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

**Issue Date:** 2020-07-08
International law and international relations have experienced in the last decades, the phenomenon on the judicialization of international relations and the subsequent proliferation of international courts and tribunals. One of the most significant aspects of this phenomenon, is the diversity in the institutional settings of each of the international courts and tribunals. These differences in the mandate, jurisdictional and institutional design make each of these judicial institutions unique. Despite these differences, there is one aspect that is common to nearly all the existing international courts and tribunals: the right for judges and arbitrators to append dissenting opinions. Differences exists, however, in how this right is regulated, designed and exercised across international courts and tribunals. While at some courts and tribunals dissenting opinions should be anonymous, at others their content should be strictly limited to the aspects addressed in the majority judgment. Likewise, judges do not always exercise their right to append dissenting opinions for the same reasons. Based on these differences, the dissertation sets out to investigate whether there are differences in the exercise of the right to append dissenting opinions that can be traced back to differences in the mandate, jurisdictional and institutional design of the international court or tribunal in which they were rendered. This research aim is made through a focus on two courts that are notable for their differences, namely, the International Court of Justice and the Inter-American Court of Human Rights.

In order to contextualise the topic of dissenting opinions, the dissertation analyses in the first place the discussion in domestic law. The purpose is to enquire whether and to what extent the discussion on dissenting opinions at the domestic level is relevant at the international level and can therefore inform the research aim. The enquire took account of the fact that the use of analogies to domestic law should consider the differences in the structure between domestic law and international law. Consequently, the use of the discussion on dissenting opinions at the domestic level is relevant at the international level, to the extent that it amounts to an important indication of policy and principles and as far it does not contradict the structure of international law. Based on this approach, the discussion at domestic law on dissenting opinions is relevant as an indication of policy and principle concerning their roles and functions of dissents at the international level.

Against this background, the dissertation addresses the exercise of the right to append dissenting opinions at the international level, focusing in its origins and the arguments in favour and against them that had had an effect
their design at various international courts and tribunals. In this regard, since the creation of the first permanent international court, the right for judges to append dissenting opinions was, save for two exceptions, not put into question. A close look at the debates during the drafting of the Statute of the Permanent Court, show that in the case of dissenting opinions most of the discussions on their permissibility centered on the convenience of the exercise of this right for judges ad hoc. In addition, the drafting of the Statute of the Permanent Court was the only instance where the admissibility of dissenting opinion was amply discussed. Upon the subsequent creation of international courts and tribunals, no discussion at all took place on the matter; dissenting opinions have multiplied in international adjudication through emulation. In the case of the arguments in favour and against dissents, the discussion as to their permissibility mainly centered on the tension between judicial authority and judicial independence. This tension played an important role in the design of the exercise of the right to append dissenting opinions at some international courts and tribunals.

Part II discusses to what extent, if at all, do differences in mandate, jurisdictional and institutional design of the International Court of Justice and the Inter-American Court of Human Rights result in differences in the exercise of the right to append dissenting opinions. In the first place, a reference to the mandate, jurisdictional and institutional design of both courts is conducted, with a view to identifying the most relevant differences and present some questions that will inform the subsequent analysis as to whether the said differences inform the exercise of the right append dissenting opinions. Relevant differences were identified regarding the mandate, composition of the bench, permissibility of judges ad hoc and national judges, deliberations and the moment to disclose the content of a dissenting opinion and their scope and publicity. These differences guided the analysis in the second chapter of Part II, as to whether they influence the exercise of the right to append dissenting opinions.

In the light of the findings of the first chapter of Part II, the dissertation follows to an analysis as to how the differences and similarities between the International Court of Justice and the Inter-American Court of Human Rights may result in differences and similarities in the exercise of the right to append dissenting opinions in their judgments and advisory opinions. With regard to the mandate in contentious and advisory proceedings of both courts, the content of some dissenting opinions reveal that they are informed by this principal mandate and therefore the judge sometimes exercises her or his right to append a dissenting opinion regrets that the approach taken by the majority in the judgment, is not in keeping with the mandate vested to the ICJ or the IACtHR. In contrast, the development of the law is not a recurrent reason for judges to append dissenting opinions; moreover, there is only one instance from each court in which it can be said that a dissenting opinion has actually contributed to the development of international law. In addition, the exercise of this mandate is also informed by the universal and regional character of these courts. Further,
in the case of the composition of the bench, this aspect also informs the exercise of the right to append dissenting opinions, especially with regard to the reasons for a judge to dissent and the number of dissenting opinions so far appended to judgments and orders, since the bench of the ICJ is heterogenous while the bench of the IACtHR is homogenous. A similar situation occurs in the case of the format of deliberations; the more active participation of ICJ judges in the drafting of judgments and advisory opinions informs the exercise of the right to dissent, when compared to the more passive role that all the judges of the IACtHR play in the drafting of judgments and advisory opinions. Lastly, the differences in mandate, jurisdictional and institutional setting between both courts do not reveal any influence in the exercise of the right to append dissenting opinions from judges *ad hoc* and national judges. Their opinions are connected to their role within the court, rather than the settings of the court.

In conclusion, the exercise of the right to append dissenting opinions at international courts and tribunals, is informed by the mandate, jurisdictional and institutional setting. The analysis performed in the dissertation opens up the possibility to new aspects for analysis concerning the exercise of the right to append dissenting opinions. Likewise, it constitutes a contribution to introduce the phenomenon on the proliferation of dissenting opinions, in an attempt to illustrate that the place of dissenting opinions in the international legal order is not limited to the aspects that have classically been mentioned, *i.e.* the development of the law. Dissents also contribute to furthering the institutional goals of the judiciary. They are therefore important from the institutional level and not only for the case at hand.