"The Different Sets of Ideas at the Back of our Heads": Dissent and Authority at the International Court of Justice

Hemi Mistry*

> *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 heads*[1]

Introduction

Commenting upon the International Court of Justice ('ICJ')'s judgment in *Oil Platforms*, Jorg Kammerhofer expressed regret at the number of individual opinions attached to the Court's judgment. Opining that '[t]he appending of individual opinions simply is not healthy', he lamented the negative effect that the publication of such opinions have on the authority of the Court and its judgments.[2] Kammerhofer is not alone in holding this view, nor was he the first to express it.[3] At the same time, supporters of the right of judges to issue individual opinions assert their complementary – even constitutive – relationship with institutional authority.[4] Despite the longevity of the theoretical debate as to the desirability of permitting additional opinions (individual opinions and joint opinions),[5] existing attempts to address this disagreement fall short of offering a resolution.[6] The differences in the attitudes towards additional opinions (AOs) is commonly attributed to the different approaches traditionally adopted within the civil law and common law traditions.[7] Assuming that it is possible to identify uniform 'civil law' and 'common law' approaches,[8] few ask specifically *why* those traditions

* 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.

[1] E. Root, *Men and Policies: Addresses* (1925) at 400, reflecting upon the negotiations of the Advisory Committee for the drafting of the PCIJ Statute.

[2] J. Kammerhofer, 'Oil's Well That Ends Well? Critical Comments on the Merits Judgement in the *Oil Platforms* Case' (2004) 17 LJIL 695, 716.

[3] See Section 1.

[4] See Section 4.

[5] For explanation of this choice of nomenclature, see Section 1.1.

[6] Undoubtedly, 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), at Chapter 4.

[7] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment of 18 August 1972 [1972] ICJ Rep 46 (Judge De Castro, Separate Opinion), at 116; I. Hussein, *Dissenting and Separate Opinions at the World Court* (1984), 5-7 and 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 and G. Sluiter (eds) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (2011), 193. E. Dumbauld, 'Dissenting Opinions in International Adjudication' (1942) 90 *University of Pennsylvania Law Review* 929, 929-934.

[8] The 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), 243-245, E. Örücü, 'General View of 'Legal Families' and of 'Mixing Systems' in E. Örücü and D. Nelken (eds) *Comparative Law: A Handbook* (2007), and generally, K. Zweigart and H. Kölz, *An Introduction to Comparative Law* (1998). On the matter of individual opinions there is no uniform approach towards individual opinions across European civil law jurisdictions, with some – from the Napoleonic civil law tradition maintaining a strict prohibition, whereas others from the Romano-Germanic tradition permitting 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

have taken the approach that they do.[9] Even fewer engage in a sustained critique of the extension of the assumptions associated with those traditions to the international sphere(s), which is 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.[10] 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 *how* dissent offends judicial authority.[11] My objective in this paper 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 paper 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 paper 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 paper 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 Court. The interpretation of the significance of those opinions will – to varying degrees – be influenced by those different sets of ideas at the backs 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 scrutinised. 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 paper 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.

Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs – Legal Affairs, PE 462.470, at www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462470/IPOL-JURI_ET(2012)462470_EN.pdf.

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

[10] Kolb *supra* note 7, at 1012-1013.

[11] Hussain *supra* n.7, at 39 *et seq*.

In the first half of this paper 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,[12] I will demonstrate that rather than being a 'hierarchically' organised system, wherein AOs are inconsistent with the structure of authority, the ICJ is more accurately characterised as a 'coordinately' structured system. Within coordinately structured systems, not only are AOs consistent with institutional authority but can also be constitutive of it. I will use the remainder of this paper to articulate a theory of the institutional function of AOs 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,[13] AOs within coordinately 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 their individual opinion) and the authority of the institution (manifested in the Court's judgment) they are accurate. However, to characterise the existence of this tension as negative *per se* is misguided. More accurately, the relationship between AOs and Court 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 paper 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.

1. "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'.

[12] M. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).
[13] On the difference between 'power' and 'authority', see Section 1.2.

1.1. 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.[14] 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'.[15] 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.[16] The culture of practice that has crystallised around that right interprets it as being broad and discretionary. The consequent polyphonic nature[17] 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.[18] 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,[19] or limiting the content of the opinion to the 'framework of the Court's opinion'.[20] The most extensive elaboration of this latter 'restrictive theory' of AOs was elaborated by then President Sir Percy Spender in response to the 9 AOs attached to the Court's highly contentious second phase judgment in *South West Africa.*[21] While

[14] While 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.
[15] The French version of the ICJ Statute refers to 'opinion individuelle', 'opinion dissidente', and 'déclaration'.
[16] Art. 57 ICJ Statute and Art. 95(2) and 107(3) Rules of Court.
[17] Or, more accurately in some cases, 'cacaphonic' nature.
[18] On the current bench, the opinions of Judge Cançado 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 (Judge Alvarez, Separate Opinion), at 39.
[19] *Oil Platforms (Islamic Republic of Iran v. United States of America)* Counter-Claims, Judgement of 6 November 2003 [2003] ICJ Rep 161 (Judge Higgins, Separate Opinion) at para.29 and H. Thirlway, *The International Court of Justice* (2016), 145.
[20] *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).
[21] Ibid.

this theory gained some traction at the time,[22] 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 judgment.[23] 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 to 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,[24] with dissenting opinions on one end of that spectrum and representing the strongest degree of disagreement, declarations on the other,[25] and separate opinions somewhere in the middle.[26] However, the accuracy of such a linear conceptualisation 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.[27] Some opinions may consist of aspects that are conventionally understood as 'dissenting' in character and aspects that conventionally understood as 'declaratory' or 'separate' in nature.[28] Moreover, additional non-substantive factors may also

[22] see J. Fawcett, 'The Function of the ICJ in the World Community' (1972) *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 31-32, and Jhabvala *supra* note 7.

[23] A 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).

[24] On the 'general' understanding of the different types of opinions connoted by their, see Thirlway *supra* note 19, at 144.

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

[26] Even 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 Judge Buergenthal's 'dissent' (p.240) from the *Wall* Advisory Opinion, contained in a self-styled Declaration: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004 [2004] ICJ Rep 136 (Judge Buergenthal, 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 vote with the Court (something conventionally understood to be a dissenting opinions): 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).

[27] G. 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), 1387-1388.

[28] Whereas 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), and *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 Cançado-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*

influence the choice that judges make.[29] For these reasons, the line between different categories of opinions has been described by one former judge of the Court as 'indeterminate'.[30] 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,[31] 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 it, 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, is 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.

1.2. Judicial Authority

For the purposes of this paper 'authority' is understood in terms of Max Weber's conception of 'authority' or 'domination', that is, as the 'legitimate exercise of power'.[32] Power denotes 'the probability that one actor within a social relationship will be in a position to carry out his own will, despite resistance'.[33] 'Legitimacy' is understood in the sense of political legitimacy, namely 'the

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] ICJ Rep 1011 (Vice-President Ranjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, Joint Declaration; Judge Higgins, Separate Opinion; Judge Kooijmans, 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 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).

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

[30] R. Jennings, 'The Collegiate Responsibility and the Authority of the International Court of Justice', in Y. Dinstein (ed) *International Law at a Time of Perplexity* (1989), 348 and Hernández *supra* note 6, at 97.

[31] The 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 and Guillaume *supra* note 29, 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'.

[32] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (1978), Vol. I, at 212 *et seq*.

[33] Ibid. at 53.

process through which both political power and obedience are justified'.[34] 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'.[35] 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'.[36] 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 legitimacy' and 'output legitimacy'.[37] Familiar conceptions of consent legitimacy may include state consent and democratic legitimacy.[38] 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).[39] 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.[40] 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

[34] J-M Coicaud, 'Legitimacy, Across Borders and Over Time', in H. Charlesworth and J-M Coicard (eds) *Faultlines of International Legitimacy* (2010), 17.
[35] Ibid.
[36] M. Radsen, 'Sociological Approaches to International Courts', in C. Romano, K. Alter and Y. Shany (eds) *The Oxford Handbook of International Adjudication* (2014), 392. See also S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989).
[37] A 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).
[38] Ibid., at 330.
[39] Ibid.
[40] Ibid.

the focus here is externally oriented – i.e. the authority in the public sphere – as Section 4 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.[41] 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':[42] 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.[43]

Authority, and particularly 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 cooperation 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 cooperation necessary for their operation and the effective discharge of their functions.[44] 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.

2. 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,[45] the publication of the names of the judges who participated in the case,[46] and the right of judges to issue AOs.[47] 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),[48] and prior to that the negotiations around the creation of the Permanent Court of Arbitration.[49] In this section I elaborate upon this view,

[41] See below, Section 4.
[42] Weber *supra* note 32, at 241.
[43] M-C Belleau and R. Johnson, 'I Beg to Differ: Interdisciplinary Questions About Law, Language and Dissent', in L. Atkinson and D. Majury (eds) *Law, Mystery and the Humanities: Collected Essays* (2008), 177.
[44] Bodansky *supra* note 37.
[45] Art. 55(1) ICJ Statute.
[46] Art. 56(2) ICJ Statute.
[47] Art. 57 ICJ Statute.
[48] PCIJ, 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.
[49] For discussion, see Hussein *supra* note 7.

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 epitomised 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'.[50] 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.[51] However international courts and tribunals – particularly the ICJ – often deal with highly politicised and much contested 'big cases', placing judicial authority under further strain.[52] 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.[53] Thus, concern as to the fragility of international judicial authority is understandable. Using the conceptualisation of authority set out in the previous section, the remainder of this section will examine how 'in-house' criticisms in the form of AOs can be perceived to undermine institutional legitimacy.

2.1. 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

[50] Kammerhofer *supra* note 2, at 716.

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

[52] R. 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.

[53] Indeed, the judgment that prompted Kammerhofer's critique of judicial practice (*supra* note 2) – *Oil Platforms* (*supra* note 19) – 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.

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.[54] 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.[55] 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.[56] 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.[57] 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.[58] Added to this the 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.[59] 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.[60] AOs that highlight weaknesses or shortcomings in the Court's interpretation of the law in a judgment – whether treaty-

[54] W. Brennan, 'In Defense of Dissents' (1985-1986) 37 *Hastings Law Journal* 427, 430.
[55] Advisory Committee of Jurists, *Documents Presented to the Committee Relating to Existing Plans for the Establishment of a Permanent Court of International Justice* (September 1920), Draft Scheme Prepared by the Committee Appointed by the Danish Government at 209.
[56] On 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, and A. Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice (2007) 18 EJIL 815.
[57] Art. 38(1)(d) ICJ Statute.
[58] Going further, see *Barcelona Traction* case, *supra* note 23 (Judge Fitzmaurice, Separate Opinion) at Para.2.
[59] H. Lauterpacht, *The Development of International Law by the International Court* (1958).
[60] The Court has been able to revisit its caselaw in some areas (e.g. maritime and territorial delimitation), resulting in the opportunity for routinisation in those areas. In turn, the authoritative potential of articulations of law in such areas of law is greater.

based or customary – can weaken the degree of consensus that crystallises around that interpretation within the wider international law-making and interpreting community.

2.2. Input Legitimacy

From the perspective of input legitimacy, that primarily concerns process, a traditional critique of AOs is that undermine what critics refer to as 'secrecy'.[61] Secrecy is an attribute of the judicial process designed to preserve and promote the actual and/or perceived independence and impartiality of individual judges.[62] The independence of the judiciary goes to the heart of the rule of law and is central to the notion of the administration of justice, distinguishing the politics of law and legalism from other forms of politics, as well as other forms of third party dispute settlement.[63] 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, judge's independence and their capacity to decide cases impartially and, in turn, authority. Initially, the fear was underpinned by the belief that that judges would always vote against decisions unfavourable to their appointing state and use AOs to record the fact and nature of their disapproval.[64] 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'.[65] More recently, in a broader defence of the secrecy of deliberations, Bruno Simma and Thore Neumann explained that the justification for such

[61] In 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 and 591-2.

[62] It 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.

[63] A. 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.

[64] Advisory Committee of Jurists *Procès-Verbaux* (1920) *supra* note 61, at 531 and 570.

[65] Ibid., at 743; Committee of Jurists on the Statute of the PCIJ ('PCIJ Committee of Jurists'), *Minutes* (May 1929) at 50.

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'.[66] Duncan French, for example, has suggested that Judge Weeramantry's failure to secure re-election for a second term office may have been influenced by the stance he maintained on a number of legal and political issues in his ICJ AOs.[67]

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.[68] 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.

3. The Structure of Authority

In his seminal study, *The Faces of Justice and State Authority*,[69] 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 idealtypes and their implications for each other. In particular, he explained how *attitudes* towards AOs are the product of the structure and organisation of authority in the context of which those attitudes are formed.[70] That structure is determined by three categories of attributes of the justice system under question: i) the attributes of the decision-makers; ii) the distribution of authority within the institution among the decision-makers; and iii) the legitimate criteria for decision-making. However, when those attitudes are taken out of

[66] T. Neumann and B. Simma, 'Transparency in International Adjudication', in A. Bianchi and A. Peters (eds) *Transparency in International Law* (2013), 457.
[67] D. French, 'The Heroic Undertaking? The Separate and Dissenting Opinions of Judge Weeramantry during his Time on the Bench of the International Court of Justice' (2006) 11 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 (Judge Weeramantry, Dissenting Opinion) and *Nuclear Weapons* Advisory Opinion *supra* note 52 (Judge Weeramantry, Dissenting Opinion).
[68] Questioning the fullness of 'collegiate discussion' in the case at hand see *Barcelona Traction* case, *supra* note 23, (Judge Fitzmaurice, Separate Opinion) at Para.37.
[69] Damaška *supra* note 12.
[70] Ibid., at 19 and 24.

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.[71]

Arguments of the kind canvassed in Section 2, 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 idealtype' of authority. The hierarchical idealtype is typified by: i) a professionalised body of official decision-makers, ii) who are organised hierarchically and among whom official authority is distributed widely and vertically, from the top down,[72] and iii) wherein the style of decision-making can be characterised as two variants upon legalistic – pragmatic legalism and logical legalism.[73] The professionalised system of official decision-making refers to a system of permanent officials, who over time and experience in the same or similar role carve out a sphere of practice.[74] In turn, this provides for the routinisation and specialisation of decision-making, namely the ability to address issues in a general, rather than individualised, manner by uniformly applying a narrow range of decision-making criteria.[75] The vertical distribution of decision-making within a pyramid of authority sees decision-making at lower levels subject to superior review.[76] Combined with the routinised and specialised characteristics of a professionalised body of decision-makers, the strict hierarchisation of this model of decision-making affords little room for official discretion in the exercise of authority.[77] Accordingly, the exercise of decision-making power is subject to a comprehensive system of institutional and professionalised accountability.

Damaška explicitly addressed the implications of the professionalisation 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.[78]

[71] On '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), 14.
[72] Damaška *supra* note 12, at 18-23.
[73] Ibid., at 21-23.
[74] Ibid., at 21.
[75] Ibid.
[76] Ibid., at 20.
[77] Ibid.
[78] Ibid., at 19.

If made in the context of a legal system tending towards the hierarchical idealtype, 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.[79] 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 idealtype of authority. Rather, the ICJ bears closer resemblance to what Damaška characterises as the 'coordinate idealtype' – characterised 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.[80] Judicial decision-makers within the coordinate idealtype 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, coordinate decision-makers are lay in that they have not received a rigorous and uniform education and training in 'being a judge'. Instead, the diversity that lay decision-makers bring to the judiciary due to the diversity of their previous careers, experiences and backgrounds is considered a quality that makes them qualified to be a judge (e.g. as practitioners, politicians or diplomats, academics).[81] Consequently, the decision-making traits of specialisation and routinisation are unlikely to take hold. It follows that there is greater opportunity for flexibility and an individualised approach to justice. The coordinate ideal is typified by 'a wide distribution of authority among roughly equal lay officials; with no one clearly superior to others, there is essentially a single stratum of authority'.[82] Whereas predictability and objectivity is ensured in the hierarchical model by the application of 'textually fixed rules', authority in the coordinate model 'depends upon the clarity of consensus in the community or in the dominant group'.[83]

The individual attributes and professional experience of ICJ judges,[84] the diversity of their background and identities and the acknowledgement of the benefits that this diversity can bring,[85] as well as the appointment of *ad hoc* judges[86] are all factors that push the ICJ towards the coordinate idealtype of justice. While judges may be appointed to the Court bearing in mind their pre-existing experience and

[79] Indeed, 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.
Damaška *supra* note 12, at 24.
[81] And this established and reputed experience and expertise may furnish the individual judge and their opinions with greater individual authority.
[82] Ibid.
[83] Ibid., at 28.
[84] On the professional backgrounds of judges see Art. 2 and 13(1) ICJ Statute. Mackenzie, Romano and Sands *supra* note 63, 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.
[85] On the diversity requirements for the Court's composition as a whole, see Art. 9 ICJ Statute; Elias, supra note 22, at 23; M. Bedjaoui, 'From an Oligarchic Law to a Law of Community', in M. Bedjaoui (ed) *International Law: Achievements and 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.
[86] Art. 31 ICJ Statute,

expertise, once on the bench, the opportunities for specialisation and routinisation 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.[87] 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.[88]

The ICJ's characterisation under the third limb of the organisation of authority idealtypes – 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 authorisation provided by Article 38(1)(c) for individual judges to canvas the world's array of legal traditions and cultures, synthesised by way of the inclusive process of internal deliberations together create a picture of institutional decision-making more consistent with Damaška's coordinate idealtype than the hierarchical one.

[87] See Arts. 26 and 27 ICJ Statute.

[88] It 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.

Again, Damaska addressed the implications of the coordinate characterisation for AOs. Whereas the judge in the hierarchical system is expected to decouple their personal identity from their professional, institutional, role, within the coordinate idealtype the personal and professional identities are inextricably interlinked.[89] Thus, within coordinately structured justice systems such as the ICJ, the individual – and the individuality of – judges are not only consistent with institutional authority but are a legitimising 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: i) the sense of personal-professional responsibility and reputational concerns of the individual judges who are personally associated with the judgment,[90] and ii) the legitimacy-appraising actors. Such accountability is facilitated through the adoption of modalities of transparency.[91] 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 are AOs. Focusing upon 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 coordinately structured system of authority.

4. 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, coordinately 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.

[89] Damaška *supra* note 12, at 27.

[90] For example, see *Barcelona Traction* case, *supra* note 23 (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 3rd October 2018 (not yet published), (Judge Cançado Trindade, Separate Opinion), at para.3:

> 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.

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

Consequently, within both coordinate 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 coordinate systems it is considered one of *constructive restraint*, and the fact that they exist as a potential restraint itself being a legitimising 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.

4.1. 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. 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.[92] In doing so, they support the Court's claim to both particular and general decisional authority.[93] 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 colonisation.[94] However Judge Ammoun reached that conclusion not on the basis of an analysis of the practice of those states recognised as 'civilised nations' at the time of colonisation (as

[92] A. Paulus, 'International Adjudication', in S. Besson and J. Tasioulas (eds) *The Philosophy of International Law* (2010), 219-220.
[93] See Gleider Hernández (*supra* note 6, 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'.
[94] *Western Sahara*, Advisory Opinion of 16 October 1975 [1975] ICJ Rep 12 (Vice-President Ammoun, Separate Opinion).

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.[95] 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.[96]

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 the both the Court's general and particular decisional authority. 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'.[97] In turn, legal scholars and ICJ judges alike have observed how AOs restore the 'conceptual richness and colour' of the Court's pronouncements,[98] which in turn aide appreciation of the judgment, how and why it came about, and its implications.[99] This has led some to refer to the 'indissoluble'[100] relationship between AOs and the Courts' judgments, one where they 'belong to each other, and ideally, illuminate each other',[101] perhaps by serving as a foil to the Court's reasoning.[102]

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 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.[103] 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

[95] Ibid. at 85-87.
[96] Some 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).
[97] S. 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 20 (Judge Tanaka, Dissenting Opinion), at 262; and Judge Bedjaoui, writing extra-judicially, at M. Bedjaoui (translation by B. Noble), 'The "Manufacture" of Judgments of the International Court of Justice' (1991) 3 *Pace Yearbook of International Law* 29, at 58.
[98] Kolb *supra* note 7, at 1014; S. Petrén, 'Forms of Expression of Judicial Activity', in L. Gross (ed), *The Future of the International Court of Justice* (1976), Vol.II.
[99] Ibid.; I. Brownlie, *Principles of Public International Law* (2008), at 24-25.
[100] Observations of the International Court of Justice on the Report of the Joint Inspection Unit (05/12/1986) UN Doc A/41/591, para.8.
[101] Fitzmaurice *supra* note 27, at 1-2, expanded upon by Judge Jennings at Jennings *supra* note 30, at 352.
[102] Bedjaoui *supra* note 96, at 58.
[103] Fitzmaurice *supra* note 27, at 1-2, expanded upon by Judge Jennings at Jennings *supra* note 30, at 352, and Bedjaoui *supra* note 97, at 58.

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.[104] 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 Statute[105] and the negotiations on the amendments to the rules of court,[106] and more recently in the extra-judicial writings of former ICJ judges.[107] 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'.[108] Beyond the Court, this view has also gained traction within the wider law-interpreting community.[109] 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]'.[110] 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 legitimising value to consensus,[111] 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 bestowing upon it the

[104] *Supra*, Section 2.1 on the Court's interpretive authority.
[105] PCIJ, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 and the Adoption by the Assembly of the Statute of the Permanent Court* (January 1921) at 37, comments found in the Swedish Proposal and comments by Leon Bourgeois as the French representative to the Council of the League of Nations.
[106] Committee of Jurists on the Statute of the PCIJ ('PCIJ Committee of Jurists'), *Minutes* (May 1929) at 51, per Judge Politis.
[107] M. Shahabuddeen, *Precedent in the World Court* (1996), 177 *et seq*.
[108] J. Crawford, *Brownlie's Principles of Public International Law* (2012), 40.
[109] For 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 27, 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).
[110] Kammerhofer *supra* note 2, at 716.
[111] An example from US constitutional law of an attempt to capitalise from the legitimising 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.

authoritativeness of actual consensus is simply misleading and risks stripping consensus (where it does exist) of the legitimising 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'.[112]

On this basis, Alter recognises 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 delegitimising 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.[113] Devised and promoted by a coalition of (non-nuclear) States and NGOs 'whose entire purpose was to achieve a political objective',[114] 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'.[115] While the 14 AOs attached to the Court's *Nuclear Weapons* advisory opinion diluted the authority of the Court's *opinion*,[116] that dilution was necessary for the preservation of the *Court's* authority. Martti Koskeniemmi has described the international law-making as a process of consensus-building, that is, 'a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or 'neutral position'.[117] 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

[112] K. Alter, *The New Terrain of International Law* (2014), 19.
[113] *Nuclear Weapons* Advisory Opinion, *supra* note 52.
[114] M. Matheson, 'The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons' (1997) 91 AJIL 417, 420.
[115] R. Falk, 'The Nuclear Weapons Advisory Opinion and the New Jurisprudence of Global Civil Society' (1997) 7 *Transnational Law and Contemporary Problems* 333, at 343.
[116] Even 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 52. 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).
[117] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), 597.

of irreducible adversity'.[118] 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'.[119] 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', would have resulted in a politicisation 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.[120] In this case, AOs served less as a means by which the authority of the Court is restricted, but as a restraint upon how the authority of the Court can be used (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,[121] 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.[122] 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,[123] was neither in the interests of the institution or the individual judges concerned. Judges should be mindful of the grave consequences

[118] Ibid.
[119] Ibid.
[120] L. Guinier, 'Demosprudence Through Dissent' (2008) 122 HLR 4.
[121] H. Mistry, 'The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals' (2017) 17 ICLR 703.
[122] Ibid. at 719-721.
[123] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment of 27 June 1986 [1986] ICJ Rep 14 (Judge Lachs, Separate Opinion, 158-161), (Judge Elias, Separate Opinion), (Judge Schwebel, Dissenting Opinion, paras. 109 and 115), and (Judge Jennings, Dissenting Opinion, 528).

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.

4.2. 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,[124] the response of coordinately structured systems of authority is to emphasise those legitimising attributes that it does possess to maximise their legitimising effect. For the ICJ, its representative diversity is often posited as one of its greatest legitimising attributes.[125] 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.[126]

Beyond diversity, AOs can be an expression of the legitimising 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 coordinate 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,[127] 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* legitimising attributes, both theirs individually and – taken in sum – that of the institution, they invite external stakeholders to scrutinise 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 coordinate systems that emphasise 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

[124] *Supra*, Section 2.
[125] Y. 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 73-74. 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 6, at 133 and G. Abi-Saab, 'The Newly Independent States and the Rules of International Law: An Outline' (1962) 8 *Howard Law Journal* 95, at 100.
[126] Judicial 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, Separate Opinion of Judge *ad hoc* Lauterpacht at 409.
[127] *Supra*, Section 2.2.

and, if so, on what matters to write,[128] 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.[129] 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 delegitimising practices upon threat of their revelation in an AO should they occur.[130]

Finally, both within coordinately 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.[131] By requiring individual judges to formulate their own tentative positions and to commit them to writing for circulation among colleagues not only does this assist the deliberations of the Court by presenting a range of possible juridical solutions to the dispute at hand that can be then debated and compared, but also enhances personal deliberations of the individual judge. As deliberations progress and a majority position crystallises, the transformation of notes into draft minority opinions provide the emerging majority with a counterpoint against which to test the coherence and persuasive rigour of their argument.[132] 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 deliberative sphere.[133] 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

[128] Which itself limits their potential as mechanisms by which to monitor judges' 'discursive inputs'. See above, text accompanying note 66.
[129] On '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.
[130] Committee of Jurists on the Statute of the PCIJ ('PCIJ Committee of Jurists'), *Minutes* (May 1929) 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 6, at 106.
[131] Art. 4, Resolution of Concerning the Internal Judicial Practice of the Court, adopted on 12 April 1976.
[132] Belleau and Johnson, supra note 43, at 175; A. Scalia, 'The Dissenting Opinion' (1994) 19 *Journal of Supreme Court History* 33, at 41.
[133] S. 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) *Osgoode Hall Law Journal* 495, 517. See also The broader point that a collective judgment drafting process ensures that each individual judge is 'a guarantor of the others' integrity' is made by Hernández *supra* note 6, at 113.

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 incentivise the strengthening of the Court's judgment.[134]

5. 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.[135]

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 civilisations 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 paper, 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

[134] H. Thirlway, 'The Drafting of ICJ Decisions: Some Personal Recollections and Observations' (2006) 5 *Chinese Journal of International Law* 15, at 19.
[135] R. Bleiker, *Popular Dissent, Agency and Global Politics* (2000), 26.

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,[136] 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 delay 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 nor the individual judge in question.[137] 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.[138] While it is not within the Court's custom to cite or refer to AOs explicitly,[139] 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.[140]

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 coordinate 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 legitimising attribute. Nevertheless, the full realisation of the legitimising 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 paper has emphasised the *potential* effects of AOs.

Thirdly, this paper 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.[141] Audiences may well be able to fully appraise the input and output legitimacy of the ICJ without recourse to AOs. However, they

[136] Section 1.1.
[137] Thirlway *supra* note 19, at 144-145, particularly footnote 10. Note also the impact of such opinions on the Court's budget. For judicial acknowledgement of these considerations, see the Judge Cançado Trindade's Separate Opinion in the *Alleged Violation of the 1955 Treaty of Amity* case, quoted at *supra* note 90.Error! Bookmark not defined.
[138] Mégret *supra* note 63.
[139] Though, Gleider Hernández has observed some notable exceptions. See Hernández *supra* note 6, at 113.
[140] I 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 6 at 113 (fn.128) and A. Pellet, 'Article 38' in A. Zimmerman *et al* (eds) *supra* note 27, at 868-869) or to academic writing (Brownlie *supra* note 99, at 24-25). 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.
[141] J. Morgan-Foster, G. Pinzauti and P. Webb, 'The International Court of Justice in the *Leiden* Journal: A Retrospective' (2017) 30 LJIL 571, at 576.

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.