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‘The different sets of ideas at the back of our heads’: Dissent and authority at the International Court of Justice

Hemi Mistry *

University of Nottingham, University Park, Nottingham, NG7 2RD, United Kingdom
Email: hemi.mistry@nottingham.ac.uk

Abstract

Additional opinions (AOs) – dissenting opinions, separate opinions and declarations, whether authored individually or jointly – are a distinctive characteristic of the ICJ’s jurisprudence. Few decisions of the International Court of Justice (the Court, ICJ) are delivered without any additional opinion attached to it. Yet, despite their ubiquity, there is still significant disagreement as to their relationship to the authority of the Court and its decisions. Although this disagreement is commonly attributed to the different approaches and attitudes traditionally associated with the ‘civil law’ and ‘common law’ traditions, few ask specifically why those traditions take the approach they do, and even fewer consider the appropriateness of the extension of those attitudes to the ICJ, which of course is neither ‘civil law’ nor ‘common law’. In this article, using the work of Mirjan Damaška, I offer a contextually coherent and contextually contingent understand of the theory and practice of additional opinions at the ICJ upon which engagement with this practice – by judges, scholars and practitioners – can be premised. This effort to understand the relationship between additional opinions and institutional authority will, by its very nature, lead to a broader enquiry into the very nature of institutional authority at the ICJ. Having explained the importance of AOs to the structural integrity of the Court’s authority, I will close this article by highlighting the role of various stakeholders when engaging with that practice to ensure that their institutional function is discharged.

Keywords: authority; comparative law; dissent; ICJ; legitimacy

We spent hours and hours and days in that committee discussing subjects where the only difference was not in our discussion or in what we were saying but in a different set of ideas in the back of our heads¹

1. Introduction

Commenting upon the ICJ’s judgment in *Oil Platforms*,² Jorg Kammerhofer expressed regret at the number of individual opinions attached to the Court’s judgment.³ Opining that ‘[t]he

*Assistant Professor, School of Law, University of Nottingham. I thank Olympia Bekou, Edward Goodwin, Dino Kritsiotis and Marko Milanovic for comments on previous iterations of this work, and the two anonymous reviewers for their thoughtful and constructive comments.

¹E. Root, *Men and Policies: Addresses* (1925), 400, reflecting upon the negotiations of the Advisory Committee for the drafting of the Statute of the Permanent Court of International Justice (PCIJ).

²*Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-claims, Judgment of 6 November 2003, [2003] ICJ Rep. 161.

³J. Kammerhofer, ‘Oil’s Well That Ends Well? Critical Comments on the Merits Judgement in the *Oil Platforms Case*’, (2004) 17 LJIL 695.

appending of individual opinions simply is not healthy',⁴ he lamented the negative effect that the publication of such opinions has on the authority of the Court and its judgments. Kammerhofer is not alone in holding this view, nor was he the first to express it.⁵ At the same time, supporters of the right of judges to issue individual opinions assert their complementary – even constitutive – relationship with institutional authority.⁶ Despite the longevity of the theoretical debate as to the desirability of permitting additional opinions (individual opinions and joint opinions),⁷ existing attempts to address this disagreement fall short of offering a resolution.⁸ The differences in the attitude towards AOs are commonly attributed to the different approaches traditionally adopted within the civil law and common law traditions.⁹ Assuming that it is possible to identify uniform 'civil law' and 'common law' approaches,¹⁰ few ask specifically *why* those traditions have taken the approach that they do.¹¹ Even fewer engage in a sustained critique of the extension of the assumptions associated with those traditions to the international sphere(s), which is(are) after all neither. One writer avoids the apparent impasse between the civil law and common law traditions by diverting attention to particular characteristics of international law that may work in favour of either permitting or prohibiting AOs.¹² However, there has been no attempt to break that impasse and, despite many critics observing that dissent undermines the authority of a given court or tribunal and its decisions, only one writer has attempted to offer an explanation of *how* dissent offends judicial authority.¹³ My objective in this article is to fill this gap in the existing literature and to offer a way forward in the debate as to the relationship between judicial dissent and judicial authority; one that is not hamstrung by the 'different sets of ideas at the back of our heads'. In this article I offer a contextually coherent and contextually contingent understanding of the theory and practice of AOs at the ICJ upon which engagement with this ubiquitous practice – by judges, scholars and practitioners – can be premised.

Thus, while the focus of this article is upon AOs at the ICJ – a practice that, in the wider scheme of international law may be considered a narrow subject of enquiry – the significance of this article is much broader. Firstly, any actor who engages with the jurisprudence of the Court is confronted with the multiplicity of opinions that accompany the judgment, order or advisory opinion of the

⁴*Ibid.*, at 716.

⁵See Section 2.

⁶See Section 5.

⁷For explanation of this choice of nomenclature, see Section 2.1.

⁸Undoubtedly, the most significant and nuanced account of the institutional function of additional opinions at the ICJ has been provided by G. Hernández, *The International Court of Justice and the Judicial Function* (2014), Ch. 4.

⁹*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972, [1972] ICJ Rep. 46, at 116 (Judge De Castro, Separate Opinion); I. Hussain, *Dissenting and Separate Opinions at the World Court* (1984), 5–7, 263–4; F. Jhabvala, *The Development and Scope of Individual Opinions in the International Court of Justice* (1977); R. Kolb, *The International Court of Justice* (2013), 1012; G. Sluiter, 'Unity and Division in Decision Making – The Law and Practice on Individual Opinions at the ICTY', in B. Swart, A. Zahar, A. Sluiter (eds.), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011), 191, at 193; E. Dumbauld, 'Dissenting Opinions in International Adjudication', (1942) 90 *University of Pennsylvania Law Review* 929, at 929–34.

¹⁰The civil law/common law dichotomy being a blunt comparative instrument even in the context of Western domestic legal systems alone, see P. Legrand, 'The Same and Different', in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003), 240, at 243–5; E. Özücü, 'General View of "Legal Families" and of "Mixing Systems"', in E. Özücü and D. Nelken (eds.), *Comparative Law: A Handbook* (2007), and generally, K. Zweigart and H. Kötz, *An Introduction to Comparative Law* (1998). On the matter of individual opinions there is no uniform approach across European civil law jurisdictions, with some – from the Napoleonic civil law tradition – maintaining a strict prohibition, whereas others from the Romano-Germanic tradition permit them in certain circumstances. For an overview of the approach of EU member states see R. Raffaelli, 'Dissenting Opinions in the Supreme Courts of the Member States' (2012), European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs – Legal Affairs, PE 462.470, available at [www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET\(2012\)462470_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET(2012)462470_EN.pdf).

¹¹Briefly considered by Hussain, *supra* note 9, at 7 and more so by Kolb, *supra* note 9, at 1012.

¹²Kolb, *supra* note 9, at 1012–13.

¹³Hussain, *supra* note 9, at 39 et seq.

Court. The interpretation of the significance of those opinions will – to varying degrees – be influenced by those different sets of ideas at the back of their heads. While scholars of the ICJ and those closely involved in the Court’s activities may have a greater understanding of how such opinions should be understood, the Court’s audience is broader and encompasses a range of substantive areas, owing to its systemic role and its general jurisdiction. Secondly, AOs (and their relationship with judicial authority) constitute a frame through which the nature of ICJ authority more generally can be scrutinized. While here, the specific purpose of our analysis of institutional authority is to situate AOs within that authority, the understanding of the nature of that authority that is developed can inform how we think about other aspects of judicial procedure and practice. Thirdly, the theoretical framework presented in this article is of relevance to other (international) courts and tribunals. When applied to those institutional contexts it may assist our understanding of how aspects of their judicial practice and procedure – whether that be the practice of delivering AOs or other practices – fit within the particular structure of authority therein.

In the first half of this article I will focus upon the authority-based critiques of AOs and demonstrate how they are premised upon an understanding of the nature and structure of judicial authority that is not reflected in the ICJ. Using Mirjan Damaška’s analytical framework for the comparative study of justice systems,¹⁴ I will demonstrate that rather than being a ‘hierarchically’-organized system, wherein AOs are inconsistent with the structure of authority, the ICJ is more accurately characterized as a ‘co-ordinately’ structured system. Within co-ordinately structured systems, not only are AOs consistent with institutional authority but can also be constitutive of it. I will use the remainder of this article to articulate a theory of the institutional function of AOs in the ICJ, explaining along the way why authority-based critiques are misconceived when made in the ICJ context. At the core of this theory is the notion that, absent the institutional checks and balances upon the exercise of judicial power that exist within hierarchically-structured systems,¹⁵ AOs within co-ordinately structured systems such as the ICJ constitute an essential mechanism by which the parameters of the Court’s authority for any given function can be appraised and established. Thus, to the extent that authority-based criticisms proclaim the existence of a tension between the authority of the individual judge (manifested in his or her individual opinion) and the authority of the institution (manifested in the Court’s judgment) they are accurate. However, to characterize the existence of this tension as negative *per se* is misguided. More accurately, the relationship between AOs and the Court’s judgments outlined here mirrors the dynamic between the individual judge and the collective in the context of the Court’s internal deliberations and judgment-drafting.

Having explained the importance of AOs to the structural integrity of the Court’s authority, I will close this article by highlighting the role of various stakeholders when engaging with that practice to ensure that their institutional function is discharged. I call upon both judges and participants in the international law-interpreting communities to exercise greater mindfulness of both the institutional functions of AOs and their responsibilities when engaging with that practice to ensure that those functions are properly discharged.

2. Additional opinions and judicial authority

Before addressing the authority-based criticisms of AOs and explaining why their application to the ICJ is misguided, to avoid the same ambiguities that plague existing discourse around AOs I will outline what I mean when referring to the concepts of ‘additional opinions’ and ‘judicial authority’.

¹⁴M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

¹⁵On the difference between ‘power’ and ‘authority’, see [Section 2.2](#).

2.1 Additional opinions

Additional opinions are an established and familiar aspect of the international jurisprudential landscape. They are written texts attached to a court's decision under a plethora of familiar labels: 'dissenting opinions', 'separate opinions', 'minority opinions', 'individual opinions', and 'declarations'. They can be authored by individual judges or jointly, by two or more judges.¹⁶ ICJ judges have confined the labels they use to those found in the Court's Statute and Rules of Procedure (English-language and French-language as appropriate). Thus, ICJ AOs exist under the English-language labels of 'dissenting opinions', 'separate opinions', and 'declarations'.¹⁷ Irrespective of the label assigned to them, all AOs share the purpose of being a platform upon which judges can express their personal views on aspects of a case, as distinct from the view of 'the Court', as manifested by the Court's decision.

The right to issue AOs is enshrined in the Court's Statute.¹⁸ The culture of practice that has crystallized around that right interprets it as being broad and discretionary. The consequent polyphonic nature¹⁹ of the Court's jurisprudence has become one of its defining characteristics. AOs are – in practice and not without controversy – used to address any matter of law, fact or policy that the authoring judge(s) deem(s) to have been raised by the case or decision at hand and pertinent to addressing and resolving the issues raised by the dispute as understood by the authoring judge. While the majority of AOs issued are used to offer focused responses to particular aspects of the Court's judgment, there is a tradition among some judges to use their individual opinions to issue lengthy and comprehensive alternative judgments or wide-ranging and general discussions of areas of law raised by the dispute at hand.²⁰ There has been judicial and non-judicial support for confining the use of AOs to explaining the authoring judge's disagreement or departure from the Court's judgment,²¹ or limiting the content of the opinion to the 'framework of the Court's opinion'.²² The most extensive elaboration of this latter 'restrictive theory' of AOs was elaborated by then President Sir Percy Spender in response to the nine AOs attached to the Court's highly contentious second phase judgment in *South West Africa*.²³ While this theory gained some traction at the time,²⁴ the view was met with strong opposition by those judges whose opinions President Spender's theory would preclude, on the basis that to limit AOs in this way would prevent judges from expressing their disagreement with the fundamental logic of the Court's

¹⁶While many use 'individual opinion' to refer to both individually-authored and jointly-authored opinions on the basis that 'individual' can refer to the individuality of the authorship as distinct from the collective of the Court, 'individual' also describes the number of authors of the opinion (a single (individual) judge as opposed to multiple judges (joint opinion)). Thus, for the avoidance of doubt and to the risk of confusion with the French-language label of separate opinions – *opinion individuelle* – I use 'additional opinion' unless otherwise specified.

¹⁷The French version of the ICJ Statute refers to *opinion individuelle*, *opinion dissidente*, and *déclaration*.

¹⁸Art. 57, ICJ Statute; Arts. 95(2) and 107(3), Rules of Court.

¹⁹Or, more accurately in some cases, 'cacaphonic' nature.

²⁰On the current bench, the opinions of Judge Cañado Trindade would be a prime example of such opinions. Previously, Judge Alvarez held the view that it was necessary for at least one of the judges to provide an extensive review of all the legal issues raised by the case. See *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, 39 (Judge Alvarez, Separate Opinion).

²¹*Oil Platforms*, supra note 2, at 233, para. 29 (Judge Higgins, Separate Opinion); H. Thirlway, *The International Court of Justice* (2016), 145.

²²*South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6 (President Sir Percy Spender, Declaration).

²³*Ibid.*

²⁴See J. Fawcett, 'The Function of the ICJ in the World Community', (1972) 2 *Georgia Journal of International Law* 59, at 62; T.O. Elias, 'Report on "Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirements which Follow from its Function as the Central Body of the International Community?"', in Max Planck Institute for International and Comparative Law, *Judicial Settlement of International Disputes: International Court of Justice, other Courts and Tribunals, Arbitration and Conciliation: An International Symposium* (1974), at 31–2; Jhabvala, supra note 9.

judgment.²⁵ Consequently, while there may be a cultural preference for limited opinions, in the spirit of accepting minority perspectives, judges have remained free to use their opinions however they wish.

AOs have been issued in connection with all forms of Court decision: merits and preliminary judgments, advisory opinions, and orders. The labels attached to AOs are *typically* associated with a spectrum of disagreement,²⁶ with dissenting opinions on the one end and representing the strongest degree of disagreement, declarations on the other,²⁷ and separate opinions somewhere in the middle.²⁸ However, the accuracy of such a linear conceptualization of the typology of AOs should be questioned. The determination of where on that spectrum a given AO lies rests with the individual author, and factors that may influence their labelling choice typically include the nature, scope, and intensity of the disagreement expressed in their AO.²⁹ Some opinions may consist of aspects that are conventionally understood as ‘dissenting’ in character and aspects that are conventionally understood as ‘declaratory’ or ‘separate’ in nature.³⁰ Moreover, additional

²⁵A particularly robust critique of President Spender’s restrictive theory was offered by Judge Tanaka in *Barcelona Traction, Light and Power Limited (Belgium v. Spain)*, Second Phase, Preliminary Objections, Judgment of 5 February 1970, [1970] ICJ Rep. 3 (Judge Tanaka, Separate Opinion).

²⁶On the ‘general’ understanding of the different types of opinions connoted by their label see Thirlway, *supra* note 21, at 144.

²⁷Although Arts. 95(2) and 107(3) of the ICJ Rules of Court suggest that the purpose of declarations is for bare statements of assent or dissent, it is common practice for judges to issue substantive, and sometimes lengthy, opinions under the label of ‘declaration’.

²⁸Even conceived so broadly, one could argue with this conception; with some of the most profound disagreements with the Court’s judgment found in AOs labelled as ‘declarations’. For example, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep 136, at 240 (Judge Buergenthal, Declaration) for Judge Buergenthal’s ‘dissent’, contained in a self-styled Declaration. Similarly, the recent Joint Declaration by Judges Tomka, Gaja, and Gevorgian while ‘declaration’ in name, is in substance an explanation of why the authors were unable to vote with the Court (something conventionally understood to be a dissenting opinion), see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Request for Provisional Measures, Order of 23 July 2018 (not yet published) (Judges Tomka, Gaja, and Gevorgian, Joint Declaration).

²⁹G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: General Principles and Substantive Law’, (1950) 27 BYBIL 1, at 1–2; R. Hofmann and T. Laubner, ‘Article 57’, in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), 1387–8.

³⁰Whereas within other courts and tribunals judges some judges have attempted to inject some nuance in their labelling choice by labelling their opinions as ‘partially dissenting and separate opinion’, judges at the ICJ have not taken this approach. Some judges have, however, issued multiple distinct opinions alongside the same judgment (either two individual opinions or contributing to a joint opinion in addition to an individual opinion). *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment of 11 September 1992, [1992] ICJ Rep. 350 (Judge Oda, Declaration; Judge Oda, Dissenting Opinion); *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, [1993] ICJ Rep. 38 (Vice-President Oda, Declaration; Vice-President Oda, Separate Opinion); *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean and Land Boundary in the Northern Part of Islas Portillos (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018 (not yet published) (Judge *ad hoc* Al-Khasawneh, Dissenting Opinion; Judge *ad hoc* Al-Khasawneh, Declaration); *Question of the 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 (Vice-President Yusuf, Judges Cañado-Trindade, Xue, Gaja, Bhandari, Robinson, and Judge *ad hoc* Brower, Joint Dissenting Opinion; Judge Gaja, Declaration; Judge Bhandari, Declaration; Judge Robinson, Declaration; Judge *ad hoc* Brower, Declaration); *Construction of a Road in Costa Rica Along the San Juan River and Certain Activities Carried Out by Nicaragua in the Border Area (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, [2015] ICJ Rep. 665 (Judges Tomka, Greenwood Sebutinde and Judge *ad hoc* Dugard, Declaration; Judge *ad hoc* Dugard, Separate Opinion). While this a more recent development in the culture of judicial practice within the Court – the beginning of this current trend marked by *Legality of the Use of Force*, Preliminary Objections, Judgment of 15 December 2004, [2004] ICJ Rep. 1011 (Vice-President Ranjeva, Judges Guillaume, Higgins, Koopmans, Al-Khasawneh, Buergenthal and Elaraby, Joint Declaration; Judge Higgins, Separate Opinion; Judge Koopmans, Separate Opinion; Judge Elaraby, Separate Opinion) – it is not without historical precedent: See *Right of Passage over Indian Territory (Portugal v. India)*, Preliminary Objections, Judgment of 12 April 1960, [1960] ICJ Rep. 6 (Judges Winiarski and Badawi-Pasha, Joint Dissenting Opinion; Judge Badawi-Pasha, Declaration) and *Fisheries Jurisdiction (UK v. Iceland)*, Merits, Judgment of

non-substantive factors may also influence the choice that judges make.³¹ For these reasons, the line between different categories of opinion has been described by one former judge of the Court as ‘indeterminate’.³² While the nature of the disagreement expressed will almost certainly have implications for institutional authority, and while the labels ascribed to AOs may themselves have implications for institutional authority through what they connote,³³ labels alone are of limited reliability as objective descriptors of the substantive nature of the disagreement contained therein.

With judges from all backgrounds and legal cultures having embraced the practice, and with few judgments and advisory opinions having been issued without a single AO attached to them, the practice of issuing AOs is an ingrained characteristic of the ICJ’s culture. Yet, there is not a clear and shared understanding of the significance of that practice. And, although the notion of authority is frequently invoked when discussing the effect of AOs by both critics and defenders of the practice, what aspect of the Court’s authority they risk offending or enhancing, and how, are rarely explained. Consequently, existing attempts to evaluate those views on their own terms prove fruitless. With this in mind, the following section lays out the understanding of ‘judicial authority’ upon which my argument is premised.

2.2 Judicial authority

For the purposes of this article ‘authority’ is understood in terms of Max Weber’s conception of authority or domination, that is, the ‘legitimate exercise of power’.³⁴ Power denotes ‘the probability that one actor within a social relationship will be in a position to carry out his or her own will, despite resistance’.³⁵ ‘Legitimacy’ is understood in the sense of political legitimacy, namely ‘the process through which both political power and obedience are justified’.³⁶ On this basis, legitimacy is defined as ‘the governed recognizing the right of the governors to lead and, to a certain extent, their entitlement to the perks of power’.³⁷ According to this view, ‘what makes a certain practice of power legitimate is the process through which authority justifies its exercise of power and gains social acceptance’.³⁸ There exist a multitude of conceptions of legitimacy premised upon different processes or bases for justification. When speaking of institutional (judicial or otherwise) legitimacy, these conceptions may be grouped into three clusters: consent legitimacy, input

25 July 1974, [1974] ICJ Rep. 3 (Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, Joint Separate Opinion; Judge Nagendra Singh, Declaration) and in *Fisheries Jurisdiction (Germany v. Iceland)*, Merits, Judgment of 25 July 1974, [1974] ICJ Rep. 175 (Judges Forster, Bengzon, Jiménez de Aréchaga, Nagendra Singh and Ruda, Joint Separate Opinion; Judge Nagendra Singh, Declaration).

³¹Such factors include the order of priority attached to opinions with different labels when published in the Court’s official records (see G. Guyomar, *Commentaire de Règlement de la Cour Internationale de Justice* (1983), 610, cited by G. Guillaume, ‘Les Déclarations Jointes aux Décisions de la Cour Internationale de Justice’, in J. Ruda and C. Armas Barea (eds.), *Liber Amicorum ‘In Memoriam’ of Judge José María Ruda* (2000), 426–7.

³²R. Jennings, ‘The Collegiate Responsibility and the Authority of the International Court of Justice’, in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989), 348; Hernández, *supra* note 8, at 97.

³³The use of the language of ‘dissent’ can invoke the political connotations associated with that language, in turn influencing how the opinion, its author, and their relationship to the Court’s judgment is perceived. See R. Jennings, ‘The Internal Judicial Practice of the International Court of Justice’, (1988) 59 BYBIL 32, at 46, explaining how some judges avoid invoking the language of ‘dissent’ to describe their opinions; Guillaume, *supra* note 31, at 433, explaining how the author preferred to style their opinions as ‘declarations’ in order to avoid having to invoke the connotations associated with ‘dissenting’ and ‘separate’.

³⁴M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (1978), vol. I, at 212 et seq.

³⁵*Ibid.*, at 53.

³⁶J.-M. Coicaud, ‘Legitimacy, Across Borders and Over Time’, in H. Charlesworth and J.-M. Coicaud (eds.), *Faultlines of International Legitimacy* (2010), 17.

³⁷*Ibid.*

³⁸M. Radsen, ‘Sociological Approaches to International Courts’, in C. Romano, K. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014), 389, at 392. See also S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989).

legitimacy and output legitimacy.³⁹ Familiar conceptions of consent legitimacy may include state consent and democratic legitimacy.⁴⁰ By contrast, input legitimacy encompasses different dimensions of process or procedural legitimacy, including deliberative legitimacy, participatory legitimacy, representative legitimacy, independence, accountability, compliance with ‘due process’ norms, legality, compliance with human rights, or the attributes of officials (e.g., expertise, experience, personal characteristics, impartiality, independence, individual values).⁴¹ Finally, output legitimacy concerns results-based legitimacy and the extent to which the outcomes of the institutional process achieve the functions attributed to the institution.⁴² While it is impossible to be certain what ‘ideas at the back of their heads’ animated existing contributions to discourse around AOs and judicial authority, the application of the conceptual framework offered in this section to those contributions demonstrates how discourse around AOs and authority can be seen as implicating and interacting with a number of these conceptions of normative legitimacy in different ways.

This conception of authority applies equally to judgments of the Court and to AOs. As platforms for the public expression of individual judicial views AOs are a vehicle through which individual judges can persuade or assert influence in the public sphere. Consequently, they are expressions of *individual* judicial power, and – to the extent that they are accepted as legitimate – expressions of individual judicial authority (individual opinions) or the pooling of the individual authorities of multiple judges (joint opinions). As such, discourse on the relationship between AOs and judicial authority is one aspect of the broader issue of the interaction between individual judicial authority and institutional judicial authority, and more broadly, the role of the individual judge within international law. While the focus here is externally oriented – i.e., the authority in the public sphere – as Section 5 illustrates, AOs (for consumption in that public sphere) also strike at the heart of the dynamic between the individual judge and the collective in the course of *internal* deliberations.⁴³ Moreover, conceiving AOs as expressions of individual judicial authority helps us focus upon those attributes of AOs that distinguish them from other expressions of disagreement with a Court’s decision, such as criticisms issued by individuals not holding the office of judge of the Court (e.g., state representatives, scholars, civil society actors). The capacity in which AOs are issued grants them what Weber referred to as ‘charismatic authority’⁴⁴ such that the contentiousness of AOs lies not simply in the fact that they are the expression of difference or of disagreement, but rather in that they are authored by a judge, and specifically a judge who participated in the case at hand.⁴⁵

Authority, and specifically its quality of being an *accepted* expression of power by a social actor, is particularly important in the context of international justice. Given the geopolitical realities of the international sphere – the primacy of the state as the principal unit of action and the dependence of international courts and tribunals upon the consent and co-operation of states to function – international courts and tribunals have weak ‘power’, that being the ability to enforce their will despite resistance and without consent of the affected parties. Thus, international courts and tribunals rely especially upon the acceptance of their legitimacy as institutions and the legitimacy of their decisions to secure the compliance and co-operation necessary for their operation and the

³⁹A useful review of the field can be found in D. Bodansky, ‘Legitimacy in International Law and International Relations’, in J. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013).

⁴⁰*Ibid.*, at 330.

⁴¹*Ibid.*

⁴²*Ibid.*

⁴³See Section 5, *infra*.

⁴⁴Weber, *supra* note 34, at 241.

⁴⁵M.-C. Belleau and R. Johnson, ‘I Beg to Differ: Interdisciplinary Questions About Law, Language and Dissent’, in L. Atkinson and D. Majury (eds.), *Law, Mystery and the Humanities: Collected Essays* (2008), 177.

effective discharge of their functions.⁴⁶ Against this backdrop, the lack of sustained study of the institutional and systemic implications of AOs upon institutional legitimacy (and in turn, authority) is surprising.

3. The perceived negative effect of additional opinions

All parties to the Court's Statute have accepted the formal criteria for the legitimacy of decision-making, including the quorum for decision-making,⁴⁷ the publication of the names of the judges who participated in the case,⁴⁸ and the right of judges to issue AOs.⁴⁹ Nevertheless, the sentiment that AOs are harmful to the Court's authority is one that has persisted since the drafting of the Statute of the Permanent Court of International Justice (the ICJ's predecessor),⁵⁰ and prior to that the negotiations around the creation of the Permanent Court of Arbitration.⁵¹ In this section I elaborate upon this view, before using the remainder of the article to explain why these sentiments, at least premised upon the assumptions that they appear to be, are misguided.

This view is epitomized by Kammerhofer who states that in the absence of 'a secure political organization, a separation of powers, and effective enforcement of its judgements by the executive branch' the ICJ depends upon 'the persuasiveness of its pronouncements' and consequently it 'cannot afford to have "in-house", "official" critics'.⁵² Although domestic courts may face similar difficulties when faced with inducing compliance by the Executive, international courts and tribunals lack the tradition of acceptance and habitual respect for their decisional authority typically associated with domestic courts. National judiciaries are able to establish their credentials as competent decision-makers in the context of 'mundane' or non-controversial cases.⁵³ However, international courts and tribunals – particularly the ICJ – often deal with highly politicized and much contested 'big cases', placing judicial authority under further strain.⁵⁴ Yet, it is often these very cases – perhaps, in part because of their magnitude or sensitivity – that are accompanied by the greatest number of AOs.⁵⁵ Thus, concern as to the fragility of international judicial authority is understandable. Using the conceptualization of authority set out in the previous section, the

⁴⁶Bodansky, *supra* note 39.

⁴⁷Art. 55(1), ICJ Statute.

⁴⁸Art. 56(2), ICJ Statute.

⁴⁹Art. 57, ICJ Statute.

⁵⁰PCIJ, Documents Concerning the Action Taken by the Council of the League of Nations under Art. 14 and the Adoption by the Assembly of the Statute of the Permanent Court (January 1921), at 24.

⁵¹For discussion, see Hussain, *supra* note 9.

⁵²Kammerhofer, *supra* note 3, at 716.

⁵³Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice' (10/02/1944), (1945) 39 AJILS 1, at para. 81(a); T. Franck, *Judging the World Court* (1986), 11.

⁵⁴R. Falk, *Reviving the World Court* (1986); K. Highet, 'Reflections on Jurisprudence for the "Third World": The World Court, the "Big Case", and the Future', (1986–87) 27 *Virginia Journal of International Law* 287. Certainly, not all proceedings before the Court have the political sensitivity of, say, the *South West Africa* proceedings, the proceedings in *Military and Paramilitary Activities in and Against Nicaragua*, the cases emanating out of the conflicts in the former Yugoslavia, or the advisory opinions in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136. Nevertheless, all cases have differing degrees of political sensitivity to a wider or narrower class of interested stakeholders that will impact upon how the Court's authority is perceived by those stakeholders in any given case.

⁵⁵Indeed, the judgment that prompted Kammerhofer's critique of judicial practice (*supra* note 3) – *Oil Platforms* (*supra* note 2) – was accompanied by 11 opinions. More recently, the three judgments issued in the *Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament* proceedings brought by the Marshall Islands against Pakistan ([2016] ICJ Rep 552), India ([2016] ICJ Rep 225), and the United Kingdom ([2016] ICJ Rep 883) each had 14 individual opinions attached to the respective judgments, and *Application on the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* Merits, Judgment of 3 February 2015, [2015] ICJ Rep. 3 had 12 individual opinions attached.

remainder of this section will examine how ‘in-house’ criticisms in the form of AOs can be perceived to undermine institutional legitimacy.

3.1 Output legitimacy

Whether speaking of the Court’s decisional authority or of its interpretive authority, authority-based arguments against AOs may be underpinned by the belief that the revelation of the existence of disagreement between judges casts doubt upon the substantive correctness of the Court’s decision. From the perspective of the Court’s dispute resolution function, the publication of disagreement between the judges on the applicable law and how it applies to the facts of the dispute weakens the Court’s claim to have resolved the dispute. That then diminishes the perceived output legitimacy of the Court’s decision and likelihood of compliance with it by the parties. Within those judicial systems that provide for appellate review of decisions, AOs – even those that disagree fundamentally with the Court’s judgment – might encourage disappointed parties to continue engagement with the judicial process by seeking appellate review, equipped with the AOs.⁵⁶ In the absence of any system for appellate review at the ICJ, AOs may have the opposite effect: they may validate a party’s sense of grievance and reinforce any decision not to comply with the Court’s decision.⁵⁷ However, this argument is not limited to the (non)compliance decision. Owing to the essentially consent-based nature of the Court’s jurisdiction as defined by Article 36 of its Statute, states have the opportunity at an earlier stage of proceedings to determine whether they will accept and comply with the Court’s judgments and orders in any case that arises.⁵⁸ Thus, when considering the effect of AOs upon the Court’s decisional authority, not only is it necessary to consider their impact upon the decisional authority of the particular judgment to which they are attached (particular decisional authority), but also their impact upon the Court’s general decisional authority and the manner in which states engage with any proceedings brought before the Court.

From the perspective of the Court’s interpretive authority, although the ICJ’s judgments do not constitute a formal source of international law, its decisions nevertheless constitute a subsidiary means of determining the law.⁵⁹ In light of the diversity of the Court’s composition, intended to be representative of the international community of states, an articulation of a rule of customary international law by the Court may hold a high degree of authority for this purpose.⁶⁰ Added to this institutional and systemic position of the Court as the ‘principal judicial organ of the United Nations’, belief in the Court’s authoritative potential in terms of the clarification and development of international law has long been held.⁶¹ Turning to the interpretive authority of particular judgments of the Court, therefore, in light of the infrequency of disputes and questions submitted to the Court, such that the Court rarely obtains the opportunity to revisit the same legal question, every statement on the law by the Court in its decisions holds considerable authoritative potential.⁶² AOs that highlight weaknesses or shortcomings in the Court’s interpretation of the law in a judgment – whether treaty-based or customary – can weaken the degree of consensus

⁵⁶W. Brennan, ‘In Defense of Dissents’, (1985–1986) 37 *Hastings Law Journal* 427, 430.

⁵⁷Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (September 1920), Draft Scheme Prepared by the Committee Appointed by the Danish Government, at 209.

⁵⁸On the complex matter of compliance with ICJ judgments see generally C. Schulte, *Compliance with Decisions of the International Court of Justice* (2004); C. Paulson, ‘Compliance with Final Judgments of the International Court of Justice’, (2004) 98 *AJIL* 434; A. Llamzon, ‘Jurisdiction and Compliance in Recent Decisions of the International Court of Justice’, (2007) 18 *EJIL* 815.

⁵⁹Art. 38(1)(d), ICJ Statute.

⁶⁰Going further, see *Barcelona Traction case*, *supra* note 25, at 64, para. 2 (Judge Fitzmaurice, Separate Opinion).

⁶¹H. Lauterpacht, *The Development of International Law by the International Court* (1958).

⁶²The Court has been able to revisit its case law in some areas (e.g., maritime and territorial delimitation), resulting in the opportunity for routinization in those areas. In turn, the authoritative potential of articulations of law in such areas of law is greater.

that crystallizes around that interpretation within the wider international law-making and interpreting community.

3.2 Input legitimacy

From the perspective of input (or process) legitimacy, that primarily concerns process, a traditional critique of AOs is that they undermine what critics refer to as ‘secrecy’.⁶³ Secrecy is an attribute of the judicial process designed to preserve and promote the actual and/or perceived independence and impartiality of individual judges.⁶⁴ The independence of the judiciary goes into the heart of the rule of law and is central to the notion of the administration of justice, distinguishing the politics of law and legalism from other forms of politics, as well as other forms of third-party dispute settlement.⁶⁵ The independence of judges – whether speaking of judicial institutions or the individual judges within the institution – is a principal criterion of input legitimacy and, in turn, a key source of authority. Thus, even when not expressed explicitly in terms of authority, ‘secrecy’-based critiques of AOs strike to the heart of institutional authority.

The arguments advanced in favour of prohibiting, particularly, national judges and *ad hoc* judges from issuing AOs during the negotiation of the PCIJ Statute and deliberations upon amendments to its Rules of Procedure illustrate how and why AOs can be perceived to undermine secrecy, judges’ independence and their capacity to decide cases impartially and, in turn, authority. Initially, the fear was underpinned by the belief that judges would always vote against decisions unfavourable to their appointing state and use AOs to record the fact and nature of their disapproval.⁶⁶ In turn, this would create the impression of partiality, thereby undermining the independence-based legitimacy of the Court and its constituent members. Later the argument shifted. Rather than potentially *revealing* latent partiality, AOs were viewed as a mechanism through which states could exert pressure on national judges and thereby undermine their independence: the prohibition of AOs would ‘shield the judge from the reproaches of national public opinion’.⁶⁷ More recently, in a broader defence of the secrecy of deliberations, Bruno Simma and Thore Neumann explained that the justification for such secrecy is to prevent governments from ‘monitoring the discursive behaviour of individual judges, [and seeking] to influence them by indirectly “disciplining” their discursive “inputs” and by using information from the deliberations to thwart a judge’s re-election’.⁶⁸ Duncan French, for example, has suggested that Judge Weeramantry’s failure to secure re-election for a second term of office may have been influenced by the stance he maintained on a number of legal and political issues in his ICJ AOs.⁶⁹

⁶³In the context of the PCIJ/ICJ, see Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (June–July 1920), at 531, 570, 591–2.

⁶⁴It can be manifested in different degrees and in different ways – from the complete anonymity of the identity of judges and the suppression of the publication of any information that may reveal their identity, to the suppression of the publication of information that may reveal the views of any individual judges, to on the other end of the spectrum, the suppression of any information that may reveal the content of the Court’s internal deliberations.

⁶⁵A. Bogdandy and I. Venzke, *In Whose Name: A Public Law Theory of International Adjudication* (2014), 159; F. Mégret, ‘International Judges’ and Experts’ Impartiality and the Problem of Past Declarations’, (2011) 10 *LPICT* 31, at 42; J. Shaman, ‘The Impartial Judge: Detachment or Passion’, (1995) 45 *DePaul Law Review* 610; J. Shklar, *Legalism* (1964); R. Mackenzie, C. Romano and P. Sands, *Selecting International Judges: Principle, Process, and Politics* (2010), at 10; Advisory Committee of Jurists, *Documents Presented to the Committee Relating to the Existing Plans for the Establishment of a Permanent Court of International Justice* (September 1920), Appendix to Memorandum Presented by the Legal Section of the Permanent Secretariat of the League of Nations, at 113.

⁶⁶Advisory Committee of Jurists *Procès-Verbaux* (1920), *supra* note 63, at 531, 570.

⁶⁷*Ibid.*, at 743; Committee of Jurists on the Statute of the PCIJ (‘PCIJ Committee of Jurists’), *Minutes* (May 1929), at 50.

⁶⁸T. Neumann and B. Simma, ‘Transparency in International Adjudication’, in A. Bianchi and A. Peters (eds.), *Transparency in International Law* (2013), 457.

⁶⁹D. French, ‘The Heroic Undertaking? The Separate and Dissenting Opinions of Judge Weeramantry during His Time on the Bench of the International Court of Justice’, (2006) 11 *AYBIL* 35, at 41, referring to *Legality of Use of Force (Serbia and Montenegro v. Belgium)* Request for the Indication of Provisional Measures, Order of 2 June 1999, [1999] ICJ Rep. 124

Moving beyond independence, an opinion that implicitly or explicitly suggests that the Court's decision was reached without full due consideration of all issues raised by the case as perceived by the authoring judge may call into question the deliberative legitimacy of the Court's decision.⁷⁰ It can be seen, therefore, that AOs may be perceived to impact upon input and output institutional legitimacy in several detrimental ways, all of which may lie behind claims that AOs undermine institutional authority. As explained in the following section, this is just one account of the relationship between AOs, legitimacy, and institutional authority. The validity of these claims – and indeed, any accounts of this relationship – depends upon the institutional context within which they are made and the structure of institutional authority therein.

4. The structure of authority

In his seminal study *The Faces of Justice and State Authority*,⁷¹ Mirjan Damaška offered a theoretical model that illustrates the relationship between procedural design and practice, official authority, and the purposes for which that authority is exercised. To understand the relationship between a particular process or practice (such as issuing AOs) and the authority of the institution, Damaška's theory suggests that it is necessary to situate that practice within the wider systemic context – considering the range of factors embodied within his matrix of ideal types and their implications for each other. In particular, he explained how *attitudes* towards AOs are the product of the structure and organization of authority in the context of which those attitudes are formed.⁷² That structure is determined by three categories of attributes of the justice system under question, namely the attributes of the decision-makers, the distribution of authority within the institution among the decision-makers, and the legitimate criteria for decision-making. However, when those attitudes are taken out of the systemic context in which they were developed and transplanted into another, the validity of that transplant depends on the fit within that new context.⁷³

Arguments of the kind canvassed in Section 3, that the expression of individual judicial authority in the form of AOs is incompatible with institutional legitimacy, are most consistent with those systems of justice that bear the characteristics of Damaška's 'hierarchical ideal type' of authority. The hierarchical ideal type is typified by the following three attributes: (i) a professionalized body of official decision-makers; (ii) the decision-makers are organized hierarchically and among whom official authority is distributed widely and vertically, from the top down;⁷⁴ and (iii) the style of decision-making can be characterized as two variants upon legalistic – pragmatic legalism and logical legalism.⁷⁵ The professionalized system of official decision-making refers to a system of permanent officials who, over time and experience in the same or similar role, carve out a sphere of practice.⁷⁶ In turn, this provides for the routinization and specialization of decision-making, namely the ability to address issues in a general, rather than individualized, manner by uniformly applying a narrow range of decision-making criteria.⁷⁷ The vertical distribution of decision-making within a pyramid of authority sees decision-making at lower levels subject to superior review.⁷⁸

(Judge Weeramantry, Dissenting Opinion) and *Nuclear Weapons Advisory Opinion supra* note 54 (Judge Weeramantry, Dissenting Opinion).

⁷⁰Questioning the fullness of 'collegiate discussion' in the case at hand see *Barcelona Traction case, supra* note 25, at 86, para. 37 (Judge Fitzmaurice, Separate Opinion).

⁷¹Damaška, *supra* note 14.

⁷²*Ibid.*, at 19, 24.

⁷³On 'legal transplants' and the importance of systemic 'fit' see D. Nelken, 'Towards a Sociology of Legal Transplantation', in D. Nelken and J. Feest (eds.), *Adapting Legal Cultures* (2001), 7, at 14.

⁷⁴Damaška, *supra* note 14, at 18–23.

⁷⁵*Ibid.*, at 21–3.

⁷⁶*Ibid.*, at 21.

⁷⁷*Ibid.*

⁷⁸*Ibid.*, at 20.

Combined with the routinized and specialized characteristics of a professionalized body of decision-makers, the strict hierarchization of this model of decision-making affords little room for official discretion in the exercise of authority.⁷⁹ Accordingly, the exercise of decision-making power is subject to a comprehensive system of institutional and professionalized accountability.

Damaška explicitly addressed the implications of the professionalization of decision-making upon the approach towards the expression of individual views, in the form of AOs. Because the professional decision-maker is expected to decouple their personal views from their official function:

[j]udgments become pronouncements of an impersonal entity (a curia) even where a single individual is entrusted with their rendition. And because the institution must be univocal so as not to be equivocal, the announcement of a judgment made by several officials nullifies prior internal dissent: those who disagree must now repress their feelings.⁸⁰

If made in the context of a legal system tending towards the hierarchical ideal type, the authority-based criticisms of ICJ AOs seem logical and consistent with the attributes of the system wherein the expression of individual judicial authority is inconsistent with institutional judicial authority.⁸¹ However, evaluating the ICJ in accordance with the aforementioned three categories of attributes, it can be seen that the ICJ bears few of the structural characteristics of the hierarchical ideal type of authority. Rather, the ICJ bears closer resemblance to what Damaška characterizes as the ‘co-ordinate ideal type’ – characterized by temporary, non-professional decision-makers, appointed for non-permanent periods of time and without any specific specialist training to equip them for official decision-making in the post they hold.⁸² Judicial decision-makers within the co-ordinate ideal type join the bench after a lengthy career and do so from a diversity of backgrounds. While they are not ‘lay’ in the general sense of the word, co-ordinate decision-makers are lay in that they have not received a rigorous and uniform education and training in ‘being a judge’. Instead, the diversity that lay decision-makers bring to the judiciary due to the diversity of their previous careers, experiences and backgrounds is considered a quality that makes them qualified to be a judge (e.g., as practitioners, politicians, diplomats, or academics).⁸³ Consequently, the decision-making traits of specialization and routinization are unlikely to take hold. It follows that there is greater opportunity for flexibility and an individualized approach to justice. The co-ordinate ideal is typified by ‘a wide distribution of authority among roughly equal lay officials; with no one clearly superior to others, there is essentially a single stratum of authority’.⁸⁴ Whereas predictability and objectivity are ensured in the hierarchical model by the application of ‘textually fixed rules’, authority in the co-ordinate model ‘depends upon the clarity of consensus in the community or in the dominant group’.⁸⁵

The individual attributes and professional experience of ICJ judges,⁸⁶ the diversity of their background and identities and the acknowledgement of the benefits that this diversity can bring,⁸⁷ as well

⁷⁹*Ibid.*

⁸⁰*Ibid.*, at 19.

⁸¹Indeed, it might be argued that within hierarchically-structured systems, beyond the courtroom individual judges do not possess *authority* as the expression of individual judicial power within those systems is not considered legitimate.

⁸²Damaška, *supra* note 14, at 24.

⁸³And this established and reputed experience and expertise may furnish the individual judge and their opinions with greater individual authority.

⁸⁴*Ibid.*

⁸⁵*Ibid.*, at 28.

⁸⁶On the professional backgrounds of judges see Arts. 2 and 13(1), ICJ Statute. Mackenzie, Romano, and Sands, *supra* note 65, at 51; D. Terris, C. Romano and I. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007), 20.

⁸⁷On the diversity requirements for the Court's composition as a whole see Art. 9, ICJ Statute; Elias, *supra* note 24, at 23; M. Bedjaoui, ‘From an Oligarchic Law to a Law of Community’, in M. Bedjaoui (ed.), *International Law: Achievements and*

as the appointment of *ad hoc* judges⁸⁸ are all factors that push the ICJ towards the co-ordinate ideal type of justice. While judges may be appointed to the Court bearing in mind their pre-existing experience and expertise, once on the bench the opportunities for specialization and routinization of decision-making to take hold are slim. The diversity in the factual and legal issues raised by cases and questions submitted to the Court, owing to its general jurisdiction and the infrequency with which they are referred, forces the Court to address directly and explicitly the individual and unique characteristics of each case on an *ad hoc* basis. The Court's 'flat' structure consists of a single level of decision-making authority composed of and within a single body and no mechanism of appellate review, irrespective of whether the Court sits in plenary – as it does in the majority of its cases – or in chamber formation.⁸⁹ In light of this single stratum of authority, the limited opportunity for formal career progression *within the Court* calls into doubt the existence of the hierarchical dynamics wherein 'team playing' and obtaining consensus is rewarded by promotion.⁹⁰

The ICJ's characterization under the third limb of the organization of authority ideal types – formal versus substantive justice as the legitimate basis for decision-making – is open to greater contention. On the one hand, Article 38(1) of the ICJ Statute suggests that the only legitimate bases upon which decisions can be reached are those under Article 38(1)(a)–(c). However, in practice, the variance in methodologies for the interpretation of treaties and the identification of custom – which in turn result in potentially great disparities in outcome – mean that a formalist conception of decision-making involving an appearance that this involves the simple identification and application of the applicable standard is not sustainable. The diversity of approaches towards decision-making represented by the judges of the Court – some maintaining a strict approach in favour of formal justice and some eschewing the boundaries of formalistic conceptions of justice in favour of more equitable approaches – means that it is impossible to ascertain a particular culture of decision-making of the institution as a whole. The diversity of legal and philosophical traditions represented through the diverse membership of the Court as required by Article 9 of the Court's Statute suggests that it was never intended for the Court to adopt a single jurisprudential approach towards decision-making, nor even to create the appearance of one. The diversity requirements under Article 9 – combined with the authorization provided by Article 38(1)(c) for individual judges to canvass the world's array of legal traditions and cultures, synthesized by way of the inclusive process of internal deliberations – together create a picture of institutional decision-making more consistent with Damaška's co-ordinate ideal type than the hierarchical one.

Again, Damaška addressed the implications of the co-ordinate characterization for AOs. Whereas judges in the hierarchical system are expected to decouple their personal identity from their professional, institutional role, within the co-ordinate ideal type the personal and professional identities are inextricably interlinked.⁹¹ Thus, within co-ordinately structured justice systems such as the ICJ, the individual – and the individuality of – judges are not only consistent with institutional authority but are a legitimizing attribute of the institution itself. In the absence of the checks and balances upon the exercise of institutional power that exist within hierarchical systems, the exercise of institutional power is held more directly accountable to the sense of personal-professional responsibility and reputational concerns of the individual judges who are

Prospects (1991), 5–11; A. Anghie, *Imperialism, Sovereignty and the Marking of International Law* (2007), 198; G. Abi-Saab, 'The International Court as a World Court', in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996); M. McWhinney, *The World Court and the Contemporary Law-Making Process* (1979); N. Singh, *The Role and Record of the International Court of Justice* (1989), 257.

⁸⁸Art. 31, ICJ Statute.

⁸⁹See Arts. 26 and 27, ICJ Statute.

⁹⁰It is undoubted that informal hierarchies may emerge and while there may be limited opportunities for career progression within the institution, the development of a reputation for consensus-building and 'team-playing' may be rewarded by appointments to other prestigious institutions or regimes.

⁹¹Damaška, *supra* note 14, at 27.

personally associated with the judgment,⁹² and the legitimacy-appraising actors. Such accountability is facilitated through the adoption of modalities of transparency.⁹³ These have the effects of highlighting the personal-professional responsibility of the individual judges for the institution's decision and of providing the information that external actors require to substantively appraise the legitimacy of the institution and its judgments. One such modality is through AOs. Focusing on their effect upon the appraisal of institutional and decisional legitimacy by external stakeholders, the following section will explore how the individual authority of judges expressed through AOs interacts with institutional and decisional authority within the ICJ as a co-ordinately structured system of authority.

5. Additional opinions within the co-ordinately structured ICJ

The previous section explained how, in the absence of the structural guarantors of legitimacy characteristic of hierarchical systems, co-ordinately structured systems of authority place greater emphasis upon the assessment of the substantive legitimacy of the exercise of institutional power by the Court by external stakeholders. Structural and procedural mechanisms are, thus, required to facilitate the appraisal of both the input and the output legitimacy of expressions of institutional powers by those external stakeholders. AOs are one such mechanism, and through the tension that is reached between the authority claimed by (and, as this section will argue, for) the institution and the individual judicial authority embodied by AO, the legitimacy of the expression of institutional power at any given time and for any given purpose can be established.

Consequently, within both co-ordinate and hierarchical contexts, AOs should be understood as having potentially the same effect, that is, as a constraint upon the institutional authority. The difference lies in how that effect is conceived. Whereas within hierarchical systems this is perceived to be a negative constraint, within co-ordinate systems it is considered one of *constructive restraint*, and the fact that they exist as a potential restraint itself being a legitimizing attribute of the Court's procedure. The relationship between AOs and institutional authority is constructive in other ways. As this section will demonstrate, they hold the potential to reinforce both input and output legitimacy. They fulfil these functions in at least two (often, but not always, related) ways: one formal and expressive, and the other substantive. In some instances, the effect of AOs upon the appraisal of institutional legitimacy lies simply in the fact of their existence and possibility as institutional practice, irrespective of the substantive way in which they are (not) used by individual judges. In other instances, in addition to what they *represent*, their significance also lies in what they *say*: their effect upon the appraisal of institutional legitimacy lies also (or predominantly) in the substantive views expressed therein. The remainder of this section will elaborate upon these ideas and will explain how, specifically, AOs act upon how institutional legitimacy is appraised.

5.1 Output legitimacy

There are two principal ways in which AOs can influence the appraisal of the output legitimacy of the Court's judgment, which in turn will affect the Court's decisional and interpretive authority.

⁹²For example, see *Barcelona Traction* case, *supra* note 25 (Judge Tanaka, Separate Opinion) and more recently, the recital made by Judge Cançado Trindade at the beginning of all his AOs in justification of the opinion that follows. E.g., *Alleged Violation of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Request of Provisional Measures, Order of 3 October 2018 (not yet published), at para. 3 (Judge Cançado Trindade, Separate Opinion):

I feel thus obliged to leave on the records, in the present Separate Opinion, the identification of such issues and the foundations of my own personal position thereon. I do so, once again under the merciless pressure of time, moved by the sense of duty in the exercise of the international judicial function.

⁹³On the triumvirate of judicial independence, judicial transparency and judicial accountability see J. Dunoff and M. Pollack, 'The Judicial Trilemma', (2017) 111 AJIL 225.

In the first instance, AOs are conceived as a supportive force: one that strengthens the claim to output legitimacy. In the second instance, the force exerted upon institutional and decisional legitimacy can work either way: they can be supportive, but they can also be forces of institutional – and necessary – restraint.

First, not only are AOs an *expression* of the Court's representative legitimacy (supporting the claim to general decisional authority) but as Andreas Paulus has suggested, they can also enhance the Court's output legitimacy by appealing to, and expressing, the value-based legitimacy criteria held by parties to the dispute and more widely, stakeholders within the international law-interpreting community.⁹⁴ In doing so, they support the Court's claim to both particular and general decisional authority.⁹⁵ An example of this might include Judge Ammoun's separate opinion in *Western Sahara*, which concurred with the Court's conclusion that the territory of Western Sahara was not *terra nullius* at the time of Spanish colonization.⁹⁶ However, Judge Ammoun reached that conclusion not on the basis of an analysis of the practice of those states recognized as 'civilised nations' at the time of colonization (as had the Court) but rather on the basis of African philosophical and legal thought, drawing upon a spiritual understanding of the relationship between humanity and the land, recalling notions of ancestral ties, rather than territorial control.⁹⁷ More recently, Judge Cançado Trindade, while voting in favour of the Court's dispositive paragraphs, frequently pens lengthy separate opinions that advance his human-centric conception of international law as the basis and rationale for the conclusion with which he concurred.⁹⁸

Furthermore, judges may use AOs to supplement the Court's reasoning and in so doing enhance its clarity and aid full understanding of how and why the Court reached its judgment. This lends support to both the general and particular decisional authority of the Court. ICJ judges have described the Court's judgment as a composite of the views of each of the judges aligned in the majority, rather than the articulation of a singular comprehensive judgment of 'the Court'.⁹⁹ In turn, legal scholars and ICJ judges alike have observed how AOs restore the 'conceptual richness and colour' of the Court's pronouncements,¹⁰⁰ which in turn aide appreciation of the judgment, how and why it came about, and its implications.¹⁰¹ This has led some to refer to the 'indissoluble'¹⁰² relationship between AOs and the Court's judgments, one where they 'belong to each other, and ideally, illuminate each other',¹⁰³ perhaps by serving as a foil to the Court's reasoning.¹⁰⁴

This idea that AOs can act as a foil to the Court's reasoning takes us to the second way in which AOs influence the appraisal of the Court's institutional and decisional output legitimacy. In the absence of any appellate process, AOs allow external stakeholders to evaluate the substantive

⁹⁴A. Paulus, 'International Adjudication', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 219–20.

⁹⁵See Hernández (*supra* note 8, at 124) who concludes that 'the Court's practice of publishing individual opinions is part of its claim for the wider authority of its judgments, not *vis-à-vis* the parties before it but with respect to the wider audience'.

⁹⁶*Western Sahara*, Advisory Opinion of 16 October 1975, [1975] ICJ Rep. 12 (Vice-President Ammoun, Separate Opinion).

⁹⁷*Ibid.*, at 85–7.

⁹⁸Some of which are collated in the following collection: A. Cançado Trindade, *Judge Antonio A. Cançado Trindade. The Construction of a Humanized International Law: A Collection of Individual Opinions (1991–2013)* (2015).

⁹⁹S. Oda, 'Comments on the Report', in D. Bowett et al. (eds.), *The ICJ: Process, Practice and Procedure* (1997), 98; *South West Africa* case, *supra* note 22, at 262 (Judge Tanaka, Dissenting Opinion); and Judge Bedjaoui, writing extra-judicially, in M. Bedjaoui (translated by B. Noble), 'The "Manufacture" of Judgments of the International Court of Justice', (1991) 3 *Pace Yearbook of International Law* 29, at 58.

¹⁰⁰Kolb, *supra* note 9, at 1014; S. Petré, 'Forms of Expression of Judicial Activity', in L. Gross (ed.), *The Future of the International Court of Justice* (1976), vol. II.

¹⁰¹*Ibid.*; I. Brownlie, *Principles of Public International Law* (2008), 24–5.

¹⁰²Observations of the International Court of Justice on the Report of the Joint Inspection Unit (05/12/1986), UN Doc. A/41/591, para. 8.

¹⁰³Fitzmaurice, *supra* note 29, at 1–2; expanded upon by Judge Jennings, *supra* note 33, at 352.

¹⁰⁴Bedjaoui, *supra* note 99, at 58.

merits of the Court's judgment in light of alternative possibilities and in turn affirm the superiority (or, perhaps, inferiority) of the judgment over possible alternatives.¹⁰⁵ Thus, in addition to exposing the Court's judgment to more rigorous scrutiny, AOs expose the authoring judge's reasoning to scrutiny for the purposes of ascertaining whether their disagreement or divergence from the position adopted by the Court was well-founded. To the extent that AOs do directly or indirectly alert external stakeholders to deficiencies in the Court's judgments, AOs *should* restrain the output legitimacy of the Court's judgments and – in turn – its claim to authority regarding those deficient matters. This constructive restraint is particularly important in the context of the Court's interpretive authority.

In the context of international law, the degree to which any given proposition of law asserted by the ICJ is accepted as an accurate and authoritative articulation of the law is determined by the wider law-interpreting community on an articulation-by-articulation basis.¹⁰⁶ As such, AOs – rather than being viewed as harmful to the Court's authority – should properly be understood as being a mechanism that assists the law-interpreting community when making that determination. Support for this conception of the institutional function of AOs can be found in the views expressed by participants in both the drafting of the PCIJ Statute¹⁰⁷ and the negotiations on the amendments to the Rules of Court,¹⁰⁸ and more recently in the extra-judicial writings of former ICJ judges.¹⁰⁹ It is implicit – even – in the pre-judicial observation of a current ICJ judge that 'a decision [of the Court], especially if unanimous or near unanimous, may play a catalytic role in the development of the law'.¹¹⁰ Beyond the Court, this view has also gained traction within the wider law-interpreting community.¹¹¹ Indeed, one only needs to consider the context in which Kammerhofer's critique of AOs was made: in the conclusion to a critical case comment on the Court's judgment in *Oil Platforms*. As he observed, '[a]nyone who reads the separate and dissenting opinions is made very much aware of the shortcomings of the present judgement [sic]'.¹¹² If one were to accept that the shortcomings as perceived by the authors of the AOs are indeed shortcomings of the Court's judgment, then the degree of authority enjoyed by the judgment should reflect those shortcomings.

While, as noted above, there is certainly a legitimizing value to consensus,¹¹³ whether that be evidenced by unanimity or near unanimity in the Court's vote or in the lesser disagreement expressed by judges with the decision – that value is only rendered possible by the opportunity for the expression of disagreement. Thus, desire for and pursuit of, unanimity should not be confused with the creation of a fiction of unanimity through the adherence to a strong conception of secrecy. To shroud majority-determined decisions with the cloak of unanimity with a view to

¹⁰⁵Fitzmaurice, *supra* note 29, at 1–2; expanded upon by Judge Jennings, *supra* note 33, at 352, and Bedjaoui, *supra* note 99, at 58.

¹⁰⁶See Section 3.1, *supra*, on the Court's interpretive authority.

¹⁰⁷PCIJ, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 and the Adoption by the Assembly of the Statute of the Permanent Court* (January 1921) at 37, comments found in the Swedish Proposal and comments by Leon Bourgeois as the French representative to the Council of the League of Nations.

¹⁰⁸PCIJ Committee of Jurists, *supra* note 67, at 51, per Judge Politis.

¹⁰⁹M. Shahabuddeen, *Precedent in the World Court* (1996), 177 et seq.

¹¹⁰J. Crawford, *Brownlie's Principles of Public International Law* (2012), 40.

¹¹¹For example, F. Berman, 'The International Court of Justice as an "Agent" of Legal Development', in C. Tams and J. Sloan (eds.), *The Development of International Law by the International Court of Justice* (2013), 12–13; Hoffmann and Laubner, *supra* note 29, at 1397. See also M. Manouvel, *Les Opinions Séparées à la Cour Internationale: Un Instrument de Contrôle du Droit International Prétorien par les Etats* (2005).

¹¹²Kammerhofer, *supra* note 3, at 716.

¹¹³An example from US constitutional law of an attempt to capitalize from the legitimizing value of consensus is the effort by Chief Justice Warren to ensure that the Supreme Court's judgment in *Brown v. Board of Education of Topeka*, 347 US 483 (1954) was reached by consensus and without any AOs so as not to fuel the already deep political and social divisions within society on the matter of racial segregation.

bestowing upon it the authoritativeness of actual consensus is simply misleading and risks stripping consensus (where it does exist) of what legitimizing value it has.

The authority-limiting potential of AOs is valuable not only from the perspective of constraining the interpretive authority claimed by *the Court* but is also important from the perspective of the authority claimed for the judgment by other political actors. As Karen Alter has observed, through their jurisprudence international courts and tribunals influence political outcomes by:

empower[ing] those actors who have international law on their side, increasing their out of court leverage. [International courts and tribunals] then alter political outcomes by giving symbolic, legal, and political resources to compliance constituencies, ever-changing groups of actors that for a variety of reasons may prefer policies that cohere with international law.¹¹⁴

On this basis, Alter recognizes international judges as being not only legal actors but also political actors. Acknowledging how judicial pronouncements can also empower other political actors (for example, by lending support to particular historical narratives or by delegitimizing political opponents), AOs serve as a potential check on the use or abuse of judicial authority by other political actors.

One can look to the *Nuclear Weapons* advisory proceedings by way of illustration.¹¹⁵ Devised and promoted by a coalition of (non-nuclear) states and NGOs ‘whose entire purpose was to achieve a political objective’,¹¹⁶ the request for an ICJ advisory opinion was motivated by the hope that the resulting opinion would strengthen ‘both governmental and civic anti-nuclear pressures’.¹¹⁷ While the 14 AOs attached to the Court’s *Nuclear Weapons* advisory opinion diluted the authority of the Court’s *opinion*,¹¹⁸ that dilution was necessary for the preservation of the Court’s authority. Martti Koskeniemi has described the international law-making as a process of consensus-building, that is, ‘a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or “neutral position”’.¹¹⁹ On this view, there is no objective centre or neutral point independent of political arguments, but rather the centre ground is actually an ever-contested ‘terrain of irreducible adversity’.¹²⁰ All law, he claimed, ‘is about lifting idiosyncratic (“subjective”) interests and preferences from the realm of the special to that of the general (“objective”) in which they lose their particular, political colouring and come to seem natural, necessary or even pragmatic’.¹²¹ This understanding of consensus forming and law-making may be applied to the analysis of decision-making and judgment forming, and AOs.

As the Court’s dispositive paragraphs and the AOs in *Nuclear Weapons* demonstrated, the ‘process of contestation’ or deliberation within the Court failed to reach a consensus, with the principal question determined by the President’s casting vote. In the absence of an emergence of a middle ground whereupon the law could be identified, for the Court to have bestowed upon one political position additional leverage by way of having the opinion of the Court ‘on its side’,

¹¹⁴K. Alter, *The New Terrain of International Law* (2014), 19.

¹¹⁵*Nuclear Weapons* Advisory Opinion, *supra* note 54.

¹¹⁶M. Matheson, ‘The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons’, (1997) 91 AJIL 417, 420.

¹¹⁷R. Falk, ‘The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society’, (1997) 7 *Transnational Law and Contemporary Problems* 333, at 343.

¹¹⁸Even those judges who voted in favour of all the dispositive paragraphs used their AOs to express their dissatisfaction with it. *Nuclear Weapons* Advisory Opinion, *supra* note 54. Judge Ferrari Bravo explained his deep dissatisfaction and described the Court’s Opinion as ‘not very courageous’ (Judge Ferrari Bravo, Declaration, at 282) and Judge Herczegh described the Court’s Opinion as being ‘burdened with uncertainty and reluctance’ (Judge Herczegh, Declaration, at 275). Other judges, dissatisfied with the Court’s Opinion lay the blame not upon the Court itself, but rather upon the law it applied (Judge Vereshchetin, Declaration, at 280 and Judge Guillaume, Declaration, at 287).

¹¹⁹M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), 597.

¹²⁰*Ibid.*

¹²¹*Ibid.*

would have resulted in a politicization of the Court in a manner inconsistent with the nature of judicial authority. Instead, the number and strength of the AOs counteracted the assumed authority of the Court's opinion, indicating that the process of contestation was still open and the outcome undecided. Rather than privileging one side in that contest the Court, through its advisory opinion and the accompanying AOs, contributed to that ongoing process of contestation, by equipping those actors accepted as legitimate lawmakers on either side of the contest with juridical arguments supporting their positions.¹²² In this case, AOs served less as a means by which the authority of the Court is restricted, but more as a restraint upon how the authority of the Court can be used (and/or abused) by other political actors.

Finally, there is one important qualification to the argument advanced in this section, concerning the constructive effect of the authority-limiting potential of AOs. It is possible that *how* individual judges use AOs may have a destructive effect upon judicial authority – both that of the individual judge and that of the institution. As I have argued elsewhere,¹²³ although AOs are not inherently inconsistent with judicial authority (whether individual or institutional), the use of particular language in AOs, or the use of AOs to launch personal attacks against colleagues, can be harmful to judicial authority by undermining collegiality and by undermining the charismatic authority of judges.¹²⁴ For example, the image of judicial quarrelling generated by a number of AOs to the *Nicaragua* judgment that addressed allegations of partiality made by one judge against another,¹²⁵ was neither in the interests of the institution nor the individual judges concerned. Judges should be mindful of the grave consequences for their own reputation as well as that of their colleagues and the institution when considering what they use their AOs to address and the way they express their concerns.

5.2 Input legitimacy

Whereas critics of AOs in the context of international law point to the fragility of international judicial authority owing to the weak institutional power,¹²⁶ the response of co-ordinately structured systems of authority is to emphasize those legitimizing attributes that it does possess to maximize their legitimizing effect. For the ICJ, its representative diversity is often posited as one of its greatest legitimizing attributes.¹²⁷ Beyond the courtroom, AOs are the principal public manifestation of the ICJ judge: not only is the mere fact of AOs an expression of that diversity, but they offer an opportunity for judges to give substantive manifestation to the diversity of legal and philosophical traditions in the Court's composition and to demonstrate the contribution of that diversity to the process and outcome of adjudication by the ICJ.¹²⁸

¹²²L. Guinier, 'Demosprudence Through Dissent', (2008) 122 HLR 4.

¹²³H. Mistry, 'The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals', (2017) 17 ICLR 703.

¹²⁴*Ibid.* at 719–21.

¹²⁵*Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 158–61 (Judge Lachs, Separate Opinion); at 158–61 (Judge Elias, Separate Opinion); at 313, para. 109, at 314–15, para. 115 (Judge Schwebel, Dissenting Opinion); at 528 (Judge Jennings, Dissenting Opinion).

¹²⁶See Section 3, *supra*.

¹²⁷Y. Shany and R. Giladi, 'The International Court of Justice', in Y. Shany (ed.), *Assessing the Effectiveness of International Courts* (2014), 185; K. Keith, 'The International Court of Justice: Reflections on the Electoral Process', (2010) 9 *Chinese Journal of International Law* 49, at 73–4. However, at the same time the degree to which the diversity requirements translate to substantive plurality and diversity of viewpoints in practice can be questioned. See Hernández, *supra* note 8, at 133; G. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline', (1962) 8 *Howard Law Journal* 95, at 100.

¹²⁸Judicial support for this, addressing specifically the role of the *ad hoc* judge, can be found at *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Further Requests for the Provision of Additional Measures, Order of 13 September 1993, [1993] ICJ Rep. 325, at 409 (Judge *ad hoc* Lauterpacht, Separate Opinion).

Beyond diversity, AOs can be an expression of the legitimizing attributes of independence and impartiality. Whereas the logic of secrecy is preferred within hierarchically-oriented systems to defend judges against threats to their independence or impartiality, within co-ordinate systems AOs are an expression of individual judicial independence and more substantively, they offer judges the opportunity to demonstrate their own independence. In the absence of hierarchical mechanisms of oversight and accountability, and recalling the scepticism around the willingness and capacity of international judges to act independently and impartially,¹²⁹ the policy of secrecy as implemented through the suppression of AOs would do little more than reduce the likelihood that any improper influence is uncovered.

Not only do AOs offer judges the opportunity to *express* legitimizing attributes, both theirs individually and – taken in sum – that of the institution, they invite external stakeholders to scrutinize the Court’s judgment (and the opinions of individual judges) in light of their content to evaluate the degree of independence and impartiality exhibited. Within co-ordinate systems that emphasize the role of external stakeholders in the substantive appraisal of legitimacy, this facilitative effect of AOs is particularly important. Although – and crucially – judges are free to determine whether to issue an AO and, if so, on what matters to write,¹³⁰ AOs hold the *potential* to uncover any undue pressure upon authoring judges by opening up the personal decision-making process of the authoring judge to the same kind of scrutiny to which the Court’s judgment is subjected and in extreme circumstances, by existing as a platform for judicial whistleblowing.¹³¹ And, because they hold the potential to reveal latent partiality or improper influence upon the Court or upon individual judges, AOs have a prophylactic effect, discouraging the adoption of potentially delegitimizing practices upon threat of their revelation in an AO should they occur.¹³²

Finally, both within co-ordinately structured systems of justice in general and within the ICJ specifically, there has been an understanding that the production of draft AOs (for consumption in the *external* deliberative sphere) enhances the quality of deliberation in the *internal* deliberative sphere, thereby enhancing the judgment’s claim to deliberative legitimacy. The production of written opinions – notes – by individual judges as the basis for internal judicial deliberations is an established part of the ICJ’s procedure.¹³³ Requiring individual judges to formulate their own tentative positions and to commit them to writing for circulation among colleagues, not only assists the deliberations of the Court by presenting a range of possible juridical solutions to the dispute at hand that can then be debated and compared, but also enhances personal deliberations of the individual judge. As deliberations progress and a majority position crystallizes, the transformation of notes into draft minority opinions provides the emerging majority with a counterpoint against which to test the coherence and persuasive rigour of their argument.¹³⁴ Being presented with a fully articulated alternative to the decision before it is rendered and made subject to public scrutiny provides an opportunity for the majority position to be clarified, modified, or strengthened in the face of weaknesses or matters arising in draft minority-judge authored opinions. The potential power of AOs in the internal deliberative sphere lies not only in their written form but also – and perhaps more significantly – in the prospect of their publication and, in turn, their capacity to influence how the Court’s judgment is received and perceived in the external

¹²⁹See Section 3.2, *supra*.

¹³⁰Which itself limits their potential as mechanisms by which to monitor judges’ ‘discursive inputs’. See above, text accompanying note 68.

¹³¹On ‘judicial whistleblowing’ in another judicial context see H. Mistry, ‘The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice’, (2015) 13 JICJ 449.

¹³²PCIJ Committee of Jurists, *supra* note 67, at 52. The bigger point that the Court’s collective judgment drafting process ensures that each individual judge is ‘a guarantor of the others’ integrity’ is made by Hernández, *supra* note 8, at 106.

¹³³Art. 4, Resolution of Concerning the Internal Judicial Practice of the Court, adopted on 12 April 1976.

¹³⁴Belleau and Johnson, *supra* note 45, at 175; A. Scalia, ‘The Dissenting Opinion’, (1994) 19 *Journal of Supreme Court History* 33, at 41.

deliberative sphere.¹³⁵ This dynamic is neatly encapsulated in an anecdote recounted by Hugh Thirlway, from his time working in the Court's Registry. After Thirlway had alerted the Court's drafting committee to an argument advanced by Judge Oda in his draft dissenting opinion, the committee duly strengthened the Court's reasoning to address the point in question. Thirlway recalls how Judge Oda, stated 'in mock bitterness, "Mr. Thirlway, you keep moving the targets that I am firing at!"', highlighting the constructive role that the prospect of the publication of credible critique can play in incentivizing the strengthening of the Court's judgment.¹³⁶

6. Conclusion

Writing on dissent in a different context, Roland Bleiker has observed that dissent is a:

field of enquiry that has the potential to reveal far more about power and agency than one might think initially. The process of undermining authority says as much, for instance, about the values and function of the existing social and political order as it does about the urge to break out of it.¹³⁷

The same can be said for judicial dissent within the context of international adjudication. Our effort to understand the relationship between AOs – as expressions of dissent – and institutional authority has led to a broader enquiry into the very nature of institutional authority at the ICJ.

AOs are not beyond reproach, both as a matter of principle and in terms of substantive practice. Nevertheless, I have proposed that those criticisms based upon the inherent nature of judicial authority are misconceived. When doing so, I have sought to articulate a more appropriate understanding of the relationship between AOs and the judgments to which they are appended. I argue not only in favour of the 'mere' consistency of AOs with the structure of the ICJ's authority, but also in favour of their significance for the structural integrity of that authority. Considering this, it is important that judges and external stakeholders appreciate their roles and responsibilities of judges *and* other actors when authoring and engaging with AOs.

Firstly, when exercising their discretion when deciding whether to issue an AO and on what matters, ICJ judges must do so mindful of the institutional context in which that discretion is being exercised. AOs *do* have consequences for institutional authority but those consequences are contextually contingent. The Court's composition is designed to reflect the principal legal systems and civilizations of the world and it is thus expected that judges will bring to the Court their views on AOs that have been informed by their prior experience and training. However, as I have argued in this article, it would be incorrect to assume that those views may be transplanted to the ICJ context. Rather, judges should be guided in their use (or non-use) of AOs by an accurate understanding of their relationship to ICJ authority. On the use of AOs as vehicles for accounts of the entire legal-philosophical outlook that informs the personal decision-making of a judge in the case,¹³⁸ the discretion that judges retain in how they use AOs must be exercised with a similar mindfulness of the institutional function of AOs. Where the production of such opinions delays the Court's proceedings owing to the time taken to produce such opinions and/or preventing them from contributing to the Court's internal deliberations, this is neither in the interests of the Court

¹³⁵S. Fuld, 'The-Voices-of-Dissent', (1962) 62 *Columbia Law Review* 923, at 927; C. L'Heureux-Dubé, 'The Dissenting Opinion: Voice of the Future?', (2000) 38 *Osgoode Hall Law Journal* 495, 517. See also Hernández, *supra* note 8, at 113, on the broader point that a collective judgment drafting process ensures that each individual judge is 'a guarantor of the others' integrity'.

¹³⁶H. Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations', (2006) 5 *Chinese Journal of International Law* 15, at 19.

¹³⁷R. Bleiker, *Popular Dissent, Agency and Global Politics* (2000), 26.

¹³⁸See Section 2.1, *supra*.

nor the individual judge in question.¹³⁹ Once a judge has established his or her legal-philosophical orientation on the judicial record, it is certainly questionable whether it is necessary for that judge to reproduce it in full in every opinion. Each AO does not exist in a vacuum: they will be read with knowledge of the author's jurisprudential leanings and – in some cases – it will be their prior record that will have influenced their election to the Court.¹⁴⁰ While it is not within the Court's custom to cite or refer to AOs explicitly,¹⁴¹ it may be both in the interests of judicial economy and judicial transparency for greater cross referencing by individual judges to prior AOs (authored by themselves or by others) when they have influenced or informed the opinion at hand.¹⁴²

Secondly, ICJ judges enjoy a broad discretion over whether to issue an AO and on what matters. How judges exercise that discretion will affect the substantive contribution of AOs to the legitimacy-appraising enterprise of external stakeholders. Given the co-ordinate structure of authority at the ICJ, the fact that judges are afforded an opportunity to issue AOs and that they exist as a mechanism of transparency is alone a legitimizing attribute. Nevertheless, the full realization of the legitimizing attributes of AOs as a mechanism of transparency depends upon how they are used by judges and the extent to which they can be said to offer an accurate, if only ever partial, window into how the decision was reached. It is for this reason that this article has emphasized the *potential* effects of AOs.

Thirdly, this article has highlighted the responsibility of external stakeholders to hold the exercise of institutional authority to account. Thus, more broadly, I join the calls for greater scholarly engagement with the work of the Court – including the work of its individual judges.¹⁴³ Audiences may well be able to fully appraise the input and output legitimacy of the ICJ without recourse to AOs. However, they are a resource that can aide that appraisal and when engaging with AOs, external stakeholders must do so on a contextually accurate understanding of their relationship to institutional authority.

Author ORCID:  Hemi Mistry 0000-0003-2942-2402

¹³⁹Thirlway, *supra* note 21, at 144–5, particularly fn. 10. Note also the impact of such opinions on the Court's budget. For judicial acknowledgement of these considerations, see Judge Cançado Trindade's Separate Opinion in the *Alleged Violation of the 1955 Treaty of Amity* case, *supra* note 92.

¹⁴⁰Mégret, *supra* note 65.

¹⁴¹Though, Gleider Hernández has observed some notable exceptions. See Hernández, *supra* note 8, at 113.

¹⁴²I would not go so far as to encourage the Court's departure from its policy not to explicitly cite or refer to AOs (Hernández, *supra* note 8 at 113 (fn. 128) and A. Pellet, 'Article 38', in A. Zimmerman et al. (eds.), *supra* note 29, at 868–9) or to academic writing (Brownlie, *supra* note 101, at 24–5). While the policy obscures the degree of individual authority that judges have within the internal sphere, for the Court to endorse or even engage with individual opinions in its judgment would significantly strengthen the authority of both opinions and their authors.

¹⁴³J. Morgan-Foster, G. Pinzauti and P. Webb, 'The International Court of Justice in the *Leiden Journal*: A Retrospective', (2017) 30 LJIL 571, at 576.

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