number of instances at both courts, in which their decisions have been taken by majority shows, that an important number of these decisions were not unanimous because the *ad hoc* judge voted against the decision. To put it other way, without *ad hoc* judges more judgments could have been unanimous. In fact, during the time that these judges were allowed at the Inter-American Court of Human Rights, they were the sole dissenter in 19 instances.[172] Similarly, in the case of the International Court of Justice, in 10 instances the *ad hoc* judge was the sole

172 *Neira-Alegría et al v. Peru*, Preliminary Objections. Judgment of December 11, 1991. Series C No. 13; *Caballero Delgado y Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C, No. 22; *"White Van" (Paniagua Morales et al) v. Guatemala*, Preliminary Objections. Judgment of January 25, 1996. Series C No. 23; *Neira-Alegría et al v. Peru*. Reparations and Costs. Judgment of September 19, 1996. Series C No. 26; *Cantoral Benavides v. Peru*. Preliminary Objections. Judgment of September 3, 1998. Series C No. 40; *Durand & Ugarte v. Peru*. Preliminary Objections. Judgment of May 28, 1999. Series C No. 50; *Castillo Petruzzi and others v. Peru*. Merits, Reparations and Costs. Judgment of May 30, 1999. Series C No. 52; *Cantoral Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79; *Myrna Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101; *Maritza Urrutia v. Guatemala*. Merits, Reparations and Costs. Judgment of November 27, 2003. Series C No. 103; *Serrano Cruz Sisters v. El Salvador.* Preliminary Objections. Judgment of November 23, 2004. Series C No. 118; *Serrano Cruz Sisters v. El Salvador*. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120; *Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125; *Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127; *Rios et al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194; *Perozo et al v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195; *Reverón Trujillo v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 30, 2009. Series C No. 197; *Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214.

dissenter.[173] The most recent example of this fact, in the case of the ICJ, is the judgment on the merits of the *Jadhav* case between India and Pakistan.

These numbers are important, if one takes account of the fact (as previously noted), that one of the objections as to the permissibility of *ad hoc* judges is based on the fact that its use has turned into an abuse, since some states have sought to appoint as judges, people who dissented from otherwise unanimous decisions.[174]

There is no doubt that the presence of *ad hoc* judges influences the number of unanimous decisions. Nonetheless, the fact that the person appointed as *ad hoc* judge is the sole dissenter does not necessarily mean that her or his appointment is to be considered as an abuse. First of all, as it was already also noted (section 1.4 above), even though unanimity is always preferred, when it is merely formal (*i.e.* recorded as such in the judgment despite conflicting views among judges), it is not desirable; whatever may be the effect upon public opinion.[175] In this sense, the dissenting opinion is the instrument that allows an *ad hoc* judge to show to the parties to the dispute and the public in general, that she or he was not basically appointed for the purposes of impeding the ICJ or the IACtHR from rendering a unanimous decision. Secondly, in order to speak of an abuse in the exercise of the right for states to appoint an *ad hoc* judge, it would be necessary for *ad hoc* judges to dissent in all cases with a view of breaking unanimity. Instances, however, exist in which the *ad hoc* judges agree with the majority and the sole dissenter that impedes unanimity is another member of the court.[176] Thirdly, a claim as to the existence of an abuse regarding *ad hoc* judges is ill-informed of the role of these judges within the court.

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173 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Preliminary Objections, Judgment of 25 March 1948, [1948] ICJ Rep. 15; *Request for Interpretation of the Judgment of November 20th, 1950, in the* Asylum Case (Colombia/Peru), Judgment of 27 November 1950, [1950] ICJ Rep. 395; *Haya de la Torre (Colombia/Peru)*, Judgment of 13 June 1951, [1951] ICJ Rep. 71; *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, Judgment of 18 November 1960, [160] ICJ Rep. 192; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962)*, Second Phase, Judgment of 5 February 1970, [1970] ICJ Rep. 3; *Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, [1993] ICJ Rep. 38; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Merits, Judgment of 17 December 2002, [2002] ICJ Rep. 625; *Frontier Dispute (Benin/Niger)*, Judgment of 12 July 2005, [2005] ICJ Rep. 90; *Application of the Interim Accord of 13 September 1995,* (Former Yugoslav Republic of Macedonia v. Greece), Merits, Judgment of 5 December 2011, [2011] ICJ Rep. 644; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objections, Judgment of 24 September 2015, [2015] ICJ Rep. 592; *Jadhav (India v. Pakistan)*, Merits, Judgment of 17 July 2019, [not yet published in the ICJ Reports].

174 Lea Shaver, 'The Inter-American Human Rights System: An Effective Institution for Regional Human Rights Protection?', (2010) 9 Washington University Global Studies Law Review, 639, 645.

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

176 See, e.g., *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment of 19 September 2012, [2012] ICJ Rep. 624.

Reference has already been made of the views expressed by *ad hoc* judge Lauterpacht in the separate opinion appended to the second request for the indication of provisional measures, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, where he noted that,

> "[the judge *ad hoc*] has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write."[177]

This view has been shared by other persons appointed as *ad hoc* judges at the International Court of Justice,[178] as well as by persons appointed at the Inter-American Court of Human Rights.[179]

A recent example that makes visible this role can be found in the most recent judgment rendered by the International Court of Justice in the case concerning *Obligation to Negotiate Access to the Pacific Ocean*. One of the arguments advanced by Bolivia concerned the existence of an obligation from Chile to negotiate, if all the instruments, acts and conduct presented to show the existence of such an obligation are taken cumulatively. With regard to this argument, the majority of the ICJ concluded that since no obligation to negotiate sovereign access has arisen from any of the documents taken individually, a cumulative analysis cannot change the previous conclusion. Similarly, it also noted that it did not deem necessary to consider whether continuity existed in the exchanges between Bolivia and Chile, since even if continuity existed it would not establish the existence of the obligation to negotiate the sovereign access.[180]

Judge *ad hoc* Daudet referred in his dissenting opinion to this argument and the way the majority addressed it. He emphasised and explained the argument advanced by Bolivia. He therefore,

> "regret[ted] that the Court (…) rejected Bolivia's argument on the ground that the obligation arising from any of the grounds that it has invoked in isolation, 'a cumulative consideration of the various bases cannot add to the overall result', following Chile's position summed up by one of its counsels by the pictorial formula 0 + 0 + 0 = 0. (…) There is indeed no reason to analyse the acts that constitute the sequence individually, because they all relate to the same object

177 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Further Request for the Indication of Provisional Measures, Order of 13 September 1993, [1993] ICJ Rep. 325, (Separate Opinion, Judge *ad hoc* Lauterpacht), p. 409, para. 6.

178 See, e.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, *supra* note 173, (Dissenting Opinion, Judge *ad hoc* Franck), at pp. 693 – 695, paras. 10 – 12.

179 *Trujillo Oroza v. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, (Separate Opinion, Judge *ad hoc* Brower).

180 *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Merits, Judgment of 1 October 2018 [2018] ICJ rep. 507, para. 174.

> and share the same claim. Certainly, there were interruptions in this claim but it must be admitted that an aspect as crucial as the access to the sea for Bolivia should only have a recurring character. (…) The same claim from Bolivia has been repeated for more than a century. In the hope of a positive result, the claim was formulated in diverse manners, diverse conditions and in acts and behaviour of diverse nature (…) Such a position must be considered in its entirety and may not be subjected to the same regime of a single and isolated act, which may be examined out of its context."[181]

In line with the above, persons who have been appointed at the Inter-American Court of Human Rights have clearly noted that, their role should be focused in for instance assisting the court with the necessary knowledge of the laws within the respondent state. As *ad hoc* judge Santistevan de Noriega noted in his partial dissenting opinion in the case of *Garcia Asto and Ramirez Rojas*,

> "In exercising international judicial functions, as an *ad hoc* judge of this Court, I have endeavoured to bring intimate knowledge to the distinguished who are members of the Court on the law in force on the country whose State is on trial, and on the practice that within its framework are being developed in order to make them compatible with the provisions of the American Convention and the Peruvian Constitution itself. Therefore, in the short but fruitful time that I have had the privilege to exercise such duty, I have set myself to share with the members of the Court the characteristics of the legal system that, amidst the democratic transition, governs the delicate situation of those persons who are on trial for crimes related to terrorist activities under similar circumstances to the two cases giving rise to this judgment."[182]

This fact, in no way means that the *ad hoc* judge believes he is acting as a representative of the appointing state. Judge Vidal Ramirez, appointed by Peru for some of its early cases at the Inter-American Court of Human Rights, noted that

> "the designation of the judge *ad hoc* by the State, notified with the application does not imply that he assumes his representation because he becomes member of the Court in an individual capacity after previous oath. To become member of the Court as judge *ad hoc* I have met same qualifications as the incumbent judges and, thus, I have been empowered with the same rights, duties, and responsibilities."[183]

In this order of ideas, *ad hoc* judges at both courts clearly know what their role is. It is moreover this role which informs the exercise their right to

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181 Ibid, (Dissenting Opinion, Judge *ad hoc* Daudet), paras. 42 – 43.

182 *García Asto and Ramírez Rojas v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 25, 2005. Series C No. 137, (Partial Dissenting Opinion, Judge *ad hoc* Santistevan de Noriega), para. 1.

183 *Durand and Ugarte v. Peru*. Merits. Judgment of August 16, 2000. Series C No. 68, (Reasoned Opinion, Judge Vidal Ramirez).

append a dissenting opinion. This does not, however, mean that because of the role and intellectual affinity of the *ad hoc* judge with the position of the appointing state, she or he should always exercise his right to append a dissenting opinion and moreover address all the aspects of the majority decision.[184] *Ad hoc* judge Berman noted in the opinion appended to the judgment of the ICJ in the case concerning *Certain Property* that, while

> "[he] find [him]self in substantial disagreement over certain issues. That would not in itself be grounds for a dissenting opinion, since I do not take the view that it is virtually incumbent on a judge *ad hoc* to tell the waiting world where and how his conclusions differ from those of the majority on the Court. Since, however (or therefore), I believe that the Court has seriously gone astray in deciding how this case should be handled at this preliminary objections phase, I must explain why."[185] (…)

In sum, the *raison d'être* of *ad hoc* judges and the practice as to the exercise of their function shows that they are, in principle, expected to ensure that the arguments advanced by their appointing state have been fully appreciated. This does not, however, mean that their function within the court is limited to these aspects.

In fact, the only difference between an *ad hoc* judge and other members of an international court or tribunal, is basically found in the manner in which they are appointed.[186] The provisions that indicate the requirements for the election of the members of the court or tribunal (*i.e.* independence, impartiality and professional qualifications) are also applicable to an *ad hoc* judge.[187] She or he is therefore called to exercise the same role and function of any other member of the court or tribunal.[188]

It is in view of the above, that *ad hoc* judges from both courts have not limited themselves to ensure that the arguments advanced by their appointing state have been fully appreciated. The following individual opinions that some of them have appended are relevant for exemplifying

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184 *Ad hoc* judge Mahiou for instance noted in his dissenting opinion in the case concerning *Application of the genocide Convention* between Bosnia and Herzegovina and Serbia and Montenegro, "that the purpose of a judge's separate opinion, even a dissenting one, is not to engage in excessively lengthy considerations of substance, to undertake a re-examination and re-appraisal of each of the points addressed by the Court and to put together, as it were, another Judgment." *Cf. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Rep. 43, (Dissenting Opinion, Judge *ad hoc* Mahiou) p. 383, para. 2.

185 *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment of 10 February 2005, [2005] ICJ Rep. 6, (Dissenting Opinion, Judge ad hoc Berman) pp. 70 – 71, para. 1.

186 Andrés Sarmiento Lamus & Walter Arévalo Ramírez, 'Non-appearance before the International Court of Justice and the Role and Function of Judges *ad hoc*', (2017) 16 *The Law and Practice of International Courts and Tribunals*, 398, 411.

187 Chiara Giorgetti, *supra* note 150.

188 Andrés Sarmiento Lamus & Walter Arévalo Ramírez, *supra* note 186.

this point. In the case of the International Court of Justice, reference will be made of the dissenting opinions appended by the *ad hoc* judges in *Nottebohm* and *Question relating to the Obligation to Prosecute or Extradite*.

In the *Nottebohm* case, *ad hoc* judge Guggenheim referred in his opinion to some of the consequences that the decision from the majority may entail for international law in general. He explicitly noted that the decision would involve important consequences, namely, that

> "even if it be admitted that nationality can be dissociated from diplomatic protection in the present case, there remains the question as to what are the consequences of the total or partial invalidity under international law of a nationality validly acquired under municipal law. Is the invalidity confined to the sphere of diplomatic protection, or does it extend to the other effects of nationality on the international level, for example, treaty rights enjoyed by the nationals of a particular State in regard to monetary exchange, establishment and access to the municipal courts of a third State, etc.? [In addition] A refusal to recognize nationality and therefore the right to exercise diplomatic protection, would render the application of the latter – the only protection available to States under general international law enabling them to put forward the claims of individuals against third States – even more difficult then (*sic*) it is already is. If the right of protection is abolished (…) if no other State is in a position to exercise diplomatic protection, as in the present case, claims put forward on behalf of an individual, whose nationality is disputed or held to be inoperative on the international level and who enjoys no other nationality, would have to be abandoned."[189]

Similarly, *ad hoc* judge Sur focused in the dissenting opinion that he appended in *Questions relating to the Obligation to Prosecute or Extradite*, on general aspects not related to the position asserted by his appointing state. He focused on the International Court's failure to settle the dispute submitted to it. He questioned if,

> "the way in which the Court has conceived of its task, which is to settle a legal dispute between States in accordance with international law. I wonder if the Court has not in fact set about responding to a request for an advisory opinion on the nature and authority of the Convention against Torture, rather than examining in a fair and balance way the arguments and conduct of the Parties (…) a judicial settlement is only a substitute for a diplomatic one, and in my view it must offer a full, balanced and clear response to all of the parties' arguments and claims (…) By way of example, let us take the reference to *jus cogens* which appears in the reasoning, a reference which is entirely superfluous and does not contribute to the settlement of the dispute."[190]

189 *Nottebohm (Liechtenstein v. Guatemala)*, *supra* note 1, (Dissenting Opinion, Judge *ad hoc* Guggenheim), at p. 63.

190 *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 1, (Dissenting Opinion, Judge *ad hoc* Sur) pp. 605 – 606, paras. 2- 4.

This situation is not exclusive of the opinions appended by *ad hoc* judges from the International Court of Justice. Examples can also be found in the case of the Inter-American Court of Human Rights. The most relevant are the opinions appended by *ad hoc* judges Caldas, Ferrer MacGregor and Rodriguez-Pinzon.

With respect to *ad hoc* judge Caldas, he appended an opinion in the case of *Garibaldi v. Brazil* in an attempt to prevent excessive delays in the judicial system of states that could eventually lead to situations of impunity. As he expressly noted,

> "I submit this opinion with my own reasoning in the hope that it will contribute to a profound reflection by Brazil and other jurisdictional countries; (…) [hence] in this opinion, I wish to outline a simple model capable, if duly followed by the States, of creating the conditions to resolve judicial delays definitely, easily, promptly and inexpensively."[191]

In the case of *ad hoc* judge Ferrer MacGregor, he sought in his opinion to highlight "the new considerations and clarifications rendered on this doctrine [of the conventionality control] in this Judgment, as well as to emphasize its importance for the Mexican judicial system, and in general, for the future of the Inter-American System."[192] Lastly, in the case of *ad hoc* judge Rodriguez-Pinzon, he noted the reason for exercising his right to append a dissenting opinion "is the result of a debate that, in my opinion, is of great importance as to the protection of human rights in America and to which several well-known jurists of this part of the world has referred by adopting different positions regarding the scope of Article 8 and Article 25."[193]

On the other hand, in the case of national judges fewer instances exist in which a decision could not be unanimous (in whole or in part) because the judge of the nationality of one of the parties to the dispute has voted against the decision of the majority. In fact, in only two cases decided by the International Court of Justice the national judge was the sole dissenter,[194] whereas in the Inter-American Court of Human Rights only one instance exists.[195] This fact does not, however, mean that national judges usually

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191 *Garibaldi v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 23, 2009. Series C No. 203 (Opinion of Judge *ad hoc* Caldas), paras. 1 – 8.

192 *Cabrera García and Montiel-Flores v. Mexico*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 26, 2010. Series C No. 220, (Concurring Opinion, Judge *ad hoc* Ferrer MacGregor), para. 1.

193 *Salvador Chiriboga v. Ecuador.* Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179, (Partial Dissenting Opinion, Judge *ad hoc* Rodriguez-Pinzon), para. 1.

194 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *supra* note 88; *Request of Interpretation of the Judgment of 31 March 2004 in the Case Concerning* Avena and Other Mexican Nationals, (Mexico v. United States) (Mexico v. United States), Judgment of 19 January 2009, [2009] ICJ Rep. 3.

195 *Caballero Delgado y Santana v. Colombia*, *supra* note 172.

vote with the majority of the court and therefore against their state of nationality. In the case of the International Court of Justice, an analysis of its docket from 1978 onwards[196] shows that in the 17 decisions in which a judge of the nationality of one the parties to the dispute was part of the bench,[197] no instance exists in which the national judge has voted with the majority and, as a consequence, against all the submissions of the state of his nationality. As for the Inter-American Court of Human Rights, the analysis of its docket shows, in clear contrast with the International Court of Justice, that from the 19 where a judge of the nationality of the respondent

196 On 14 April, 1978, the International Court adopted revised Rules of Court. One of the amendments made (when compared to its previous Rules of Court of 1946), was to add that the judgment to be given by the full court or a chamber, should contain the number and names of the judges constituting the majority. In this sense, it was therefore problematic regarding decisions rendered before 1978, to know if a national judge had voted in favour of his government, unless an individual opinion was appended. Consequently, it is better to only consider those decisions in which the voting behaviour is known.

197 *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *supra* note 88; *Elettronica Sicula S.p.A (ELSI) (United States of America v. Italy)*, Judgment of 20 July 1989, [1989] ICJ Rep. 15; *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 109; *Military and Paramilitary Activities in and against Nicaragua*, *supra* note 88; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, [1993] ICJ Rep. 38; *Request for an Examination of the Situation in accordance with paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *case*, Order of 22 September 1995, [1995] ICJ Rep. 288; *LaGrand (Germany v. United States of America)*, *supra* note 700; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment of 27 February 1998, [1998] ICJ Rep. 115; *Oil Platforms (Iran v. United States)*, Preliminary Objections, Judgment of 12 December 1996, [1996] ICJ Rep. 803; *Oil Platforms (Iran v. United States)*, *supra* note 64; *Avena and other Mexican Nationals (Mexico v. United States of America)*, *supra* note 435; *Request of Interpretation of the Judgment of 31 March 2004 in the Case Concerning* Avena and Other Mexican Nationals, *supra* note 194; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 88; *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 1; *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Merits, Judgment of 31 March 2014, [2014] ICJ Rep. 226; *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, *supra* note 1; *Obligations concerning Negotiations relating to cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep 255.

state was part of the bench,[198] in only 2 of these the national judge voted in favour of the state's submissions.[199]

4.2.3 The active and passive participation in the drafting of judgments as a source for the exercise of the right to append dissenting opinions and its relation with the majority judgment

The second difference in the anatomy of both courts is to be found on how its judgments are drafted. This is an interesting aspect that is not moreover limited to these two courts. As has been indicated elsewhere, an examination of the working methods of several international courts and tribunals (the International Court of Justice and Inter-American Court of Human Rights included) shows that they are noted for their diversity.[200] The differences between the ICJ and the IACtHR are but a reflection of those that exist, between all the existing international courts and tribunals in this regard.

In the case of the International Court of Justice and the Inter-American Court of Human Rights the differences in the drafting of their judgments is based on the fact that, since in the composition of the former the representation of the main forms of civilization and of the principal legal systems

198 *Caballero Delgado and Santana v. Colombia*. Preliminary Objections. Judgment of January 21, 1994. Series C No. 17; *Caballero Delgado and Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C No. 22; *El Amparo v. Venezuela*. Reparations and Costs. Judgment of September 14, 1998. Series C No. 28; *Suarez Rosero v. Ecuador*. Merits. Judgment of November 12, 1997. Series C No. 35; *Benavides Cevallos v. Ecuador*. Merits, Reparations and Costs. Judgment of June 10, 1998. Series C No. 38; *Suarez Rosero v. Ecuador*. Reparations and Costs. Judgment of January 20, 1999. Series C No. 44; *"The Last Temptation of Christ" (Olmedo Bustos et al) v. Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73; *Case of the Caracazo*. Reparations and Costa. Judgment of August 29, 2002. Series C No. 95; *Alfonso Martin del Campo-Dood v. Mexico*. Preliminary Objections. Judgment of September 3, 2004. Series C No. 113; *Huilca-Tecse v. Peru*. Merits, Reparations and Costa. Judgment of March 3, 2005. Series C No. 121; *Gomez-Palomino v. Peru*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 136; *Blanco Romero et al. v. Venezuela*. Merits, Reparations and Costs. Judgment of November 28, 2005. Series C No. 138; *Ximenes-Lopez v. Brazil*. Preliminary Objection. Judgment of November 30, 2005. Series C No. 139; *Baldeon-Garcia v. Peru*. Merits, Reparations and Costa. Judgment of April 6, 2006. Series C No. 147; *Ximenes-Lopez v. Brazil*. Merits, Reparations and Costs. Judgment of July 4, 2006. Series C No. 149; *Montero Aranguren et al (Detention Center of Catia) v. Venezuela*. Preliminary Objecitons, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150; *Claude Reyes at al v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151; *Case of the Dismissed Congressional Employees v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158; *Nogueira de Carvalho et al v. Brazil.* Preliminary Objections. Judgment of 28 November, 2006. Series C No. 161.

199 In consequence, there are only two instances in which a judge of the nationality of the state has voted in favour of its submissions. *Cf. Caballero Delgado and Santana v. Colombia*. Merits. Judgment of December 8, 1995. Series C No. 22; *Claude Reyes at al v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151

200 David H. Anderson, 'The Internal Judicial Practice of the International Tribunal for the Law of the Sea', in Patibandla Chandrasekhara Rao & Rahmatullah Khan (eds.) The International Tribunal for the Law of the Sea: Law and Practice (Martinus Nijhoff Publishers 2001), 199, 200.

of the world should be assured,[201] participation should be given to all of its members. In other words, the diversity in the composition should be meaningful. In that sense, it was necessary for the International Court of Justice to implement a method for the drafting of its judgments in which all its members, as representatives of a region of the world and a legal system, should have the possibility to contribute in the decision to be adopted.

In clear contrast, as noted above (section 4.2.1) the majority of member states of the Organization of American States belong to the continental law system. They have therefore adopted a method for the drafting of its judgments (*i.e.* through a judge rapporteur) that is known for all the judges of the Inter-American Court of Human Rights. These aspects explain why, whereas the International Court of Justice has opted for a system in which all judges should circulate a written note, expressing their views on the submission of the parties (before the drafting committee is chosen), in the Inter-American Court of Human Rights there is only one judge writing the opinion in its behalf.

These differences seems to be an important factor for explaining the disparity in the number of occasions in which dissenting opinions, have been appended to judgments of both courts. In other words, these differences are not a mere internal aspect devoid of any relevance whatsoever, with regard to the role and function of dissenting opinions. Certainly, it may also be argued that the method for deliberation and drafting of judgments at the International Court of Justice, instead of contributing to a major number of dissenting opinions, is in fact designed to avoiding individual opinions, considering that it seeks to integrate the views from all the members of the ICJ.[202] In principle, an assertion of this kind holds true. Nonetheless, there is one aspect in the deliberation process of the International Court that explains why, despite it is aimed to obtain unanimous decisions, the number of judgments without dissenting opinions appended shows otherwise.

As explained in detail above (section 3.2.3) after the closure of the oral proceedings, and once the President of the International Court has circulated the list of issues that will be discussed, time is given to each of the judges, for the preparation of a written note in which the judge will be presenting his colleagues the solution to each of the points that will be addressed in the judgment. This is an important aspect since the writing of the note requires of all the information advanced by the parties, in support of their position. The note is therefore a well-reasoned document constituting the product of a conscious and judicial analysis, in which the judge attempts to convince his colleagues that his position should be adopted. The former president of the International Court, Mohammed Bedjaoui, has refer to the process of writing the note, in the following terms,

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201 Statute of the International Court of Justice, (adopted 26 June 1945, entered into force 24 October 1945) 1 U.N.T.S. 993, article 9.

202 *Cf.* Nina H. Jørgensen & Alexander Zahar, 'Deliberation, Dissent, Judgment', in Göran Sluiter *et al* (eds.) *International Criminal Procedure: Principles and Rules* (Oxford University Press 2013), 1151, 1200.

> "This is the moment of truth, a moment spread over several weeks. No stage in a case is so revealing for a Judge as when he finds himself committing to paper the substance of his thought on the opposing contentions, and his proposed solution. I have said that one is never *unus judex* at the Court; but what a Judge is called upon to pen in his 'written note' is, in final analysis, a personal mini-Judgment. Hence, there are notes which, for that very reason, take on maxi-dimensions."[203]

Against this background, the importance attached to the process of writing the note, coupled with the time invested naturally endangers a desire from the judge, to see his thoughts in print.[204] In addition, the fact that all the issues must be addressed by each judge entrenches the position or closes the mind to new thinking, ahead of the oral debate.[205] It is therefore more difficult for a judge to change his position. Consequently, more dissenting opinions are to be expected.

On the other hand, in the case of the Inter-American Court of Human Rights, it is only the judge rapporteur who has the duty to make and in-depth analysis of the submissions, arguments and evidence advanced by each of the parties. No such duty exists for the rest of the members of the Inter-American Court of Human Rights. Moreover, the fact that in practice it cannot be considered as a permanent court is relevant in this regard.[206] In that sense, no much time for deliberations (compared to the International Court of Justice) is available. It is only possible for the members of the Inter-American Court of Human Rights to deliberate, during the regular and special or extraordinary periods of sessions, which is limited to about 14 weeks a year.[207] During these sessions, judges should hold public hearings on on-going cases, decide on requests for provisional measures, hold private hearings for monitoring compliance with judgments and deliberate. In that sense, there is not sometimes enough time for judges to deliberate. This makes that only the most salient aspects of the draft judgment are discussed during deliberations. No reading of the judgment, paragraph by paragraph is possible and in consequence a judge is less likely to dissent.

In addition, it should also be noted that this difference in the in the manner that both courts deliberate and draft their judgments, is not only

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203 Mohammed Bedjaoui, 'The "Manufacture" of Judgments at the International Court of Justice", (1991) 3 *Pace Yearbook of International Law*, 29, 47.

204 Richard B. Lillich & Edward White, 'The Deliberation Process of the International Court of Justice: A Preliminary Critique and some Possible Reforms', (1976) 70 American Journal of International Law, 29, 36 – 37.

205 David H. Anderson, 'Deliberations, Judgments and Separate Opinions in the practice of the International Tribunal for the Law of the Sea', in Myron H. Nordquist et al (eds.) Current Marine Environmental Issues and the International Tribunal for the Law of the Sea (Martinus Nijhoff Publishers 2001), 63, 65.

206 *Cf*. Manuel Ventura Robles, 'La Corte Interamericana de Derechos Humanos: La necesidad inmediata de convertirse en un tribunal permanente', (2005) 6 *Revista do Instituto Brasileiro de Direitos Humanos*, 141.

207 Alexandra Huneeus & Mikael Rask Madsen, 'Between Universalism and Regional Law and Politics: A Comparative History of the American, European and African Human Rights Systems', (2017) *iCourts Working Paper Series No. 96* 1, 23.

relevant for the purposes of explaining why more dissenting opinions are appended in the International Court of Justice. The difference also informs the exercise of the right to append dissenting opinions.

At the ICJ, in order to achieve unanimity or the amplest majority of judges in favour of the judgment, judges (especially the drafting committee and other judges in agreement with its position) have to bargain hard over its discursive normative component,[208] in view of the different judicial views expressed by each of the judges. The judgment therefore constitutes the lowest common denominator;[209] consequently, the reasoning is less candid and sometimes lacks candour and transparency.[210] In this kind of situations, the critic contained in the dissenting opinion refers to the fact that the majority has either omitted or not clearly explained why a certain aspect should not be analysed. A clear example of this aspect is for instance to be found, in one of the most recent judgments rendered by the International Court, namely, the preliminary objections decision in *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast*.

In this case, one of the arguments advanced by Colombia to demonstrate that the International Court had already decided Nicaragua's claim to a continental shelf beyond 200 nautical miles, on its merits, was the fact that in the 2012 judgment in the *Territorial and Maritime Dispute*, the International Court concluded that since Nicaragua did not establish that it has a continental margin that extends far enough to overlap with Colombia's continental shelf;[211] in consequence, Nicaragua's submission could not be upheld.[212] In fact, Colombia built an argument in order to show how, in its case-law the International Court has always used the term "uphold", when deciding on the merits of a claim.[213]

With regard to this argument, as well as to Nicaragua's reply to it, the majority of the International Court limited itself to indicate in the judgment that, "is not, however, persuaded that the use of that formula [cannot uphold] leads to the conclusion suggested by Nicaragua. Nor is the Court convinced by Colombia's argument that "cannot uphold" automatically equates to a rejection by the Court of the merits of a claim."[214]

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208 Ian Scobbie, 'Smoke, Mirrors and Killer Whales: The International Court's Opinion in the Israeli Barrier Wall', (2004) 9 *German Law Journal*, 1107.

209 Manfred Lachs, 'Le juge international à visage découvert (Les opinions et le vote)', in 2 *Estudios de Derecho Internacional: Homenaje al Profesor Miaja de la Muela* (Tecnos 1979), 939, 949; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, [2008] ICJ Rep. 12, (Dissenting Opinion, Judge *ad hoc* Dugard), p. 133, para. 2.

210 Ian Scobbie, *supra* note 208, 1113.

211 *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 176, p. 669, para. 129.

212 Ibid, at p. 670, para. 131.

213 *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Public sitting held on Wednesday 7 October, 2015, pp. 18 – 20.

214 *Question of Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *supra* note 88, p. 129, para. 74.

The majority of the dissenting judges, who moreover appended a joint dissenting opinion, referred to this part of the majority decision and noted that,

> "[t]he consistent use of the phrase 'cannot uphold' demonstrates that the Court rejected Nicaragua's request to delimit purportedly overlapping extended continental shelf entitlements in the 2012 Judgment. The majority states in the present Judgment that, as it was not persuaded by Nicaragua's and Colombia's interpretation of the phrase 'cannot uphold', it will not 'linger over the meaning of the phrase 'cannot uphold'' (Judgment, para. 74). Yet the majority gives no clear indication as to why it rejects the Parties' interpretations; moreover, it does not examine the meaning and scope of the phrase. Since, according the Court's jurisprudence, *res judicata* attaches to the *dispositiff*, it is beyond comprehension why the majority chooses not to 'linger' over the meaning of 'cannot uphold'".[215]

On the other hand, there is no doubt that in the case of the IACtHR, dissenting opinions may also amount to a direct critic of the majority reasoning. Nonetheless, the manner in which the said critic is couched differs, since in the case of the Inter-American Court of Human Rights the content of majority judgment does not constitute the lowest common denominator of agreement between its members. Compared to the International Court of Justice, judges do not have to bargain hard over the discursive normative component of the judgment. The common denominator of agreement is to be found in the human rights that the IACtHR will declare as being violated in the case at hand and the reasons that sustain the said violations. Hence, the dissenting opinion is not drafted as a critic of the majority reasoning, in the sense of criticising the majority for either omitting or not clearly explaining why a certain aspect should not be analysed. The critic contained in the dissenting opinion relates to the merits of the majority reasoning as a whole. Two recent dissenting opinions appended by judge Sierra Porto are relevant in exemplifying this aspect.

In the case of *Galindo Cárdenas et al v. Peru*, judge Sierra Porto disagreed from the majority in concluding that the state was responsible for the violation of the rights to personal integrity, fair trial and judicial protection. For this judge, the way in which the majority judgment assessed the evidence was insufficient to conclude as to the violation of the above mentioned rights. The Inter-American Court of Human Rights argued that in view of the nature of the facts and the context in which they took place (*i.e.* the fight against terrorism) evidence was limited. Based on the said circumstances, the majority concluded that an affectation to the physic and moral integrity

215 Ibid, (Joint Dissenting Opinion, Judges Yusuf, Cançado Trindade, Xue, Gaja, Bhandari, Robinson and judge *ad hoc* Brower), pp. 146 – 147, para. 16.

of the victim took place.[216] Judge Sierra Porto therefore explained why the reasons contained in the majority judgment could not sustain the use of the available evidence, in order to conclude that the rights to personal integrity, fair trial and judicial protection were violated. [217] Further, in the also recent case of *Lagos del Campo v. Peru*, judge Sierra Porto appended a dissenting opinion to express his disagreement, with regard to the majority decision to declare a violation of article 26 of the American Convention.[218] Concretely, in his opinion he addresses the general arguments against the justiciability of economic, social and cultural rights based on article 26 of the ACHR, the impertinence of a reference to the said article in the context of the case at hand and the flaws in the reasons provided by the majority in its judgment.[219]

In sum, the examples provided above it can be appreciated that, the method for the drafting of a judgment informs the exercise of the right to append dissenting opinions, with respect to its content.

4.2.4 The scope and publicity of individual opinions in relation to the exercise of the right to append dissents

The governing instruments of the International Court of Justice and the Inter-American Court of Human Rights are both, similar and different in some aspects regarding the question of the publicity and scope of dissenting opinions.

With respect to the aspect of publicity, the governing instruments stipulate that the possibility for judges to append a dissenting opinion is a right. Consequently, it is not mandatory for a judge voting against the majority decision, to append a dissenting opinion. The practice from both courts shows that despite this similarity, whereas the judges from the Inter-American Court of Human Rights always exercise their right to append a dissenting opinion, the judges of the International Court of Justice do not always exercise this right. Two instances are worth mentioning to exemplify this point. The first one concerns judge Simma, who according to the *dispositif* voted against the majority judgment that rejected the application from Costa Rica for permission to intervene (as non-party) in the *Territorial*

216 *Galindo Cardenas and others v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 2, 2015. Series C No. 30, paras. 244 – 246.

217 See, *e.g.*, Ibid, (Dissenting Opinion, Judge Sierra Porto).

218 *Lagos del Campo v. Peru.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 31, 2017. Series C No. 340, paras. 141 – 154.

219 Ibid, (Dissenting Opinion, Judge Sierra Porto).

and Maritime Dispute (Nicaragua v. Colombia).[220] From the seven judges who voted against this decision, Simma was the only judge who did not append any individual opinion expressing his views as to why he could not agree with the majority of the International Court of Justice.[221] Similarly, in the most recent judgment of the ICJ, the decision on preliminary objections in the case concerning *Certain Iranian Assets* between Iran and the United States, four judges voted against the decision to uphold the second preliminary objection to the ICJ's jurisdiction raised by the United States. From these judges, judge Bhandari was the only one who did not append any individual opinion in order to explain why he voted against this operative subparagraph.[222]

On the other hand, the aspect of the scope of the dissenting opinion is different at the International Court of Justice and the Inter-American Court of Human Rights. As already noted (section 3.2.4 above), whereas the governing instruments of the International Court of Justice are silent on this aspect, since 2000 the Rules of the Inter-American Court of Human Rights are clear in indicating that any individual opinion to be appended to a judgment, shall only refer to the issues covered in the majority judgment.

This difference is important as it has led the judges of the International Court of Justice to address the aspect of the scope of their opinions in the dissenting opinions themselves. In this regard, reference is to be made of the individual opinions appended by some members of the ICJ in the controversial decision of the *South-West Africa* cases, as well as to the declarations that the former president Zafrulla Kahn and judge Gros appended to the

220 Andrés Sarmiento Lamus, 'La Corte Internacional de Justicia y la intervención de terceros en cuestiones marítimas: a propósito de la decisión en las solicitudes de intervención de Costa Rica y Honduras en la Controversia Territorial y Marítima (Nicaragua vs. Colombia)', (2012) 5 *Colombian Yearbook of International Law*, 123.

221 In this specific case, one may argue that judge Simma's decision is related to the fact that the International Court of Justice was also seised of a request for permission to intervene from Greece, in the case concerning *Jurisdictional Immunities of the State*. The ICJ's decision in the said case was rendered two months after its decision concerning the request from Costa Rica. Since the applicant state in the proceedings was Germany (the state of his nationality), it is possible to infer that, he did not seem appropriate to express his views as to his disagreement in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.

222 In this specific case, one may argue that judge Bhandari's decision is related to the fact that he voted in favour of some operative subparagraphs that run counter to the position argued by the state of his nationality in the case at hand (India). In consequence, should judge Bhandari had decided to append an individual opinion, he would have been forced to also explain why he agreed with the majority of the International Court of Justice.

preliminary objections decision in *Fisheries Jurisdiction*[223] and *Aegean Sea Continental Shelf*, respectively.

In the *South-West Africa* cases, the president of the International Court of Justice, Sir Percy Spender, appended a declaration in which he sought to indicate the scope of the right vested upon the judges to deliver an individual opinion, as consecrated in article 57 of the Statute of the ICJ. The reason for addressing this issue was based on the fact that some of the judges voting with the minority attempted (and ultimately did so), to refer to the submissions of the applicant states on the merits, whereas the majority limited the analysis of its judgment to the answer the question whether the applicants have any legal right or interest in the subject-matter of the claims.[224] Accordingly, and after referring to the history of the right to append dissenting opinions in international adjudication, Sir Percy Spender concluded that,

> "The contemplated purpose of the publication of the dissent, certainly its main purpose, was to enable the view of the dissenting judge or judges on particular questions of law dealt with in the Court's judgment to be seen side by side with the views of the Court on these questions."[225]

In consequence, for Sir Percy Spender the dissenting opinions should be connected and is therefore dependent of the majority judgment; a dissent should not therefore deal with issues that were not addressed by the International Court of Justice.[226] Hence, the dissenting judges in the decision of the second phase of the *South-West Africa* cases were only allowed to refer to the questions on the merits addressed by the ICJ, *i.e.* those that have and antecedent and more fundamental character and that moreover render a decision on the ultimate merits unnecessary.[227]

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223 *Fisheries Jurisdiction (Germany v. Iceland)*, *supra* note 1. An additional instance that can be mentioned in this regard is the *Nuclear Tests* cases. All the dissenting judges in these cases (i.e. Onyeama, Dillard, Jiménez de Arechaga, Waldock, de Castro and judge *ad hoc* Barwick) analysed the aspects on jurisdiction and admissibility of the applications, although the Court's judgment focused on the question whether the object of the applicants' claim is devoid of any purpose. In that regard, judge de Castro, by referring to the declaration of Percy Spender in *South-West Africa* cases noted that, even though this judge "endeavoured to narrow the scope of the questions with which the judges might deal in their opinions... in the present case, it does not seem to me that the question of jurisdiction and admissibility fall outside the range of the Court's decision." *Cf. Nuclear Tests case (Australia v. France)*, *supra* note 1, (Dissenting Opinion, Judge de Castro), pp. 375 – 376, fn. 1. Nonetheless, this is an instance that can be distinguished from the *South-West Africa* and *Fisheries Jurisdiction*, since no judge opposed to the decision from the dissenting judges to deal with issues not addressed by the International Court of Justice in its majority decision.

224 *South-West Africa Cases*, (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, (Declaration, President Spender), pp. 50 – 51, paras. 1 – 2.

225 Ibid, (Declaration, President Spender), p. 53, para. 12.

226 Ibid, (Declaration, President Spender), p. 55, para. 22.

227 Ibid, (Declaration, President Spender), p. 56, para. 30.

On the other hand, judge Tanaka presented a different position in the dissenting opinion that he appended to the same judgment. For him the opinion from the dissenting judges should not be limited to the aspects addressed in the majority opinion judgment. Dissenting judges are therefore allowed to express their views on the rest of the submissions on the merits advanced by the applicant states, based on the hypothesis that their contention (on what the majority decided) is well-founded.[228]

As for the *Fisheries Jurisdiction* cases, the sole dissenting judge in both judgments, Padilla Nervo, focuses on demonstrating the existence of a right for states to extent their fisheries zone over waters covering their continental shelves. Based on this fact, he believes (contrary to the majority reasoning) that the exchange of notes allowing states to have recourse to the International Court of Justice has elapsed by means of a fundamental change of circumstances. Since the issue that judge Padilla Nervo addressed in his opinion, concerning the existence of a fisheries zone beyond 12 nautical miles could be considered as belonging to the merits phase, President Zafrulla Kahn indicated in his declaration that,

> "[t]he sole question before the Court in this phase of this proceedings is whether, in view of the compromisory clause in the Exchange of Notes of 11 March 1961 between the Government of the United Kingdom and the Government of Iceland, read with Article 36(1) of its Statute, the Court is competent to pronounce upon the validity of the unilateral extension by Iceland of its exclusive fisheries jurisdiction from 12 to 50 nautical milles... All considerations tending to support or to discount the validity of Iceland's actions are, at this stage, utterly irrelevant. To call any such consideration into aid for the purpose of determining the scope of the Court's jurisdiction, would not only beg the question but would put the proverbial cart before the horse with a vengeance and is to be strongly deprecated."[229]

Lastly, in the case concerning *Aegean Sea Continental Shelf*, the International Court based its decision to decline jurisdiction, on two grounds. On the one hand, that the Brussels Communiqué of 1975 required the joint submission of the dispute. On the other hand, that the reservation made by Greece on acceding to the General Act for the Pacific Settlement of International Disputes, would impede it for establishing the ICJ's jurisdiction. In that sense, the International Court omitted referring to the argument advanced by Turkey, and according to which the General Act for the Pacific Settlement of Disputes. In this regard, judge Gros explained that he agreed with the conclusion but based on a different ground, namely, that the General Act for the Pacific Settlement of Disputes is not a convention in force. However,

228 Ibid, (Dissenting Opinion, Judge Tanaka), p. 262.

229 *Fisheries Jurisdiction (Germany v. Iceland)*, *supra* note 1, (Declaration, President Zafrulla Kahn), pp. 22 – 23.

> "by the effect of Article 57 of the Statute I could, in principle, make known my own reasons, but the particular character of the present Judgment appears to forbid this in my view. It is generally recognized that judges' individual opinions, whether separate or dissenting, should be written in correlation to the actual contents of the Judgment, and not deal with any topics extraneous to the decision and its reasoning. It so happens that, whereas my opinion is based on another reasoning, explaining it would involve reference to instruments and grounds not dealt with in the Judgment; this would be doubly unfortunate inasmuch as the Court seems to view the resumption of the case through fresh proceedings as a possibility (para. 108). Any comment on my part, then, would be deprived of judicial character, since it would touch upon matters with which the Court has decided not to deal."[230]

All these instances are relevant to prove that in the case of International Court of Justice, the scope of a dissenting opinion is not settled. In consequence, it is at the discretion of the judge to decided what aspects she or he will address in the dissenting opinion. This aspect can be explained in the light of three dissenting opinions appended in the *South-West Africa*, *East Timor* and *Certain Property* cases. In the first two cases, the International Court of Justice rendered its judgment on the merits but decided to be without jurisdiction to adjudicate on the dispute submitted to it. In the *South West-Africa* cases, judge Tanaka examined *in extenso* the merits of the dispute, after considering that the application involved a legal interest from the applicant states.[231] Similarly, in the *East Timor* case judge Weeramantry addressed in his dissenting opinion aspects related to the merits of the dispute such as, the obligations of Australia in relation of the rights of East Timor, the general duties of all states regarding the right to self-determination, Australia's duties regarding the right to self-determination *vis-á-vis* East Timor and whether Australia was in breach of its international obligations contained in the Timor Gap Treaty. Judge Weeramantry addressed these aspects, by taking advantage of the fact that the parties agreed that jurisdiction and admissibility should be joined to the merits.[232] Lastly, in the *Certain Property* case, judge Kooijmans noted in his dissenting opinion that he will

> "try to confine strictly to what [he] consider to be the preliminary issues. Whatever [his] views on the validity of Liechtenstein's claims may be, they are not relevant to the present stage of the proceedings. Since the case will not reach the merits phase, [he] will refrain from any comments in that respect."[233]

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230 *Aegean Sea Continental Shelf (Greece v. Turkey)*, *supra* note 81, (Declaration, Judge Gros), p. 49.

231 *South-West Africa Cases*, *supra* note 224, (Dissenting Opinion, Judge Tanaka), pp. 263 – 324.

232 *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep 90, (Dissenting Opinion, Judge Weeramantry), p. 90.

233 *Certain Property (Liechtenstein v. Germany)*, *supra* note 185, (Dissenting Opinion, Judge Kooijmans), p. 29, para. 2.

These three instances demonstrate that it is the dissenting judge who decides on the scope of her or his opinion. Nonetheless, these instances also prove that the judge is not at complete liberty to address any aspect whatsoever. One limit exists in this regard, namely, the phase of the proceedings that the International Court of Justice is studying. Whereas in the *Certain Property* case the ICJ was only examining the preliminary objections advanced by the respondent state, in the *South-West Africa* and the *East Timor* cases the ICJ was already examining the merits of the dispute.

Further, despite the fact that since 2000 the rules of procedure the Inter-American of Human Rights clearly settle the aspect of the scope of dissents, it is worth nothing that before the said amendment of the rule, judges were also at liberty to refer to aspects not address in the majority judgment. Two individual opinions appended by judge Cançado Trindade in the cases of *Caballero Delgado and Santana*[234] and *Blake*,[235] where the IACtHR was exclusively addressing the reparations and costs to be awarded to the victims (as the merits were already decided in a separate judgment), are useful in exemplifying this aspect. Moreover, they can possibly constitute the reason behind the decision from the Inter-American Court of Human Rights to amendment article 55 of its rules of procedure.

In the *Caballero Delgado and Santana* case, judge Cançado Trindade dissented from the majority decision that declare non-pecuniary reparations inadmissible, which concerned a reform to Colombia's legislation on the remedy of *habeas corpus* and the codification of the crime of forced disappearance of persons. The Inter-American Court of Human Rights declared the request inadmissible since in its previous judgment on the merits of the case, it did not find a violation of article 2 of the American Convention. In his dissenting opinion, judge Cançado Trindade analysed two aspects, namely, the content of article 1 of the ACHR and the relationship between the obligations contained in the said provision and the obligation of article 2 concerning the adoption of the legislative and other measures necessary to give effect, to the rights contained in the American Convention. He sought to demonstrate that even when the latter provision has not been violated a state has a duty to amend its internal laws.

As for the *Blake* judgment, judge Cançado Trindade addressed in his separate opinion the reservations made to the acceptance of the IACtHR's contentious jurisdiction, in relation to its jurisdiction *ratione temporis*. His purpose in the said opinion (as it can be deduced from its content) was to draw attention to the existing tension between the law of treaties and international human rights law on the subject of reservations. He therefore sought to advocate for the impermissibility of these reservations in the light

234 *Caballero Delgado y Santana v. Colombia*, *supra* note 172, (Dissenting Opinion, Judge Cançado Trindade).

235 *Blake v. Guatemala*. Reparations and Costs. Judgment of January 22, 1999. Series C, No. 48, (Separate Opinion, Judge Cançado Trindade).

of the object and purpose of human rights treaties,[236] as well as he proposed a system of objective determination of compatibility of reservations for human rights treaties, in order to regulate adequately the legal relations, not only at the inter-state level.[237]

As noted above, in *Caballero Delgado and Santana* and *Blake* the Inter-American Court of Human Rights was only addressing the reparations and costs to be determined, based on the violations of the ACHR that it found in its decisions on the merits of both cases. Hence, it was expected that any judge appending an individual opinion should limit the views contained therein to aspects related to the reparations and costs phase. In his dissenting and separate opinions in *Caballero Delgado and Santana* and *Blake*, respectively, judge Cançado Trindade seemed to have referred to aspects that the IACtHR did not addressed in this stage of the proceedings. In addition, he also addressed aspects already decided by the Inter-American Court of Human Rights in its judgments on the preliminary objections and merits.

In view of all the above, it can be concluded that no difference arises in the exercise of the right to append dissenting opinions, despite the scope of dissents is not regulated at the International Court of Justice and it is regulated in the case of the Inter-American Court of Human Rights. In that sense, the instances from the latter where a judge has referred to aspects that did not correspond to the phase of the proceedings under analysis, constitute an exception. This situation has moreover not taken place since year 2000, as the IACtHR amended in the rules of procedure adopted that year, the provision concerning preliminary objections in order to indicate that the preliminary objections, merits and reparations and costs of a case, may be decided in a single judgment.

236 Ibid, paras. 12 – 19.
237 Ibid, para. 28.